SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 63

UWS HOLDINGS CORP.,

Plaintiff,

- against -

DARWISH RAFI and RAFI DARWISH DIAMONDS LTD.,

Defendants.

Index No.: 650996/16

DECISION/ORDER

COIN, ELLEN, J.:

In this action, plaintiff UWS Holdings Corp. sues to recover damages resulting from defendants' alleged breach of a joint venture agreement to buy and sell diamonds. The complaint alleges causes of action for breach of contract, unjust enrichment, and breach of fiduciary duty. Defendants Darwish Rafi and Rafi Darwish Diamonds Ltd. move, pursuant to CPLR 3211 (a) (1), (7) and (8), to dismiss the complaint for lack of personal jurisdiction, based on documentary evidence and for failure to state a cause of action.

Background

UWS Holdings Corp. (UWS) is a New York corporation engaged in the business of diamond dealing and diamond cutting, with its principal place of business in New York, New York. Joshua Kirschenbaum (Kirschenbaum) is the President of UWS. Rafi Darwish Diamonds Ltd. (RDD) is an Israeli company engaged in diamond dealing, with its principal place of business in Israel. Darwish Rafi (Rafi), a resident of Israel, owns and operates RDD.

According to Kirschenbaum, he met Rafi in 2012 and began conducting business with him in January 2013. He alleges that Rafi frequently visits New York in connection with his business, and purchased diamonds from UWS on at least 14 occasions from 2013 through 2015. Affidavit of Kirschenbaum in Opposition to Defendants' Motion (Kirschenbaum Aff.), ¶¶ 11-14. Kirschenbaum attests that in May 2015, while Rafi was in New York to buy diamonds, they met and discussed a partnership to buy and sell diamonds. *Id.*, ¶¶ 15-16. Rafi proposed that he would front all costs and purchase the rough diamonds, Kirschenbaum would cut the stones to increase their value, and they would evenly split the profits. *Id.*, ¶ 16.

In June 2015, Kirschenbaum flew to Israel, at defendants' expense. Rafi Affirmation in Support of Defendants' Motion (Rafi Aff.), ¶¶ 21-22. According to Rafi, the parties agreed that plaintiff would re-cut a diamond for Rafi, and the re-cut diamond would be sold for the "mutual benefit" of plaintiff and defendants. *Id.*, ¶ 23. Rafi asserts that RDD subsequently purchased a 3.1 carat diamond, on June 21, 2015, for $43,400, and the diamond was sent to plaintiff to be re-cut and returned to defendants.

Kirschenbaum attests that he cut and refined the diamond several times, until the size was decreased to 2.83 carats, and after submitting it several times to the Gemological Institute of

America (GIA) to evaluate and grade, he mailed the diamond to defendants on or about October 13, 2015. Kirschenbaum Aff., ¶¶ 20-22. The complaint alleges that, in October 2015, plaintiff agreed to sell RDD the 2.83 carat diamond for $56,600, and shipped it to RDD with an invoice indicating payment was due on November 12, 2015. Complaint, ¶¶ 7-9. Plaintiff also alleges that RDD received the diamond but failed to pay the invoice; plaintiff seeks to recover the amount of the invoice, with interest. *Id.*, ¶¶ 10-14. Rafi asserts that he did not agree to purchase the re-cut diamond from plaintiff for $56,600 because defendants already owned it. Rafi Aff., ¶¶ 24-26.

In early December 2005, defendants listed the diamond for sale online for about $70,000, and soon after the diamond was sold. Kirschenbaum Aff., ¶¶ 23-24. Plaintiff claims that defendants sold the diamond for more than $70,000, and did not split the profit, in violation of their joint venture agreement. Complaint, ¶¶ 19-21. Rafi attests that, after receiving the re-cut 2.83 carat diamond from plaintiff, defendants sold the diamond to a company in Israel, in or around late 2015 or early 2016, for $47,119.50. Rafi Aff., ¶ 28. He claims that after deducting the costs related to the sale of the diamond, including plaintiff's June 2015 travel expenses, interest on the initial purchase price, and tax, the sale of the diamond resulted in a net loss of several hundred dollars. *Id.*, ¶¶ 29-31.

Plaintiff commenced this action in February 2016, seeking compensatory and punitive damages. The complaint alleges in the first cause of action that the corporate defendant breached an agreement to pay plaintiff for the diamond, and owes plaintiff $56,500, plus interest. The second cause of action alleges that Rafi, by selling the diamond and keeping the profit for himself, violated his joint venture agreement with plaintiff to share the profits of the sale of the diamond. The third cause of action alleges that defendants were unjustly enriched by benefitting, without payment to plaintiff, from plaintiff's cutting of the diamond to enhance its value. The fourth cause of action alleges that Rafi violated his fiduciary duty to plaintiff, as a co-venturer, by representing that the diamond was sold for a loss and retaining the proceeds of the sale of the diamond without any payment to plaintiff.

Discussion

CPLR 3211(a)(8)

Service of Process

Turning first to the branch of defendants' motion which seeks dismissal based on improper service, to the extent that the motion is directed to service on the individual defendant, it is denied. Plaintiff submits an affidavit of service of the complaint on Rafi, which is regular on its face, and defendants do not dispute the veracity or content of the affidavit or deny

receipt of such service, or otherwise demonstrate that such service was improper. Plaintiff fails, however, to submit an affidavit or other proof of service of the complaint on the corporate defendant, or even to argue that such service was made. This branch of the motion, therefore, is granted as to the corporate defendant, and the complaint as against Rafi Darwish Diamonds Ltd. is dismissed.

Personal Jurisdiction

In New York, personal jurisdiction may be based on general jurisdiction (*see* CPLR 301) or long-arm jurisdiction (*see* CPLR 302). A nonresident defendant "is amenable to suit in New York courts under CPLR 301 if it has engaged in such a continuous and systematic course of 'doing business' here that a finding of its 'presence' in this jurisdiction is warranted." *Landoil Resources Corp. v Alexander & Alexander Servs.*, 77 NY2d 28, 33 (1990) (citations omitted); *see McGowan v Smith*, 52 NY2d 268, 271 (1981); *Fernandez v DaimlerChrysler, AG.*, 143 AD3d 765, 766 (2d Dept 2016). As a matter of due process, general jurisdiction exists only if the defendant's "'affiliations with the State are so "continuous and systematic" as to render [it] essentially at home in the forum State.'" *Daimler AG v Bauman*, 571 US __, 134 S Ct 746, 761 (2014), quoting *Goodyear Dunlop Tires Operations, S.A. v Brown*, 564 US 915, 919 (2011); *see Motorola Credit Corp. v Standard Chartered Bank*, 24 NY3d 149, 161 n 4 (2014). Following

Daimler, New York courts have held that there is no basis for general jurisdiction where defendant "is not incorporated in New York and does not have its principal place of business in New York." *Magdalena v Lins*, 123 AD3d 600, 601 (1st Dept 2014); *see D&R Global Selections, S.L. v Bodega Olegario Falcon Piñeiro*, 128 AD3d 486, 487 (1st Dept 2015); *Sustainable Pte. Ltd. v Peak Venture Partners, LLC*, 2017 WL 413173, 2017 NY Misc LEXIS 331, *12, 2017 NY Slip Op 30202(U) (Sup Ct, NY County 2017); *Zoni Language Ctrs., Inc. v Glassdoor Inc.*, 2017 WL 413171, *2, 2017 NY Misc LEXIS 329, *4, 2017 NY Slip Op 30199(U) (Sup Ct, NY County 2017).

Under CPLR 302(a)(1), a court may exercise long-arm jurisdiction over a nondomiciliary defendant who in person or through an agent "transacts any business within the state or contracts anywhere to supply goods or services in the state." "The CPLR 302(a)(1) jurisdictional inquiry is twofold: under the first prong the defendant must have conducted sufficient activities to have transacted business in state, and under the second prong, the claims must arise from the transactions." *Rushaid v Pictet & Cie*, 28 NY3d 316, 323 (2016); *see Licci v Lebanese Can. Bank, SAL*, 20 NY3d 327, 334 (2012); *Fischbarg v Doucet*, 9 NY3d 375, 380 (2007). To satisfy the "transacting business" prong, "there must have been some 'purposeful activities' within the State that would justify bringing the

nondomiciliary defendant before the New York courts." *McGowan*, 52 NY2d at 271 (citations omitted); *see Fischbarg*, 9 NY3d at 380; *Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 (2006). "Purposeful activities are those with which a defendant, through volitional acts, 'avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Fischbarg*, 9 NY3d at 380, quoting *McKee Elec. Co. v Rauland-Borg Corp.*, 20 NY2d 377, 382 (1967); *see Rushaid*, 28 NY3d at 323.

"'The transacting-business requirement of N.Y. CPLR 302 requires far fewer contacts with New York than does the doing-business requirement of N.Y. CPLR 301.'" *Rushaid*, 28 NY3d at 323 n 4 (citation omitted). "The commission of some single or occasional acts of an agent in a state may be enough to subject a corporation to specific jurisdiction in that state with respect to suits relating to that in-state activity." *Matter of Stettiner*, __ AD3d __, 46 NYS3d 608, 615 (1st Dept Feb. 14, 2017) (internal citations omitted); *see Deutsche Bank Sec.*, 7 NY3d at 71; *Wilson v Dantas*, 128 AD3d 176, 181 (1st Dept 2015). Similarly, "[c]umulative minor activities that, individually, may be insufficient, may suffice for constitutional purposes as long as the cumulative effect creates a significant presence within the state." *O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 200 (1st Dept 2003) (citations omitted).

Determining whether a defendant transacts business in New York "'requires an examination of the totality of the circumstances.'" *America/Intl. 1994 Venture v Mau*, 146 AD3d 40, 52 (2d Dept 2016) (citation omitted); *see Paradigm Mktg. Consortium, Inc. v Yale New Haven Hosp., Inc.*, 124 AD3d 736, 737 (1st Dept 2015); *see also Pincione v D'Alfonso*, 506 Fed Appx 22, 24-25 (2d Cir 2012). "'So long as a party avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its actions there, due process is not offended if that party is subjected to jurisdiction even if not "present" in that State.'" *Deutsche Bank*, 7 NY3d at 71, quoting *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 466 (1988); *see also Ehrenfeld v Bin Mahfouz*, 9 NY3d 501, 508 (2007).

Courts "have interpreted the second prong of the jurisdictional inquiry to require that, in light of all the circumstances, there must be an 'articulable nexus' or 'substantial relationship' between the business transaction and the claim asserted." *Licci*, 20 NY3d at 339 (citations omitted). "This inquiry is 'relatively permissive,' and does not require causation, but merely 'a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former, regardless of the ultimate merits of the claim.'" *Rushaid*, 28 NY3d at 329, quoting *Licci*, 20 NY3d at 339.

"The claim need only be 'in some way arguably connected to the transaction'" (*Rushaid*, 28 NY3d at 329 [citation omitted]), and more than "'merely coincidental' with it." *Licci*, 20 NY3d at 340, citing *Johnson v Ward*, 4 NY3d 516, 520 (2005).

"As the party seeking to assert personal jurisdiction, the plaintiff bears the ultimate burden of proof on this issue." *Marist Coll. v Brady*, 84 AD3d 1322, 1322-1323 (2d Dept 2011); *see Carrs v Avco Corp.*, 124 AD3d 710, 710 (2d Dept 2015); *Copp v Ramirez*, 62 AD3d 23, 28 (1st Dept 2009). "However, to defeat a CPLR 3211 (a) (8) motion to dismiss, a plaintiff need only establish, prima facie, that the defendant was subject to the personal jurisdiction of the Supreme Court." *Carrs*, 124 AD3d at 710; *see Chen v Guo Liang Lu*, 144 AD3d 735, 736 (2d Dept 2016); *Doe v McCormack*, 100 AD3d 684, 684 (2d Dept 2012). "[I]n deciding whether the plaintiffs have met their burden, the court must construe the pleadings and affidavits in the light most favorable to them and resolve all doubts in their favor." *Brandt v Toraby*, 273 AD2d 429, 430 (2d Dept 2000); *Weitz v Weitz*, 85 AD3d 1153, 1153-1154 (2d Dept 2011).

Even absent a prima facie showing of personal jurisdiction, a plaintiff may show that it has made a "sufficient start" in establishing jurisdiction so as to warrant jurisdictional discovery. *See Peterson v Spartan Indus.*, 33 NY2d 463, 467 (1974); *Venegas v Capric Clinic*, 147 AD3d 457 (1st Dept 2017);

Expert Sewer & Drain, LLC v New England Mun. Equip. Co., 106 AD3d 775, 776 (2d Dept 2013); *American BankNote Corp. v Daniele*, 45 AD3d 338, 340 (1st Dept 2007). To that end, "plaintiffs must demonstrate the possible existence of essential jurisdictional facts that are not yet known." *Copp*, 62 AD3d at 31. That is, "[t]he opposing party need only demonstrate that facts 'may exist' whereby to defeat the motion. It need not be demonstrated that they *do* exist." *Peterson*, 33 NY2d at 466.

Defendants do not dispute that they transacted business in New York, but argue that such business activities were infrequent, and that the entirety of the transaction at issue occurred in Israel, including purchase of the diamond, payment for it from an Israeli bank account, and plaintiff's presence in Israel to discuss the parties' proposed agreement. *See* Defendants' Memorandum of Law in Support of Motion to Dismiss, at 6. In opposition, however, plaintiff submits evidence, including the affidavit of Kirschenbaum, to show that defendants transacted business in New York on a regular basis, and that Rafi met with plaintiff in New York in connection with the parties' partnership.

Kirschenbaum attests, and submits documents to show, that Rafi traveled to New York on numerous occasions for purposes of transacting business, that defendants bought diamonds from plaintiff in New York, and that Rafi met or communicated with

Kirschenbaum in New York about the parties' joint venture and the transaction involving the diamond. Further, defendants sent the diamond to plaintiff to be cut in New York in preparation for its resale. While plaintiff has not demonstrated that defendants are subject to personal jurisdiction in New York for all purposes, its submissions raise questions as to the extent and scope of defendants' business transactions in New York, and plaintiff thus has made a sufficient start in demonstrating that jurisdiction may exist to warrant discovery on the issue. *See Firegreen Ltd. v Claxton*, 160 AD2d 409 (1st Dept 1990) (existing record, showing one meeting in NY, does not clearly demonstrate lack of purposeful activity so as to preclude jurisdiction).

CPLR 3211 (a) (1) and (7)

It is well settled that on a 3211 motion to dismiss for failure to state a cause of action, the pleadings are to be liberally construed. *See* CPLR 3026; *ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 227 (2011); *Leon v Martinez*, 84 NY2d 83, 87 (1994). The court "must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory." *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 (2001) (internal citations omitted); *see Nonnon v City of New York*, 9 NY3d 825, 827 (2007); *511 W. 232nd*

Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 (2002); *Leon*, 84 NY2d at 87-88. The court further may consider a plaintiff's opposing affidavits to remedy pleading defects. *See Rushaid*, 28 NY3d at 327; *Chanko v American Broadcasting Cos.*, 27 NY3d 46, 52 (2016); *Leon*, 84 NY2d at 88.

"The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" *511 W. 232nd Owners Corp.*, 98 NY2d at 152, quoting *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 (2001). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005); *see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 (2005). On a CPLR 3211 (a) (1) motion to dismiss based on documentary evidence, dismissal is warranted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002); *see AG Capital Funding Partners, L.P.*, 5 NY3d at 590-591; *Leon*, 84 NY2d at 88.

First Cause of Action (Breach of Contract against RDD)

The first cause of action is for breach of contract against the corporate defendant. Assuming plaintiff's allegations,

which, for purposes of this motion, must be accepted as true and given every favorable inference, sufficiently state a claim, this cause of action, as well as the second and third causes of action, as found above, are dismissed as against RDD for lack of personal jurisdiction.

Second Cause of Action (Breach of Contract against Rafi)

The second cause of action alleges that Rafi breached an oral joint venture agreement to buy and sell diamonds, and to evenly split the profits and losses of such transactions, and, in particular, to split the profit from the sale of the diamond at issue in this case.

"The elements of a joint venture are an agreement of the parties manifesting their intent to associate as joint venturers, mutual contributions to the joint undertaking, some degree of joint control over the enterprise, and a mechanism for the sharing of profits and losses." *Clarke v Sky Express, Inc.*, 118 AD3d 935, 935 (2nd Dept 2014); *see Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 (1st Dept 2014); *see also Matter of Steinbeck v Gerosa*, 4 NY2d 302, 317 (1958). Construing the pleadings of the complaint liberally, accepting the facts alleged therein as true, and according the plaintiff the benefit of every favorable inference, the complaint adequately alleges the elements of a joint venture. Although defendants dispute plaintiff's allegations as to the terms of the agreement, and

claim that plaintiff can show no damages, the documents submitted do not conclusively refute plaintiff's allegations, but raise questions of fact not properly determined on a motion to dismiss.

Third Cause of Action (Unjust Enrichment)

"The theory of unjust enrichment lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties." *Georgia Malone & Co. v Rieder*, 19 NY3d 511, 516 (2012) (internal quotation marks and citations omitted); *see Pappas v Tzolis*, 20 NY3d 228, 234 (2012); *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 (2009). To adequately plead an unjust enrichment claim, the plaintiff must allege that the defendant was enriched, at plaintiff's expense, and "that it is against equity and good conscience to permit [the defendant] to retain what is sought to be recovered." *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 (2011) (internal quotation marks and citations omitted); *see Georgia Malone & Co.*, 19 NY3d at 516; *Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 (1972), *cert denied* 414 US 829 (1973).

"[U]njust enrichment is not a catchall cause of action to be used when others fail (*Corsello v Verizon, N.Y., Inc.*, 18 NY3d 777, 790 [2012]), and, generally, "'a party may not recover in . . . unjust enrichment where the parties have entered into a contract that governs the subject matter." *Pappas*, 20 NY3d at

234, quoting *Cox v NAP Constr. Co., Inc.*, 10 NY3d 592, 607 (2008). However, where, as here, there is a dispute as to the existence, scope or application of the contract, "a party is not precluded from proceeding on both breach of contract and quasi-contract theories." *Curtis Props. Corp. v. Greif Cos.*, 236 AD2d 237, 239 (1st Dept 1997); *see Basu v Alphabet Mgt. LLC*, 127 AD3d 450, 451 (1st Dept 2015); *Chowaiki & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600, 601 (1st Dept 2014); *see also On the Level Enters., Inc. v 49 E. Houston LLC*, 104 AD3d 500, 501 (1st Dept 2013) ("a party is permitted to plead inconsistent theories of recovery" unless it is the party "seeking expedited disposition").

Thus, at this early stage of the proceedings, plaintiff may proceed with its unjust enrichment claim.

Fourth Cause of Action (Breach of Fiduciary Duty)

For similar reasons, the fourth cause of action for breach of fiduciary duty survives the instant motion to dismiss.

"A fiduciary relationship arises between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." *Roni LLC v Arfa*, 18 NY3d 846, 848 (2011) (internal quotation marks and citations omitted). "To state a claim for breach of fiduciary duty, a plaintiff must allege the existence of a fiduciary relationship, misconduct by the other party, and

damages directly caused by that party's misconduct." *Castellotti v Free*, 138 AD3d 198, 209 (1st Dept 2016); *see Pokoik v Pokoik*, 115 AD3d 428, 429 (1st Dept 2014). A "plaintiff's status as an alleged partner in a joint venture gives rise to a fiduciary relationship." *Plumitallo v Hudson Atl. Land Co.*, 74 AD3d 1038, 1039 (2d Dept 2010); *see Parr v Ronkonkoma Realty Venture I, LLC*, 65 AD3d 1199, 1201 (2d Dept 2009); *see generally Matter of Steinbeck*, 4 NY2d at 317-318.

Plaintiff has sufficiently alleged that it had a fiduciary relationship with Rafi, based on their joint venture agreement, and that Rafi breached his fiduciary duty as a co-venturer by failing to consult with plaintiff before selling the diamond, misrepresenting the actual sale price of the diamond, and retaining all the proceeds from the sale of the diamond. *See e.g. Pokoik v Norsel Realties*, 138 AD3d 493 (1st Dept 2016); *Mawere v Landau*, 130 AD3d 986, 990 (2nd Dept 2015). Although Rafi asserts, and submits some evidence to show, that the diamond was sold at a loss and no profit existed to share with plaintiff, defendants' evidence does not conclusively establish their defense as a matter of law.

Moreover, while plaintiff's breach of fiduciary duty claim appears to arise out of the same factual allegations underlying the breach of contract claim, and may be duplicative (*cf Nineteen Eighty-Nine, LLC v Icahn*, 96 AD3d 603, 604 [1st Dept 2012]),

because there is, as noted previously, a dispute as to the scope and validity of the joint venture agreement, plaintiff is not required to elect its remedies and may proceed on alternate theories. *See Worldcare Intl., Inc. v Kay*, 119 AD3d 554, 556 (2d Dept 2014); *Plumitallo*, 74 AD3d at 1039.

Punitive Damages

With respect to plaintiff's demand for punitive damages against Rafi, however, the complaint fails to allege conduct on the part of Rafi that would potentially justify an award of punitive damages.

"Punitive damages are available only in those limited circumstances where it is necessary to deter defendant and others like it from engaging in conduct that may be characterized as gross and morally reprehensible and of such wanton dishonesty as to imply a criminal indifference to civil obligations." *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 (1995) (internal quotation marks and citations omitted); *see Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 614 (1994). A claim for punitive damages requires "allegations that 'the wrongdoing is intentional or deliberate, presents circumstances of aggravation or outrage, evinces a fraudulent or evil motive, or is in such conscious disregard of the rights of another that it is deemed willful and wanton." *Barnes v Hodge*, 118 AD3d 633, 633 (1st Dept 2014) (citation omitted); *see Marinaccio v Town of Clarence*, 20

NY3d 506, 511 (2013); *Dupree v Giugliano*, 20 NY3d 921, 924 (2012).

Plaintiff has not alleged facts showing willful, wanton and reckless misconduct or intentional or deliberate wrongdoing, aggravating or outrageous circumstances, or fraudulent or evil motive. Nor does plaintiff offer any opposition to this branch of defendants' motion. Its claim for punitive damages, therefore, is dismissed. *See Barnes*, 118 AD3d at 633-634; *Putter v Feldman*, 13 AD3d 57, 58 (1st Dept 2004).

Accordingly, defendants' motion to dismiss is granted in part and denied in part, and it is

ORDERED that the motion to dismiss based on improper service is granted as to the corporate defendant only and the complaint is dismissed as against Rafi Darwish Diamonds Ltd.; and it is further

ORDERED that the action is severed and continued against the remaining defendant, Darwish Rafi; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the Trial Support Office, who are directed to mark the court's records to reflect the change in the caption herein; and

it is further

ORDERED that the motion to dismiss for lack of personal jurisdiction as to defendant Darwish Rafi is denied without prejudice to renewal upon completion of discovery on the jurisdictional issue; and it is further

ORDERED that the motion to dismiss based on documentary evidence and for failure to state a cause of action is granted only as to the claim for punitive damages, and the claim for punitive damages is dismissed, and the balance of the motion is denied.

Dated: March 23, 2017

ENTER:

HON. ELLEN M. COIN, A.J.S.C.