

<b>Swatch Group (U.S.) v 3rd Ave. Jewels Inc.</b>
2018 NY Slip Op 32046(U)
August 20, 2018
Supreme Court, New York County
Docket Number: 654942/2017
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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THE SWATCH GROUP (U.S.),  
Plaintiff,

INDEX NO. 654942/2017

MOTION DATE 7/20/2017

MOTION SEQ. NO. 001

- v -

3RD AVENUE JEWELS INC., 45TH STREET JEWELS, INC.,  
57TH STREET JEWELS, INC., ALLEN M. BROOKLYN, INC.,  
ALLEN M. OUTLETS, INC., ALLENMJEWELERS.COM, INC.,  
JNR TRADING TIME, INC., MAMROUT TRADING INC., ORA  
TRADING INC., O & R TRADING INC., WATCHES PROS, LLC.

**DECISION AND ORDER**

Defendants.

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The following e-filed documents, listed by NYSCEF document number 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 73, 74, 76, 77, 78, 79, 80, 81

were read on this application to/for Judgment - Summary In lieu of Complaint

HON. SALIANN SCARPULLA:

In this action, plaintiff The Swatch Group (U.S.) Inc. (“SGUS”) alleges that defendants 3rd Avenue Jewels Inc., 45th Street Jewels, Inc., 57th Street Jewels, Inc., Allen M. Brooklyn, Inc., Allen M. Outlets, Inc., Allenmjewelers.com, Inc., JNR Trading Time, Inc., Mamrout Trading Inc., ORA Trading Inc., O & R Trading, Inc., and Watches Pros, LLC (collectively, “Defendants”) failed to make payments for watches SGUS sold to Defendants. SGUS moves, pursuant to CPLR 3213, for summary judgement in lieu of complaint on the ground that the invoices sent to Defendants are instruments for the payment of money only and that there is no dispute that payment remains outstanding.

### **Background**

SGUS is a wholly owned subsidiary of The Swatch Group, Ltd., which owns various watch brands and sells watches to retailers worldwide. Defendants operate a jewelry business under the trade names Madison Jewelers and/or Allen M Jewelers and purchase watches from SGUS. Defendants maintain an open account with SGUS and have been purchasing watches from SGUS for at least eight years.

SGUS attests that from June 2016 to March 2017, Defendants have collectively purchased more than \$3.8 million of watches from SGUS. SGUS further attests that during this period, SGUS delivered the watches to Defendants and sent corresponding invoices to the respective Defendants. SGUS attests that the invoices total \$3,822,431.00 for the period of June 2016 to March 2017, and that Defendants have only paid \$882,173.00.

SGUS states that Defendants have neither returned the watches after delivery nor objected to any of the invoices. On June 22, 2017, SGUS delivered demand letters and account statements to each defendant seeking payment of the outstanding balances plus interest. SGUS seeks \$2,940,258.00 plus interest on those invoices, together with attorneys' fees and costs.

In support of its motion SGUS submits invoices it sent to Defendants, which Defendants did not sign. SGUS also submits the Terms and Conditions that Defendants signed at the outset of their business relationship with SGUS. The Terms and Conditions provide that "interest will be charged on all past due accounts. Interest must be paid prior

to resuming shipments.” The Terms and Conditions also state that “in the event this account is placed for collection the customer will be liable for and will repay on demand all costs and expenses arising there from including attorney’s fees.”

Defendants oppose summary judgment claiming the unsigned invoices do not qualify for treatment as “instruments for the payment of money only” and that they have meritorious defenses to payment.

### Discussion

A plaintiff may commence an action by summary judgement in lieu of complaint “[w]hen an action is based upon an instrument for the payment of money only....” CPLR 3213. “[A] document comes within CPLR § 3213 ‘if a prima facia case would be made out by the instrument and a failure to make the payments called for by its terms.’” *Weissman v Sinorm Deli, Inc.*, 88 N.Y.2d 437, 444 (1996) (citation omitted). “The instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document.” *Weissman*, 88 N.Y.2d at 444.

SGUS argues that because the Defendants never objected to the invoices it sent and made partial payments on some of the invoices prior to the commencement of this action, Defendants are obligated to pay the remaining debt, which constitutes an account stated and entitles SGUS to relief under CPLR § 3213.

However, SGUS’s motion fails to satisfy CPLR 3213’s threshold requirement as it is not “based upon an instrument for the payment of money only . . . .” “[C]ases within CPLR § 3213 ‘have dealt primarily with some variety of commercial paper in which the

party to be charged has formally and explicitly acknowledged an indebtedness.”

*Weissman*, 88 N.Y.2d at 444 (citation omitted). The unsigned invoices and Terms and Conditions are insufficient to invoke CPLR § 3213 (even when considered together) because neither demonstrates that defendants have expressly obligated themselves to make payments on the accounts in question for a sum certain. Because the documents SGUS submits do not come within CPLR § 3213, SGUS failed to make a prima facie case “based upon an instrument for the payment of money only,” and I deny SGUS’s motion.

SGUS’s assertions demonstrate, at most, that an implied account stated exists between SGUS and Defendants. *See Interman Indus. Prods., Ltd. v R.S.M. Electron Power, Inc.*, 37 N.Y.S.2d 151, 154 (1975). However, an implied account stated “is not sufficient to entitle [SGUS] to avail itself of the procedural device provided by CPLR 3213.” *Interman Indus. Prods., Ltd.*, 37 N.Y.S.2d at 679.

In accordance with the foregoing it is

ORDERED that the motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that the plaintiff shall serve a formal complaint upon Defendants 3rd Avenue Jewels Inc., 45th Street Jewels, Inc., 57th Street Jewels, Inc., Allen M. Brooklyn, Inc., Allen M. Outlets, Inc., Allenmjewelers.com, Inc., JNR Trading Time, Inc., Mamrout Trading Inc., ORA Trading Inc., O & R Trading, Inc., and Watches Pros, LLC within 20 days of the date of this decision and defendants 3rd Avenue Jewels Inc., 45th Street Jewels, Inc., 57th Street Jewels, Inc., Allen M. Brooklyn, Inc., Allen M. Outlets, Inc.,

Allenmjewelers.com, Inc., JNR Trading Time, Inc., Mamrout Trading Inc., ORA Trading Inc., O & R Trading, Inc., and Watches Pros, LLC shall move against or serve an answer to the complaint within 20 days after service thereof.

This constitutes the decision and order of the Court.

8/20/18  
DATE

*Saliann Scarpulla*  
SALIANN SCARPULLA, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>			

APPLICATION:

CHECK IF APPROPRIATE: