SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **IAS MOTION 53EFM**

Justice

----------X

RAFAEL KOBLENCE, RAFKA & COMPANY, LTD,

Plaintiff,

- v -

ASTER JEWELS, INC.,AJAY JAIN, AJAY JAIN AS PRESIDENT, JANE DOES, JOHN DOE CORPORATION, 1-10, JOHN DOE ENTITIES 1-10

Defendant.

----------X

INDEX NO. 656288/2017

MOTION DATE 01/29/20

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for DISMISS.

Upon the foregoing documents, and for the reasons set forth on the record (1.29.20), Aster Jewels, Inc. (**Aster**) and Ajay Jain's (Aster and Mr. Jain, collectively, hereinafter, the **Defendants**) motion to dismiss the first cause of action (rescission), third cause of action (conversion), and fourth cause of action (violation of General Business Law §§ 48 and 349) of Rafka & Company, Ltd. (**Rafka**) and Rafael Koblence's Amended Complaint (NYSCEF Doc. No. 25, the **Amended Complaint**) is granted solely to the extent that the first cause of action is dismissed and the complaint is dismissed in its entirety as against Mr. Jain in his individual capacity.

THE RELEVANT FACTS AND CIRCUMSTANCES

Pursuant to a certain Memorandum, dated June 21, 2013, between Aster, a precious gem wholesaler, and Rafka, a jewelry design company, (the **June 21 Memo**), Aster agreed to advance

$1.7 million to secure the release and return of 17 cut emeralds (the **Emeralds**; Amended Complaint ¶¶ 6, 7) to Rafka and charging 1.25% interest and 10% of the profits on the sale of the Emeralds (the **Loan**).

The June 21 Memo is set forth on a pre-printed form memorandum. It is undisputed that the form memorandum is not typically used in connection with this type of transaction. And, in fact, the pre-printed terms of the form do not comport with the terms of the transaction contemplated by the parties as set forth in the Amended Complaint. For example, the form, which is on Aster's letterhead, provides:

> [t]he merchandise described herein is ***delivered to you*** on MEMORANDUM only, at your risk of loss, or damage . . . . ***Title to said merchandise is and shall remain in ASTER JEWELS INC.*** and is held by the undersigned subject to my/our order . . . . Unreported merchandise will be billed in 30 days. Merchandise cannot be accepted/returned after 30 days from invoice date.

(NYSCEF Doc. No. 26 [emphasis added]). No one disputes that (i) the collateral was not being delivered to Rafka (*i.e.*, the "you" in the pre-printed form) and (ii) the title to the merchandise was not Aster's as the June 21 Memo's pre-printed language would seem to indicate if such pre-printed language were to apply to the subject transaction. For the avoidance of doubt, the parties also do not dispute that no collateral was deposited on June 21, 2013 with either Rafka or Aster.

By way of background explanation only, the court notes that in his Affidavit in Support of the Defendant's Motion to Dismiss, Mr. Jain explains that the form is customarily used in the precious gems trade when goods are delivered "on memo" by a merchant to another merchant to be sold to a third-party customer (Jain Aff. ¶¶ 15-16). He further explains that the form was used as a matter of convenience as it was available to the parties at the time the deal was made (*id.*

¶15), and he asserts that none of the provisions of the pre-printed form were ever intended to apply to the Loan because this was not the type of transaction for which the form and pre-printed text are intended (*id.* ¶ 17).

In any event, the handwritten notes on the June 21 Memo indicate:

> 17 [pieces] Em cut 105.13 [carats] Advanced for purchase $1,700,000 — 1.25% interest + 10% profit.

(NYSCEF Doc. No. 26). Notwithstanding the fact that the amount recited in the June 24 Memo is $1.7 million, Rafka alleges that Aster actually advanced only $1.5 million (*id.* ¶ 14).

To secure the Loan, three days later, Rafka deposited several items of jewelry with Aster pursuant to a Memorandum (the **June 24 Memo**), which gives a description of the deposited items and beneath the descriptions states: "Not For Sale For Collateral only ***Loan Amount $1,700,000.00***" (Amended Complaint ¶ 9; NYSCEF Doc. No. 19 [emphasis added]). The items initially deposited by Rafka as collateral include: one 26.47 carat emerald cut Burma sapphire platinum ring (the **Burma Sapphire**) valued at $1.25 million, one 8.42 carat Kashmir sapphire platinum ring (the **Kashmir Sapphire**) valued at $700,000, and nine Columbian emeralds (the **Columbian Emeralds**) totaling 37.32 carats valued at $500,000 (Amended Complaint ¶ 11; NYSCEF Doc. No. 27).

The June 24 Memo, like the June 21 Memo, is set forth on a pre-printed form. And, like the June 21 Memo, the pre-printed provisions do not reflect the allegations as set forth in the Amended Complaint. To wit, the June 24 Memo, which is on Rafka's letterhead, provides:

> The Goods described above are sent to you ***for your examination only.*** These are valued at the amount set opposite each item to which amounts you agree. Such goods remain our property and are to be returned on demand. Until the goods are returned to Rafka and Co., Ltd, and actually received in our premises, they are at your risk from all hazards regardless of the course of loss or damage. Possession of the goods under the terms of this agreement in no way constitutes you are our agent or factor [sic]. The receipt and retention by you of the goods described is your acceptance of all terms and conditions of this agreement and consideration for making it. ***The foregoing constitutes the entire agreement*** in respect to the goods described above, and may not be varied by oral agreements, prior course of dealing or custom in the trade. A sell [sic] of all or any portion of the described goods will take affect only from the date of our approval in writing delivered to you.

(NYSCEF Doc. No. 27 [emphasis added]). And, it is undisputed that the collateral was not sent for examination only and that the June 24 Memo does not reflect the entire agreement as the $1.7 million—or $1.5 million as Rafka asserts—was previously loaned pursuant to the June 21 Memo. Like the June 21 Memo, Mr. Jain asserts that the pre-printed text on the form of the June 24 Memo was never intended to apply to the collateral delivered by Rafka as security for the Loan (Jain Aff. ¶ 19).

Subsequently, Aster returned the Kashmir Sapphire to Rafka and Rafka deposited 22 Zambian emeralds and 59 diamonds valued at $2 million (Amended Complaint ¶ 18). This change was reflected in a hand-written note on a re-executed copy of the June 24 Memo (the **Amended Memo**) (*id.* ¶ 16; NYSCEF Doc. No. 28). The Defendants used the items deposited by Rafka as collateral to obtain loans from third parties, which allegedly prevented Rafka from selling those items (Amended Complaint ¶ 19).

By letter from Aster's attorneys to Rafka, to the attention of Mr. Koblence, dated May 17, 2016, Aster's attorneys provided formal notice to Rafka that it was in default of its obligation to repay

the Loan and demanded immediate repayment of $2,440,322, representing the principal Loan balance and accrued interest through May 16, 2016 (NYSCEF Doc. No. 33). The letter further stated that if payment was not received within ten (10) days, Aster intended to exercise its rights as a secured creditor to liquidate the items pledged by Rafka as collateral (*id.*).

In a subsequent letter, dated May 27, 2016, Aster's attorneys notified Rafka of its intent to sell the deposited items (*id.* ¶ 21; NYSCEF Doc. No. 11). Rafka replied on June 14, 2016 that Aster was not authorized to sell the deposited items and demanded that Aster cease its efforts to sell them (Amended Complaint ¶ 22). On December 1, 2016, Aster notified Rafka that all of the deposited items were to be sold on December 15, 2016 and demanded interest in the amount of $868,333 (*id.* ¶ 23). On May 2, 2017, Aster notified Rafka that it had sold the Burma Sapphire and the Columbian Emeralds for a total of $1 million (*id.* ¶ 24).

And, in response, Rafka and Mr. Koblence sued the Defendants pursuant to an Amended Complaint, dated June 5, 2019, asserting causes of action for rescission (first cause of action), breach of contract (second cause of action), conversion (third cause of action), and violation of General Business Law §§ 46, 48 and 349 (fourth cause of action).

DISCUSSION

A party may move for judgment dismissing one or more causes of action on the ground that the pleadings fail to state a cause of action for which relief may be granted (CPLR § 3211 [a] [7]). On a motion to dismiss pursuant to CPLR § 3211 (a) (7), the court must afford the pleadings a liberal construction and accept the facts alleged in the complaint as true, according the plaintiff

the benefit of every favorable inference (*Morone v Morone*, 50 NY2d 481, 484 [1980]). The court's inquiry on a motion to dismiss is whether the facts alleged fit within any cognizable legal theory (*id.*). Bare legal conclusions are not accorded favorable inferences, however, and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]).

I. The Motion to Dismiss as to Mr. Jain in his Individual Capacity

The Defendants argue that this lawsuit must be dismissed as against Mr. Jain because the Amended Complaint fails to allege any facts which fit within a cognizable legal theory upon which relief can be granted as against Mr. Jain individually. The court agrees and, accordingly, this lawsuit is dismissed without prejudice as against Mr. Jain individually.

II. The First Cause of Action (Rescission)

The Amended Complaint alleges that the Loan transaction is void *ab initio* and must be rescinded because Aster violated Article 5 of the General Business Law (the **GBL**). More specifically, the Plaintiffs allege that Aster is a "collateral loan broker" and that Aster violated Article 5 of the GBL by charging impermissibly high interest in violation of Section 46 and by selling the collateral in a manner that was not commercially reasonable by (x) failing to provide proper notice of the sale, (y) failing to obtain Rafka's written authorization, and (z) selling the items at a commercially unreasonable price in violation of Section 48. The argument however fails as Aster was not acting as a collateral loan broker.

Pursuant to General Business Law § 52:

> [t]he term "collateral loan broker" contained in this article shall be construed so as to include any person, partnership, or corporation: (1) loaning money on deposit or pledge of ***personal property,*** other than securities or printed evidences of indebtedness; or (2) dealing in the purchasing of personal property on condition of selling it back at a stipulated price; or (3) designated or doing business as furniture storage warehousemen, and loaning and advancing money upon goods, wares or merchandise pledged or deposited as collateral security.

(GBL § 52 [emphasis added]). UCC § 9-102 (48) defines "inventory" as

> goods, other than farm products, which: (A) are leased by a person as lessor; (B) are held by a person for sale or lease or to be furnished under a contract of service; (C) are furnished by a person under a contract of service; or (D) consist of raw materials, work in process, or materials used or consumed in a business

UCC § 9-102 defines goods as:

> all things that are movable when a security interest attaches. The term includes (i) fixtures, (ii) standing timber that is to be cut and removed under a conveyance or contract for sale, (iii) the unborn young of animals, (iv) crops grown, growing, or to be grown, even if the crops are produced on trees, vines, or bushes, and (v) manufactured homes. The term also includes a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program if (i) the program is associated with the goods in such a manner that it customarily is considered part of the goods, or (ii) by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods. The term does not include a computer program embedded in goods that consist solely of the medium in which the program is embedded. The term also does not include accounts, chattel paper, commercial tort claims, deposit accounts, documents, general intangibles, instruments, investment property, letter-of-credit rights, letters of credit, money, or oil, gas, or other minerals before extraction. "all things that are movable when a security interest attaches.

(*id.* § 9-102 [44]; *see also* NY UCC § 2-105 [1]).

The items of jewelry deposited by Rafka in this case were items that were movable at the time when the security interest attached and were to be held by Rafka for sale. There is nothing alleged in the Amended Complaint that would suggest that any of these items were personal

property, or that this was anything other than inventory financing. For clarity, to the extent that certain of the deposited items were emeralds or diamonds to be used by Rafka in designing jewelry, such items are "raw materials," or "work[s] in process," intended to be "used or consumed in a business," and are therefore inventory.

Put another way, because Aster did not loan money to Rafka on deposit or pledge of personal property, it is not a "collateral loan broker", and the first cause of action is dismissed.

III. The Third Cause of Action (Conversion)

The Defendants argue that the cause of action grounded in conversion must be dismissed because it is duplicative of the breach of contract claim. To wit, the Defendants argue that the Amended Complaint alleges that Aster received the Burma Sapphire and Columbia Emeralds from Rafka as a bailee, and that Aster converted these items by selling them without authorization, resulting in damages to Rafka (Amended Complaint ¶¶ 36-38). These allegations, the Defendants argue, are exactly the same allegations which form the basis for the breach of contract claim.

To state a cause of action for conversion, a plaintiff must allege (i) that the plaintiff has a possessory right or interest in the subject property, and (ii) the defendant has exercised dominion and control over the property or otherwise interfered with it, in contravention of the plaintiff's right of possession (*id.* at 50). The tort of conversion occurs "when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50-51 [2006]).

And, as the Court of Appeals has observed, a bailment relationship between parties may give rise to a legal duty of care independent of the parties' contractual obligations (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 551 [1992]). Here, the Amended Complaint alleges a bailment relationship between Aster and Rafka (Amended Complaint ¶ 36). Therefore, because the contract and conversion causes of action are alleged to be based on separate duties, they are not duplicative (*Connecticut New York Lighting Co. v Manos Business Mgt. Co., Inc.*, 171 AD3d 698, 699-700 [2d Dept 2019]). Accordingly, the motion to dismiss the third cause of action is denied.

IV. The Fourth Cause of Action (General Business Law §§ 48 [2] [b] and 349)

The Amended Complaint alleges that Aster's sale of the Burma Sapphire and the Columbian Emeralds was not done on commercially reasonable terms in violation of GBL § 48. As set forth above, however, Aster is not collateral loan broker. Accordingly, GBL § 48 does not apply. Nevertheless, the Amended Complaint does allege facts sufficient to state a cognizable claim under Article 9 of the New York Uniform Commercial Code (the **NY UCC**).

NY UCC § 9-610 provides:

> Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms.

(NY UCC § 9-610 [b]). Pursuant to NY UCC § 9-627 (b), the sale of collateral after a default is commercially reasonable if made "(1) in the usual manner on any recognized market; (2) at the

price current in any recognized market at the time of the disposition; or (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition."

NY UCC § 9-612 provides:

> (a) [Reasonable time is question of fact.]
> Except as otherwise provided in subsection (b), whether a notification is sent within a reasonable time is a question of fact.
>
> (b) [10-day period sufficient in non-consumer transaction.]
> In a transaction ***other than a consumer transaction,*** a notification of disposition sent after default and 10 days or more before the earliest time of disposition set forth in the notification is sent within a reasonable time before the disposition.

(NY UCC § 9-612 [emphasis added]).

Inasmuch as, Rafka alleges that the sale of the sale of the Burma Sapphire and the Columbian Emeralds was not commercially reasonable because Aster did not provide Rafka with ten (10) days' notice of the sale, Rafka did not approve the sale as allegedly required by the pre-printed terms of the Amended Memo, and they were sold at a markedly lower price than their agreed value, the Amended Complaint sufficiently states a cause of action under Article 9 of the NY UCC.

To the extent that Aster argues that it provided timely notice based on the notice that it served Rafka dated December 1, 2016, this argument is unavailing. Rafka alleges that the sale did not occur on December 15, 2016 as originally noticed but was instead held on April 27, 2017, and that no subsequent notice was provided as to the adjourned sale date. Had the notice been provided, Rafka may well have chosen to register to bid. The alleged failure to provide this

notice deprived Rafka of this opportunity. Although notice of disposition sent at least 10 days prior to the earliest time of disposition is generally sufficient in a non-consumer transaction (NY UCC § 9-612 [b]), there is a question of fact as to the reasonableness of notice under the circumstances alleged here because the original auction was canceled.

In addition, to the extent that Aster argues that pursuant to NY UCC § 9-627 a sale of collateral is not commercially unreasonable simply because a greater amount could have been obtained, this argument is similarly unpersuasive.

NY UCC § 9-627 (a) provides:

> Greater amount obtainable under other circumstances; no preclusion of commercial reasonableness. The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner.

Although a discrepancy between the sale price and the fair market value of the collateral does not necessarily make a sale commercially unreasonable, "a wide or marked discrepancy between the sale price and the value of the property will trigger close scrutiny" (*Federal Deposit Ins. Corp. v Forte*, 94 AD2d 59, 67 [2d Dept 1983]). As the First Department has observed, "whether a term or requirement is commercially reasonable is generally an issue of fact that cannot be decided at this stage" (*Atlas MF Mezzanine Borrower, LLC v Macquarie Texas Loan Holder LLC*, 174 AD3d 150, 165 [1st Dept 2019]). Here, the issue of whether there was a wide or marked discrepancy between the sale price of the items and their fair market value is a factual issue that cannot be resolved at this stage of the proceeding.

Accordingly, the motion to dismiss the fourth cause of action is denied solely to the extent that that a cognizable claim exists under the Article 9 of the NY UCC.

Accordingly, it is

ORDERED that Aster Jewels, Inc. and Ajay Jain's motion to dismiss is granted to the extent that the first cause of action is dismissed and is otherwise denied; and it is further

ORDERED that the motion of Ajay Jain to dismiss the claims asserted against him in his individual capacity in the Amended Complaint herein is granted and the Amended Complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

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

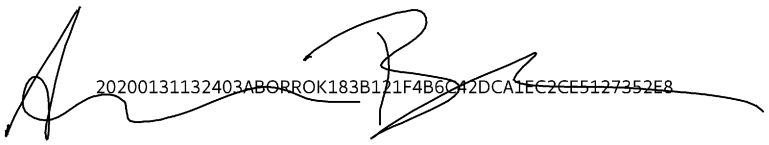
ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's

Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (access*ible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the defendant shall file an Amended Answer to the Amended Complaint within 30 days of the date of the decision and order herein.



1/31/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE