SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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RAFAEL KOBLENCE, RAFKA & COMPANY, LTD,

Plaintiff,

- v -

ASTER JEWELS, INC., JANE DOES, JOHN DOE CORPORATION, 1-10, JOHN DOE ENTITIES 1-10

Defendant.

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INDEX NO.	656288/2017
MOTION DATE	12/8/2020
MOTION SEQ. NO.	003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 68, 69, 70, 71, 74, 76, 77, 78, 79, 80

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, and for the reasons set forth below, Rafael Koblence and Rafka & Company, Ltd.'s (**Rafka**) motion to partially reargue the court's January 29, 2020 decision and order (the **Prior Order**), which granted Aster Jewels, Inc.'s (**Aster**) motion to dismiss the Amended Complaint (mtn. seq. no. 002) in part, is granted, and upon reargument, the first (rescission) and fourth (General Business Law §§ 46, 48, and 349) causes of action are dismissed.

I. The Facts Relevant to the Motion

Familiarity with the facts and procedural history is presumed. Briefly, Mr. Koblence and Rafka filed this lawsuit against Aster for rescission based on violations of Article 5 of the General Business Law (first cause of action), breach of contract (second cause of action), conversion (third cause of action), and violations of General Business Law §§ 46, 48, and 349 (fourth cause

of action), alleging that Aster wrongfully sold certain items of jewelry that had been deposited with Aster by Rafka as collateral for a $1.7 million loan to finance the acquisition of 17 cut emeralds (NYSCEF Doc. No. 32). Aster moved to dismiss the first (rescission), third (conversion), and fourth (NY GBL §§ 46, 48, and 349) causes of action of the Amended Complaint pursuant to CPLR § 3211(a)(7) (mtn. seq. no. 002). In the Prior Order, the court granted the motion to dismiss in part, dismissing the first and fourth causes of action and dismissing the Amended Complaint in its entirety as against Aster's principal, Ajay Jain, in his individual capacity (NYSCEF Doc. No. 70).

II. Discussion

To succeed on a motion for leave to reargue, a party must demonstrate that the court either (1) overlooked or misapprehended the relevant facts, or (2) misapplied a controlling principle of law (*William P. Paul Equip. Corn. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]). Reargument is not intended "to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted" (*Haque v Daddazio*, 84 AD3d 940, 242 [2d Dept 2011]; *Foley v Roche*, 68 AD2d 558 [1st Dept 1979]).

Mr. Koblence and Rafka argue that the court should grant the motion to reargue because Mr. Koblence and Rafka did not brief the issue of personal property and the court did not otherwise consider certain persuasive authority which held that inventory is a "good" and also "personal property" covered by Article 9 of the UCC (*See In re Brown*, 45 BR 766, 768 [ND NY 1985]; *Harrison v Konfino*, 616 BR 295, 302 [SD NY 2020]). Inasmuch the parties had not briefed the issue and Mr. Koblence and Rafka persuasively argue that the court erred in its application of the

UCC in interpreting Article 5 of the NY GBL as it relates to the Prior Order, the motion for reargument is granted. However, upon reargument, as currently pled, the first and fourth causes of action based on Article 5 of the General Business law are dismissed.

Article 5 of the GBL defines a "collateral loan broker" as:

> 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 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).

The statute prohibits any person, partnership, or corporation from "carry[ing] on the business of a collateral loan broker, without having first obtained" a license (GBL § 40). In other words, it is the occupation, not the act, that is the subject of the statute. Stated differently, this is a statute which is designed to apply to merchants regularly engaged in the business of making loans secured by pledges of personal property (*see Kahan Jewelry Corp. v Coin Dealer of 47th St. Inc.*, 2018 NY Slip Op 30674(U), *12-13 [Sup Ct, NY County 2018]). A single alleged transaction does not constitute "carrying on the business" (*id.*, citing *New York Architectural Terra Cotta Co. v Williams*, 102 AD 1, 7 [1st Dept 1905], *aff'd*, 184 NY 579 [1906] ["Doing business evidently means . . . carrying along a regular business of some kind. A single act cannot . . . constitute doing business."]; *see Morris Cohon & Co. v Russell*, 27 AD2d 522, 522 [1st Dept 1966] [defendant not carrying on business without license where single act was merely incidental to primary transaction of business]).

In *Kahan Jewelry Corp. v Coin Dealer of 47th St. Inc.*, the parties were merchants engaged in the trade of precious metals in New York (*Kahan*, 2018 NY Slip Op 30674(U), at *1). Kahan Jewelry Corp. (**Kahan Jewlery**) made six loans of $100,000 each to Coin Dealer of 47th St. Inc. (**Coin Dealer**) secured by certain precious metals given to Kahan Jewelry by Coin Dealer to hold as collateral to pay bills and purchase new inventory (*id.*, at *3-4). Coin Dealer defaulted on the loans and Kahan Jewelry liquidated the collateral (*id.*, at *4). Kahan Jewelry sued Coin Dealer and its principals to recover the unpaid balances of the loans (*id.*, at *6). The defendants moved for summary judgment seeking dismissal of the complaint arguing, among other things, that Kahan Jewelry's claims were barred because it was acting as an unlicensed "collateral loan broker" (*id.*, at *7).

The court (Kornreich, J.) rejected the argument. In denying the defendants' motion for summary judgment, the court stated:

> The court rejects the contention, for which no authority is cited, that the loans allegedly issued to defendants suffice to bring Kahan Jewelry within the ambit of Article 5. The argument is premised on an obvious misreading of the statute. Defendants assert that, because Kahan Jewelry allegedly loaned them money upon merchandise pledged as collateral, it falls within the third prong of the statutory definition of collateral loan broker which concerns those who "loan[] and advance[] money upon goods, wares or merchandise pledged or deposited as collateral security." *See* Dkt. 176 at 11 (emphasizing this statutory language). Defendants ignore that, by its express terms, this language relates only to those "designated or doing business as furniture storage warehousemen," a definition inapplicable to Kahan Jewelry. § 52.
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> Moreover, even if the alleged loans satisfied another prong of the statutory definition, such as the first portion concerning those who "loan[] money on deposit or pledge of personal property, other than securities or printed evidences of indebtedness," this alone would not render Kahan Jewelry a collateral loan broker subject to regulation. ***The statute's licensing requirement applies only to those who "carry on the business" of a collateral loan broker. §§ 40 & 41. To "carry***

> ***on" a business requires more than a single transaction.*** *Cooper Mfg. Co. v Ferguson*, 113 U.S. 727, 734-35, 5 S. Ct. 739, 28 L. Ed. 1137 (1885) (holding that single act does not constitute carrying on of business); *see New York Architectural Terra Cotta Co. v Williams*, 102 AD 1, 7, 92 N.Y.S. 808 (1st Dept 1905), *aff'd*, 184 N.Y. 579, 77 N.E. 1192 (1906) ("Doing business evidently means . . . carrying along a regular business of some kind. A single act cannot . . . constitute doing business."). The phrase denotes a routine and continuous involvement in business activity. *See Cooper Mfg. Co*, 113 U.S. at 734-35 ("The meaning of the phrase 'to carry on,' when applied to business, is well settled. . . . [it means] To prosecute, to help forward, to continue: as to carry on business."). Defendants offer no evidence to demonstrate that Kahan Jewelry routinely engaged in the business of a collateral loan broker, and Kahan's unrebutted testimony is that his company did not regularly extend loans secured by a pledge of collateral. Kahan Dep. at 116.

(*id.*, at *16-18 [emphasis added]).

Here, as in *Kahan*, Mr. Koblence and Aster fail to allege that Aster engaged in the business of a collateral loan broker. Instead, they merely allege that "[i]n making ***the*** loan to Rafka, Aster was acting as a collateral loan broker under Article 5 of the NY GBL" (Am. Compl., ¶ 26 [emphasis added]). This single, conclusory allegation is insufficient to state a cause of action under Article 5 of the General Business Law because there are insufficient allegations in the Amended Complaint as currently pled to support the inference that Aster was "carry[ing] on the business of a collateral loan broker" without a license (NY GBL §§ 40, 41), i.e., that this was anything other than a single, isolated inventory financing transaction between two jewelry merchants.

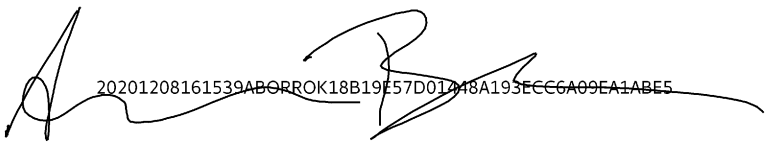
Indeed, the cases relied on by Mr. Koblence and Aster all involve transactions with a licensed pawnbroker that was regularly engaged in the business of making loans on the pledge of personal property (*Harrison*, 616 BR at 298, 302 [noting that former principal of plaintiff was alleged to have pawned certain diamonds and other items in transactions with defendant New Liberty Pawn Shop, Inc., a duly licensed pawnbroker]; *Mann v R. Simspon & Co.*, 257 AD 329, 329 [1st Dept

1939] ["The plaintiff is a dealer in jewelry and the defendant is a licensed pawnbroker"]) or are otherwise completely unrelated to the interpretation of Article 5 of the General Business Law (*In re Brown*, 45 BR at 767 [discussing the definition of "consumer goods" under Article 9 of the UCC]).

Thus, as currently pled, Mr. Koblence and Rafka fail to state a cause of action against Aster under Article 5 of the General Business Law and the first and fourth causes of action are dismissed without prejudice with leave to replead.

Accordingly, it is

ORDERED that the plaintiffs' motion for leave to partially reargue the motion to dismiss is granted, and upon reargument, the first (rescission) and fourth (General Business Law §§ 46, 48, and 349) causes of action are dismissed.



12/8/2020
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