

Basal Trading and Sons Ltd. v M&G Diamonds, Inc.
2021 NY Slip Op 32590(U)
December 7, 2021
Supreme Court, New York County
Docket Number: Index No. 651740/2020
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA JAMES

PART 59

Justice

-----X

BASAL TRADING AND SONS LTD.,

Plaintiff,

- v -

M&G DIAMONDS, INC., M&G DIAMOND CO., ROMAN
MALAKOV DIAMONDS LTD., and ROMAN MALAKOV,

Defendants.

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INDEX NO. 651740/2020MOTION DATE 06/29/2020MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for

DISMISSAL

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of defendants M&G Diamonds, Inc., M&G Diamond Co., Roman Malakov Diamonds Ltd, and Roman Malakov to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against such defendants, with costs and disbursements to such defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of such defendants.

DECISION

In its complaint, plaintiff alleges an oral partnership agreement among and between the parties to this action. According to the complaint, such partnership, interest in which

is divided equally between plaintiff (50%) and defendants (50%), owns a one-third interest in a non-party partnership, which owns three diamonds. Under such agreement, three of the parties at bar contributed one half of one third, i.e., one sixth, of the purchase price of such diamonds, and are entitled to receive one half of one third, i.e., one sixth, of the proceeds arising from the sale of any and/or all of the diamonds.

Plaintiff alleges that it made its contributions toward the purchase price of such diamonds on May 6, 2009; May 15, 2009; November 2, 2009; and May 4, 2010. Plaintiff contends that the defendants in question received their one sixth share of the profits from the sale of two of the three diamonds, and that plaintiff received its one-sixth share of such payment.

Plaintiff asserts that the third diamond was sold in December 2019 and that the proceeds of such sale were paid to the non-party partnership, and that defendants received their one sixth share, but that plaintiff has not received its one sixth share of such payment.

The court disagrees with defendants that as the essence of the contract was for the purchase and sale of goods, here diamonds, that the statute of frauds of UCC § 2-201 bars any oral agreement. As in Walsh v Rechler, 151 AD2d 473 (2d Dept 1989) (citation omitted), plaintiff herein is not "seeking to

acquire an interest in the [diamonds], but is asserting an alleged interest in claimed partnership assets”.

Notwithstanding that UCC § 2-201 does not pertain, in its complaint, plaintiff alleges that it made its contributions over a period that was only two days short of a one-year period and that the sale of the first two diamonds occurred more than one year from its initial contribution. Based on such assertion, this court determines that the cause of action for breach of contract lacks merit, in any event, as both the complaint and the affirmation in opposition to the motion to dismiss at bar demonstrate that the oral partnership agreement could not have been performed in one year, and is therefore violative of the Statute of Frauds, General Obligations Law § 5-701(a)(1). See Harrington v Murray, 169 AD2d 580, 581 (1st Dept. 1991).

Nor does the doctrine of “part performance” exception to such statute of frauds rescue plaintiff’s claim for breach of an oral agreement. Such exception is inapplicable not only because plaintiff’s actions cannot be characterized as “‘unequivocally referable’ to the agreement alleged”, Anostario v Vicinanza, 59 NY2d 662, 664 (1983), but also, as defendants argue, because plaintiff seeks monetary damages, as opposed to specific performance in the form of the conveyance of a one third interest in the non-party, unnamed partnership, of which the

diamonds are an asset, see Mihalko v Blood, 86 AD2d 723, 724 (1982).

Alternatively, the breach of contract claim is insufficiently pled, as it fails to assert the essential terms of an agreement, including, but not limited to, the parties thereto, Ace Fire Underwriters Ins Co v ITT Indus, Inc, 84 AD3d 688, 689 (1st Dept 2011), and “whether the alleged agreement was, in fact, written or oral”, Caniglia v Chicago Tribune-New York News Syndicate, 204 AD2d 233, 234 (1st Dept 1994). With respect to the parties to the agreement, in opposition to defendants’ motion to dismiss, plaintiff submits the affirmation of Zevolon Shemesh, dated June 2020, in which Shemesh names Garni Diamonds, as the entity whom Shemesh represented and, on whose behalf, Shemesh negotiated, and sold the three diamonds to “a partnership”. However, such affirmation does not provide the name of the partnership to whom he sold the three diamonds. Nor does the complaint name the partnership to whom Garni Diamonds allegedly sold the three diamonds. The opposing affidavit of the principal of plaintiff likewise fails to specify the name of such partnership.

This court also agrees with defendants that the second cause of action for unjust enrichment fails, as plaintiff “may not use such a claim to evade New York’s statute of frauds”.

Kocourek v Booz Allen Hamilton Inc, 71 AD3d 511, 512 (1st Dept. 2011).

Finally, the third cause of action, in which plaintiff seeks the imposition of a constructive trust upon the proceeds of the diamond sale, likewise, lacks merit. As argued by defendants, plaintiff fails to allege any facts that tend to show that there was a fiduciary relationship between plaintiff and any of the defendants. See Simon v Francinvest, S.A., 178 AD3d 436, 437 (1st Dept 2019).

Debra A. James
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<u>12/7/2021</u>			<u>DEBRA JAMES, J.S.C.</u>
DATE			
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE