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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU : IAS PART 11
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FINE- CUT DIAMONDS CORP.,

Plaintiff,

-against- Index No. 1283/06

ELIAHU SHETRIT and ELI UNIQUE DIAMOND, INC., and JOHN DOE No. 1 THROUGH JOHN DOE No. 10, INCLUSIVE, the names of the last 10 defendants being fictitious and unknown to Plaintiff, the persons or parties intended being those in possession and/or having purchased Open Memo Goods described in the Verified Complaint,

Defendants.

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Present: Hon. LEONARD B. AUSTIN, J.S.C.

Attorney for Plaintiff

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DECISION AFTER TRIAL

This action was commenced by Plaintiff, Fine-Cut Diamonds Corp. ("Fine-Cut"), primarily against Defendants, Eliahu Shetrit ("Shetrit") and Eli Unique Diamonds, Inc. ("EUD"), with regard to various sales of Plaintiff's diamonds by Shetrit which were given to him on consignment.

The amended complaint alleges six theories of recovery; to wit: breach of contract, conversion, accounting and imposition of a trust on proceeds, unjust enrichment, replevin and fraud. Defendants generally denied the allegations in the amended complaint and interposed the affirmative defenses of accord and satisfaction, corporate shield, equitable estoppel and unclean hands.

The trial of this matter was held on September 2, 4, 8, 9, 10 and 11, 2008. Post-trial memoranda were simultaneously submitted on November 7, 2008. Based upon the credible evidence presented at the trial of this matter, the following are the findings and decision of the Court.

FINDINGS OF FACT

Fine-Cut, a family owned and operated business, was engaged in the manufacturing and wholesale sale of loose diamonds and diamond jewelry ("goods"). Fine-Cut's business was located at the "Diamond District" at 47th Street in New York City.

In early January 2004, Fine-Cut's president, Michael Deutsch ("Deutsch"), met Shetrit when he was at Fine-Cut's office to repay a loan to Deutsch's son, Joel. Previously, Joel had told his father that he loaned money to a jewelry salesman for his wedding. A well-respected member of Joel's synagogue had identified Shetrit as a "very honest man" and that he was competent in selling goods outside the New York metropolitan area.

Over the course of two or three meetings with Shetrit in early January 2004,

Shetrit advised Deutsch that he worked as a salesman for a jewelry company called First Image. His territory was outside the New York metropolitan area because jewelry could be sold for higher prices. He also took care to be sure his customers had good credit. Based upon their conversations and Shetrit's reputation, Fine-Cut hired Shetrit as a salesman.

The terms of the relationship were that Shetrit would sell goods "on memo"[1]; Shetrit would keep Fine-Cut apprised as to whom he was selling goods; Fine-Cut had the right to determine whether or not Shetrit could sell to a customer and/or limit the amount sold; Shetrit could not sell anything for an amount which was lower than the price stated on the memo without Fine-Cut's permission ("memo price"); Shetrit was responsible for reporting his sales to Fine-Cut; and Shetrit was responsible for collection of payments due from his customers and remitting the memo price to Fine-Cut or returning the goods. If he did not make payment or return the goods, he was personally responsible. Fine-Cut paid all of Shetrit's expenses which included attendance at jewelry shows for Shetrit and some of his customers.

For the sale of jewelry, Shetrit was entitled to retain a commission of 10% of the memo price and remit the balance to Fine-Cut. For the sale of loose diamonds, Shetrit was entitled to keep any amount realized over the memo price. The amount of goods

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[1] The sale of the loose diamonds and jewelry were consigned to salespeople "on memorandum" or "on memo". Title to the goods remained with the consignor. The "memo" given included the date, description of the goods and its price. The risk of loss was borne by the consignee.

Shetrit got from Fine-Cut was dependent on his volume of sales as reflected in his sales reports.

Goods that were delivered to Shetrit or his customers were on memo. Most, but not all, of the memos were signed by Shetrit. During the trial of this matter, Shetrit and Fine-Cut agreed that memos contained in Plaintiff's exhibit 5 and compiled in Plaintiff's exhibit 4 were an accurate reflection of the goods taken on memo by Shetrit. When he did sign for any goods on memo, Shetrit always signed in his individual capacity.[2]

On an almost weekly basis, Shetrit and Deutsch would meet to reconcile Shetrit's sales reports. The sales reports would reflect the goods sold, the dates of sale, the sales price and the payment terms. Deutsch claimed that, based upon the sales reports, he determined whether Shetrit would receive more goods. However, no one at Fine-Cut had personal knowledge as to the accuracy of the sales reports.

At the trial of this matter, Shetrit invoked his Fifth Amendment privilege against self-incrimination by refusing to answer questions with regard to his sales reports which were in evidence.[3] Nevertheless, based upon the sales reports, Shetrit made sales of

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[2] EUD was formed on December 3, 2004 but its formation never apparently affected Shetrit's personal liability under the memos inasmuch as he signed all of them individually.

[3] Shetrit's invocation of his Fifth Amendment rights warrants this Court taking a negative inference with regard to not only his testimony relating to the sales reports (Matter of Commissioner of Social Services v. Philip De G., 59 N.Y.2d 137, 141 [1983]; and Breen Belgium BVBA v. International Foreign Currency, Inc., 37 A.D.3d 633, 634 [2nd Dept. 2007]) but also his testimony in chief. Republic of Haiti v. Duvalier, 211 A.D.2d 379, 386 (1st Dept. 1995).

Fine-Cut goods totaling $15,809,967.82 (Px 4[4]) including $618,059.00 from the last two collection reports.

In addition to sales reports, Shetrit also submitted collection reports which outlined the collections he made from his customers. When the moneys realized were turned over to Fine-Cut, it was reflected on the collection reports. An issue in this matter is whether the acceptance of the collection reports and the payments recorded thereon constitute a settlement of the account between the parties. All collections reflected on the reports were turned over to Fine-Cut except moneys due under the last two collection reports totaling $618,059.00 (Px 8).

When taken together with the sales reports and other documents reflecting payments, Shetrit paid Fine-Cut on account of sales a total of $9,329,718.66 (Px 9). After taking into account a credit for commissions and expenses in the amount of $148,952.69 (Px 10), the total credit to Shetrit is $9,478,671.35.

The credit to which Shetrit is entitled must be deducted from the total sales of $15,809,967.82 (Px 4). The net amount of Fine-Cut's claim is $6,331,296.47. The parties have stipulated that, subject to Shetrit's defenses, this sum accurately reflects the balance due to Fine-Cut for the goods reported to have been sold by Shetrit. However, an additional $1,699,590.29 of memo goods delivered to Shetrit by Fine-Cut were neither reported sold or returned to Fine-Cut (Px 11).

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[4] Plaintiff's trial exhibits are referred to as "Px ___". Defendants' trial exhibits are referred to as "Dx ___".

Taken together, Fine-Cut's claim against Shetrit totals $8,030,886.76. This is the sum Fine-Cut claims is due as of the date Shetrit resigned his employment, January 10, 2006.

CONCLUSIONS OF LAW

A. Election of Remedies

Plaintiffs always have the option of pleading in the alternative. CPLR 3014. However, they cannot do so in order to realize an inconsistent judgment. Siegel, *New York Practice 4th Ed.*, §214. See, Payne v. New York Susquehanna and Western Railroad Co., 201 N.Y. 436, 441 (1911) ("[A]lthough there may be various grounds for liability, there can be but one cause of action and one recovery.") See also, Baratta v. Kozlowski, 94 A.D.2d 454,464 (2nd Dept. 1983).

Although Fine-Cut has argued that it has a right to recovery under the various theories propounded, an election of remedies is required. Fine-Cut suggests in its post-trial submissions that all of its theories are viable. However, even where a party establishes a right to recovery under all its causes of action, there can be no recovery for each independent claim. Instead, "there is but one primary right, one primary wrong and one liability." Payne v. New York Susquehanna and Western Railroad Co., *supra* at 441.

Since there has been no specific election of remedies, the Court will address Plaintiff's primary theory of recovery; breach of contract. Although they appear to have merit, the remaining causes of action, thus, must be dismissed without prejudice.

B. Breach of Contract

To establish a cause of action for breach of contract, one must demonstrate: (1) the existence of a contract between the plaintiff and defendant; (2) consideration; (3) performance by the plaintiff; (4) breach by the defendant; and (5) damages resulting from the breach. Furia v. Furia, 116 A.D.2d 694 (2nd Dept. 1986).

Fine-Cut has met its burden in establishing each of these elements. The memos executed by Shetrit memorialized the understandings of the parties with regard to each of the consignments of loose diamonds and jewelry entrusted to Shetrit by Fine-Cut. Based upon the total of the goods delivered to Shetrit on memo, sales totaling $15,809,967.82 were demonstrated. Fine-Cut was entitled to payment of that sum less Shetrit's commissions, expense reimbursement and the sums remitted by Shetrit. Since Shetrit tendered only $9,478,671.35, Fine-Cut has established that the balance due is $6,331,296.47.

In addition to the goods delivered to Shetrit which were covered in the Shetrit sales reports, an additional $1,699,590.29 of memo goods is not reflected in any of the sales reports. By demonstrating that these goods were delivered to Shetrit on memo, Fine-Cut is entitled to recover for this amount as well. The total of Fine-Cut's claim is thus $8,030,886.76.

Based upon Shetrit's breach of contract with Fine-Cut, Fine-Cut is entitled to recover $8,030,886.76 together with interest from January 10, 2006, Shetrit's last day

with Fine-Cut when the balance of the moneys due under the memos should have been paid. CPLR 5001(b).

C. Shetrit's Defenses

1. *Corporate Shield*

Corporations are formed to protect individual shareholders, directors and officers from liability. Bartle v. Homowners Cooperative, Inc., 309 N.Y. 103, 106 (1955); Goldman v. Chapman, 44 A.D.3d 938 (2nd Dept. 2007); and Damianos Realty Grp. LLC v. Fracchia, 35 A.D.3d 344 (2nd Dept. 2006). Certainly, corporate officers acting in their corporate capacity are protected from personal liability. See, Kramer v. Twin County Grocers, 151 A.D.2d 722, 724 (2nd Dept. 1989).

Fine-Cut argues that Shetrit's fraud warrants the imposition of personal liability against a corporate officer who commits or participates in the commission of a tort; even if it is done for the benefit of the corporation. Widlitz v. Scher, 148 A.D.2d 530 (2nd Dept. 1989). See, Huggins v. Parkset Plumbing Supply, Inc., 7 A.D.3d 672 , 673 (2nd Dept. 2004); and Kopec v. Hempstead Gardens, Inc., 264 A.D.2d 714, 716 (2nd Dept. 1999);

This defense is of no moment. The breach of contract claim is personal to Shetrit. The credible evidence presented at trial demonstrates that none of the memos was entered into with EUD nor do any sales reports reflect EUD's direct involvement

with Fine-Cut.[5] Significantly, Shetrit never signed any documents with Fine-Cut reflecting that he was acting in a corporate capacity. Thus, the liability under Plaintiff's breach of contract theory is personal to Shetrit. There is no need to pierce the corporate veil.

EUD was formed in December 2004 for the purpose of paying Fine-Cut the moneys realized by Shetrit's sales of its goods. Nevertheless, there is no credible proof that EUD was ever a party to any memo.

Thus, this defense must fail.

2. *Accord and Satisfaction*

An accord and satisfaction connotes both an accord that the stipulated performance will be accepted in lieu of an existing claim and the execution of an agreement which is a satisfaction. Denberg v. Parker Chapin Flatau & Klimpl, 82 N.Y.2d 375, 383 (1993). It requires the intention to resolve a dispute by the knowing acceptance of a lesser amount by a creditor. See, Consolidated Edison Co. of New York, Inc. v. Jet Asphalt Corp., 132 A.D.2d 296, 303 (1st Dept. 1987) *citing* Shuttinger v. Woodruff, 259 N.Y. 212, 216-217 (1932).

Shetrit relies upon the sales reports and collection reports to demonstrate an accord and satisfaction. Such reports which included running totals of the amounts

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[5] EUD appears to be little more than an artifice created for record keeping purposes on Fine-Cut's books.

collected by Shetrit and a running accounting of moneys and goods delivered to Fine-Cut. Such documents do not, in any way, demonstrate a knowing, intentional compromise of any claims for moneys due pursuant to the memos. Both Deutsch and Shetrit agreed in their testimony that each sales report represented an on-going accounting with regular adjustments based upon collections and other considerations. No sales report, it seems, was ever final. No testimony was adduced during the trial which would result in a different conclusion.

3. *Equitable Estoppel*

The defense of equitable estoppel is established by proof that defendant reasonably or "rightfully" relied on plaintiff's word or deed and, by reason of such reliance, changed its position to its detriment. Nassau Trust Co. v. Montrose Concrete Products Corp., 56 N.Y.2d 175, 184 (1982).

The gravamen of Shetrit's equitable estoppel defense lies in the undisputed fact that Fine-Cut reported accounts receivable and inventory amounts to its lender, Antwerp Diamond Bank ("ADB"), which were lower than the actual amounts. Deutsch testified that Fine-Cut was obligated enough receivables and inventory to satisfy its lender and maintain its credit lines (Dx RRRR).

It is unclear as to how Shetrit detrimentally changed his position with regard to representations which were made to ADB. In the absence of such proof, his defense cannot bar Fine-Cut's recovery. See, Siger v. Rich, 308 A.D.2d 235, 242 (1st Dept. 2003).

4. *Unclean Hands*

The doctrine of unclean hands requires the defendant to prove that (1) the plaintiff is guilty of immoral, unconscionable conduct; (2) the conduct was relied upon by the defendant; and (3) the defendant was injured thereby. National Distillers and Chemical Corp. v. Seyopp Corp., 17 N.Y.2d 12, 15-16 (1966); and Kopsidas v. Krokos, 294 A.D.2d 406, 407 (2nd Dept. 2002).

Shetrit relies upon Fine-Cut's under-reporting to ADB, its failure to properly report currency transactions on IRS form 8300 (Px 20) and inaccuracies noted in Fine-Cut's 2004 amended tax return (Px 18) and 2005 tax return (Px 19).

While the Court agrees that the manner in which Fine-Cut reported its income and case transactions to the IRS are highly questionable, at best, and very possibly criminal, Shetrit was not harmed by such filings. Indeed, Shetrit's sales reports and collection reports submitted into evidence give rise to the possibility of illegal activities on the part of Shetrit.

In the final analysis, this defense is little more than the pot calling the kettle black. This is especially true with Shetrit invoking his Fifth Amendment rights with regard to the crucial sales reports. Shetrit has failed to demonstrate the elements of an unclean hands defense.

D. Conclusion

Based upon the credible evidence, Fine-Cut is entitled to entry of a judgment against Shetrit only in the sum of $8,030,886.76 together with interest from January 10,

2006. No judgment is granted as against EUD since it is clear that the disputed transactions herein were between Fine-Cut and Shetrit. The action as against EUD must be dismissed.

Settle judgment on ten (10) days notice.

Dated: Mineola, NY
February 3, 2009

Hon. LEONARD B. AUSTIN, J.S.C.