SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA A. CRANE** **PART** **60M**

Justice

----------X

GOGREEN DIAMONDS INC.

Plaintiff,

- v -

QUANTUM JEWELRY LLC,

Defendant.

----------X

INDEX NO. 656356/2022

MOTION DATE 12/15/2023, 12/20/2023

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 167, 168, 169, 170, 171, 172, 173, 174

were read on this motion to/for DISMISS.

The court consolidates motion sequence numbers 002 and 003 for disposition.

In this action alleging, inter alia, breach of contract, plaintiff GoGreen Diamonds, Inc., moves for partial summary judgment pursuant to CPLR 3212 (e) on the first, second, third, and sixth causes of action in the complaint (mot seq 002). Defendant Quantum Jewelry LLC moves to dismiss the fourth and fifth causes of action pursuant to CPLR 3211, or for partial summary judgment pursuant to CPLR 3212 (e) dismissing the fourth and fifth causes of action (mot seq 003). For the reasons that follow, plaintiff's motion is denied, and defendant's motion is granted in part and denied in part, with the fourth cause of action being sustained and fifth cause of action being dismissed.

BACKGROUND

Plaintiff is a New York corporation engaged in the manufacture and distribution of laboratory grown diamonds and finished jewelry pieces containing laboratory grown diamonds. Defendant is a New York limited liability company engaged in the wholesale jewelry business. Plaintiff began consigning laboratory grown diamonds to defendant in the fall of 2019. This litigation stems from two alleged agreements the parties entered into, the first being a consignment agreement and the second being a business agreement related to an alleged capital contribution plaintiff made in return for a specified share of defendant's profits. Plaintiff initiated this action alleging that defendant breached both agreements. Plaintiff also seeks damages under the alternative theories of unjust enrichment and quantum valebant, as well as its attorney's fees and costs in bringing this action.

According to the complaint, "[i]n or about December 2021," the parties entered into an agreement (hereinafter, the Consignment Agreement) pursuant to which plaintiff agreed to consign agreed upon quantities, sizes, and styles of lab grown diamonds to defendant (Complaint at ¶ 5). Without annexing the Consignment Agreement to the complaint or citing to specific sections, the complaint sets forth that defendant breached the Consignment Agreement as follows.

Plaintiff "consigned agreed upon quantities, sizes and styles of Lab Grown Diamond Goods to [defendant] on consignment" (*id.* at ¶ 6). All of the diamonds consigned were accepted "without any protest or objection thereto" (*id.* at ¶ 7). "Title to any and all Lab Grown Diamond Goods consigned to [defendant] at all times remained with [plaintiff] until: (a) it was sold to [defendant's] customers . . . ; or (b) it was purchased and paid for by [defendant]" (*id.* at ¶ 8). Plaintiff "had the right to demand that [defendant] return any or all of the Lab Grown Diamond Goods consigned to it" (*id.* at ¶ 9). Defendant granted plaintiff "a security interest in the

proceeds of the sales by [defendant] of Lab Grown Diamond Goods consigned by [plaintiff] up to the amount of the price which [defendant] agreed to pay [plaintiff] for the Lab Grown Diamond Goods sold by [defendant]" (*id.* at ¶ 10).

"Between May 13, 2021 and December 31, 2021, [plaintiff] issued invoices to [defendant] for payment in total amount of $548,997.13 on account of the agreed upon prices of Lab Grown Diamond Goods reported by [defendant] to [plaintiff] as having been sold to [defendant's] customers" (*id.* at ¶ 11). Defendant thereafter "remitted payments to [plaintiff] totaling only $25,068.99 on account of aforementioned invoices" (*id.* at ¶ 12). As a result, "there is an unpaid principal balance currently due and owing . . . in the amount of $523,928.14" (*id.* at ¶ 13). Despite plaintiff demanding payment, defendant "has not remitted any further payment" (*id.* at ¶ 14).

The complaint also alleges that certain diamonds plaintiff consigned to defendant "have neither been returned to [plaintiff] nor have they been reported by [defendant] as having been sold" (*id.* at ¶ 15). These diamonds have "agreed upon prices totaling $146,845.50" (*id.*). Although demanded, defendant has not returned any portion of these unaccounted-for diamonds and has not remitted any payment for them (*id.* at ¶¶ 16 & 17).

In the first cause of action, plaintiff alleges that defendant breached "the terms of its agreements with [plaintiff]" by failing to pay the amounts owed under the invoices and/or failing to return diamonds that have not been reported as sold (*id.* at ¶ 18). Consequently, the first cause of action "demands judgment against [defendant for breach of contract] in the total principal amount of $ 670,773.64, with interest thereon at the statutory rate of 9% per annum" (*id.* at ¶ 19). The second cause of action for unjust enrichment and the third cause of action quantum valebant seek to recover the same amount based upon the same allegations.

The complaint alleges a fourth cause of action that seeks to recover damages for breach of a "Business Agreement" (*id.* at ¶ 30). Without indicating whether the Business Agreement was oral or written, the complaint states that pursuant to the agreement, plaintiff

> "agreed to invest certain agreed upon funds in, and to supply loose lab grown diamonds on consignment to, [defendant] which [defendant] would then incorporate into finished jewelry items and provide same to its customers for sale, with [plaintiff] and [defendant] sharing an agreed upon percentage amounts of any profits therefrom, to wit, 70% to [plaintiff] and 30% to [defendant] in the first year of the agreement and 65% to [plaintiff] and 35% to [defendant] in and after the second year of the agreement"

(*id.* at ¶ 30).

The complaint alleges that in accordance with the Business Agreement, plaintiff contributed $400,100.00 in capital and that $349,972.00 in shared profits is now due and owing to plaintiff under the Business Agreement. Although demanded, defendant has not remitted any payment. The complaint asserts that, by refusing to pay plaintiff its agreed upon share of the profits, defendant breached the Business Agreement and must refund plaintiff's $ 400,100.00 capital contribution. Consequently, plaintiff seeks no less than $750,072.00 for plaintiff's breach of the Business Agreement. The complaint includes a fifth cause of action for unjust enrichment seeking the same amount, based upon on these same facts.

Finally, the complaint asserts a sixth cause of action for attorney's fees and costs in this action. The complaint asserts in this regard that "[p]ursuant to the terms of the agreements . . . , in the event [plaintiff] is required to make efforts to collect any amounts owed by [plaintiff] or to otherwise enforce its rights with regard to any dispute with [defendant], [defendant] is obligated to pay all costs and expenses, including reasonable attorneys' fees, incurred by [plaintiff] with respect thereto" (Complaint ¶ 46).

After completing discovery, the parties filed these motions. Plaintiff moves for partial summary judgment on the first, second, third, and sixth causes of action. Defendant moves to

dismiss the fourth and fifth causes of action pursuant to CPLR 3211 or for partial summary judgment dismissing the fourth and fifth causes of action.

PLAINTIFF'S MOTION

Summary Judgment Standard

"On a motion for summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.*, 36 NY3d 69, 73 [2020] [internal quotation marks and citations omitted]). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014] [quotation marks and citation omitted]). Once this showing has been made "the burden shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action" (*Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.*, 36 NY3d at 74 [internal quotation marks and citations omitted]). "[T]he evidence submitted both in support of and in opposition [to a motion for summary judgment] must be tendered in admissible form" (*Benedetto v Hyatt Corp.*, 203 AD3d 505, 506 [1st Dept 2022]).

First Cause of Action – Breach of the Consignment Agreement

Plaintiff seeks summary judgment on its first cause of action for breach of the Consignment Agreement. "The elements of a cause of action for breach of contract are the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Noto v Planck, LLC*, 228 AD3d 516, 516 [1st Dept 2024] [internal quotation marks and citation omitted]). "A private document offered to prove the existence of a

valid contract cannot be admitted into evidence unless its authenticity and genuineness are first properly established" (*Sherrod v Mount Sinai St. Luke's*, 204 AD3d 1053, 1055 [2d Dept 2022]). An agreement that remains unauthenticated is not admissible and, therefore, not an appropriate basis on which to grant summary judgment (*see Garces v Windsor Plaza, LLC*, 189 AD3d 539, 540 [1st Dept 2020]; *Clarke v American Truck & Trailer, Inc.*, 171 AD3d 405, 406 [1st Dept 2019]). However, where the party opposing the motion does not challenge the authenticity of the contract in its opposition papers, the opposing party is deemed to have admitted that the contract is authentic (*see Vitucci v Durst Pyramid LLC*, 205 AD3d 441, 444-445 [1st Dept 2022]; *see also Carey v Toy Indus. Assn. TM, Inc.*, 216 AD3d 404, 405 [1st Dept 2023]).

Here, in support of its motion, plaintiff annexes a copy of the Consignment Agreement (NYSCEF Doc. No. 111), along with the affidavit of plaintiff's Chief Operating Officer, Sehal Modi (NYSCEF Doc. No. 110). Modi states that he executed the Consignment Agreement on December 22, 2020, the same date that defendant's owner and managing member, Manshi Mehta signed the agreement (Modi Reply Affidavit at ¶ 4, NYSCEF Doc. No. 162). However, the version of the Consignment Agreement appended to plaintiff's motion, dated December 22, 2020, was not annexed to the verified complaint. It references a consignment agreement entered into "on or about December 2021," not December 22, 2020 (Complaint at ¶ 5). Plaintiff provides no explanation for this.

In support of its motion, plaintiff also offers a UCC financing statement, filed on December 23, 2020, showing plaintiff as creditor, defendant as debtor, and laboratory grown diamonds and jewelry defendant consigned to plaintiff together with, *inter alia*, all the proceeds thereof provided as collateral (NYSCEF Doc. No. 112). However, this document, in and of itself, is insufficient to establish the authenticity of the Consignment Agreement.

In opposition to plaintiff's motion, defendant objects to the authenticity of the Consignment Agreement annexed to plaintiff's motion. It submits the affidavit of Manshi Mehta, wherein she concedes that her signature appears on the last page of the document, but states that she was shown this document for the first time at her deposition on June 13, 2023 (Manshi Mehta Affidavit at ¶ 9, NYSCEF Doc. No. 160). Manshi states that she does not recall signing the document, it contains unfair terms that she never would have agreed to, the terms contradict the parties' course of dealing, the document contains suspicious characteristics, and, thus, she believes the document was "substantially altered and manipulated" (*id.* at ¶¶ 9-14). Manshi's affidavit statements *partially* contradict the testimony that she provided in her deposition on June 13, 2023 (Manshi Mehta EBT at 88, ¶¶ 9-21, EDOC. 151). Manshi does nothing to explain this contradiction in her affidavit. As such, she cannot now simply assert that she does not recall signing it, or that she never would have agreed to the 'unfair' terms.

Defendant also submits the affidavit of Robin Gandhi, Manshi Mehta's husband and joint owner of defendant (Gandhi Affidavit, NYSCEF Doc. 159). Gandhi states that he first learned of a Consignment Agreement, purportedly executed on December 22, 2020, during the course of this litigation in 2023. He states that "the parties never had an actual consignment agreement and have been doing a substantial amount of business on mutually agreed oral terms since November 2019" (*id.* at ¶ 35).

In its reply papers, plaintiff purports to authenticate the Consignment Agreement through an excerpt of Manshi Mehta's deposition testimony, during which she was shown the Consignment Agreement plaintiff offered in support of this motion and asked: "is that your signature"? (Manshi Mehta EBT at 88, NYSCEF Doc. Nos. 163, 166). To which Manshi Mehta replied: "Yeah" (*id.*). A moving party may not, however, "use reply papers to remedy . . . basic

deficiencies in [its] prima facie showing" (*Tribbs v 326-338 E 100th LLC*, 215 AD3d 480, 481 [1st Dept 2023] [internal quotation marks and citation omitted]), and this is not a case where the defendant has conceded the authenticity of the agreement (*see Carey v Toy Industry Assn. TM, Inc.*, 216 AD3d at 405; *Vitucci v Durst Pyramid LLC*, 205 AD3d at 444-445).

Moreover, the statements Manshi Mehta made in her affidavit raise a question of fact as to whether this document represents a valid agreement between the parties. Although a party may not create a "feigned issue of fact" in order to defeat summary judgment, Manshi Mehta's affidavit concerning her stance that the document is doctored, does not "flatly contradict" her prior deposition testimony that her signature appears on the document (*see generally Red Zone LLC v Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048, 1049 [2016]). Therefore, her affidavit may be considered in opposition to defendant's motion and is sufficient to raise an issue of fact.

In addition to the issues of fact that Manshi Mehta's affidavit contrasted with plaintiff's attempt to authenticate the Consignment Agreement create, peculiarities within the Consignment Agreement raise issues of fact as to whether Manshi Mehta's signature was cut and pasted onto the document. First, on page 2 of the agreement (EDOC. 135, p.3) the numbered bullet points are out of order. Specifically, the numbers on the page start counting upwards from three to four, before jumping backwards, and beginning again counting from two to four. This same error continues on page 5 of the Consignment Agreement (*id.* at p.6) with the numbered bullet points jumping from the number eight to twelve and subsequently thirteen. These circumstances raise questions as to whether the agreement was doctored, or a "bait and switch" as defendant contends. Consequently, there are issues of fact concerning the authenticity of the Consignment Agreement that will need a trial, along with credibility determinations, to decide. In view of the

foregoing, that branch of plaintiff's motion that is for partial summary judgment on the first cause of action for breach of contract is denied.

Second Cause of Action – Unjust Enrichment (the lab-grown diamonds)

Unjust enrichment is a quasi-contractual remedy that is generally "unavailable where there exists a valid and enforceable agreement governing the particular subject matter" (*see Kramer v Greene*, 142 AD3d 438, 441 [1st Dept 2016]). However, that rule does not apply where "the matter presents a bona fide dispute as to the existence of a valid contract" (*Tahari v Narkis*, 216 AD3d 557, 559 [1st Dept 2023]; *see Kramer v Greene*, 142 AD3d at 441-442). Here, plaintiff does not have to elect its remedies because the issue of whether the Consignment Agreement constitutes a valid and enforceable contract between the parties is in dispute (*see Kramer v Greene*, 142 AD3d at 442).

"To recover under a theory of unjust enrichment, a litigant must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Columbia Mem. Hosp. v Hinds*, 38 NY3d 253, 275 [2022] [internal quotation marks and citations omitted]). Plaintiff asserts that it consigned certain merchandise to defendant, who accepted the merchandise, and then sold it to customers, from which it received payment (or expects to receive payment), or otherwise retained the benefit of the merchandise. As a result, defendant derived a substantial benefit from the consigned diamonds for which plaintiff has not been compensated. Plaintiff alleges that as a result, defendant has been unjustly enriched in an amount of no less than $670,773.64.

In support of this cause of action, plaintiff proffers memoranda and invoices purporting to reflect the goods delivered to and retained by defendant, to which defendant allegedly never

objected (NYSCEF Doc. Nos. 113-115, 117-118). Sehal Modi states in his affidavit that the Consignment Agreement requires that each shipment of goods to defendant is to be accompanied by a memo identifying the goods and setting forth the prices to be charged and paid by defendant for each item (Modi Affidavit at ¶ 6 [c], NYSCEF Doc. No. 110). He avers that when defendant failed to return or pay for the delivered goods, plaintiff issued two invoices to defendant, both dated December 31, 2021, that totaled $523,928.14 (Invoices, NYSCEF Doc. Nos. 113 & 114). Modi states that he personally emailed these two invoices to Robin Gandhi on January 24, 2022 and followed up with text messages and personal discussions, during which Gandhi never objected to the invoices (Modi Affidavit at ¶ 14, NYSCEF Doc. No. 110).

Modi states that in addition, pursuant to an invoice dated May 31, 2021, defendant owed plaintiff $25,447.50, of which it paid only a portion (Invoice, NYSCEF Doc. No. 115). According to Modi, defendant still owes $378.51 on that invoice (Modi Affidavit at ¶ 12 [c], NYSCEF Doc. No. 110). Modi attests that the total amount due under the three invoices is $523,928.14, "no portion of which has been paid even though [defendant] received the goods itemized in these invoices" (*id.* at ¶ 13).

Modi states that besides the money defendant owes for the three invoices, defendant received $146,845.50 of goods on consignment for which it was never invoiced (*id.* at ¶ 15). Modi attests that defendant received these goods "on memo" and agreed to the price of the goods (Open Memo Schedule, NYSCEF Doc. No. 117), but failed to make payment or return the goods (Modi Affidavit at ¶ 18, NYSCEF Doc. No. 110). Modi states that on June 23, 2023, defendant finally returned $53,121.50 worth of goods it received "on memo," and therefore, in total defendant owes plaintiff the sum of $617,652.13, plus interest and attorney's fees (*id.* at ¶¶ 24-25).

In opposition, Manshi Mehta attests in her affidavit that the parties never agreed on the prices reflected in the invoices (Mehta Affidavit at ¶ 18, NYSCEF Doc. No. 160). She states that during the course of defendant's relationship with plaintiff, goods were turned from a memo to an invoice only *after* defendant reported to plaintiff that it sold certain merchandise to its customers. Only then would the parties negotiate and reach an agreement on the price and payment terms, taking into consideration the price defendant received for the goods and the current market value of the goods (*id.* at ¶ 20). Manshi Mehta avers that the invoices plaintiff submitted are overinflated and were created for the purpose of extorting money out of defendant so as to drive defendant out of business. She asserts that plaintiff's "unreasonable monetary demands" began after defendant terminated its relationship with plaintiff in May of 2021 upon learning that plaintiff directly contacted defendant's clients (*id.* at ¶¶ 5, 6, 16).

Manshi Mehta also points out that many of the memos upon which the invoices are based are marked "closed," ostensibly meaning they were already paid for, and many are not signed or do not include a signature she recognizes as belonging to someone either working for, or allowed to represent, defendant. As to the goods plaintiff claims were not paid for but do not appear on any invoice, Manshi Mehta states that defendant has tried to return these goods, but that plaintiff refuses to accept them. Therefore, she states that defendant does not owe the amount plaintiff is claiming (*id.* at ¶ 43).

In his affidavit, Robin Gandhi states that the invoices plaintiff submitted "contain numerous deficiencies and inaccuracies" and that plaintiff is attempting to use them to recover "a windfall" (Gandhi Affidavit at ¶ 18, NYSCEF Doc. 159). He affirms that the invoices reflect "a much higher amount than would ordinarily have been negotiated and agreed upon between the

parties during the open memo phase," during which they would have considered current market conditions (*id.*).

In their affidavits, neither Mehta nor Gandhi appears to be disputing that they received the goods listed on the memos. They highlight that some of the memos do not include their signatures, but they fail to deny receipt of the items. They also do not dispute that at least some of the items listed on the invoices have not been paid for and have not been returned to plaintiff. Mehta and Gandhi do, however, indicate that they already paid plaintiff for some of the items listed, as evinced by the fact that some of the memos are marked "closed." They also indicate that they never agreed to pay the prices listed on the memos for items sold to their customers. Rather, their course of dealing and understanding was to negotiate a price later based upon the amount defendant's customer paid for the goods and the market conditions at the time. This is sufficient to raise triable issues of fact regarding the extent to which there is an unpaid balance in connection with the consigned goods listed on the invoices.

Plaintiff asserts that Mehta's and Gandhi's contentions that they never agreed to the prices set forth in the invoices are insufficient to defeat summary judgment given defendant's failure to object to the invoices within a reasonable time. Plaintiff argues that defendant's failure to do so "constitutes an acquiescence to the correctness of the invoices" (*Garr Silpe, P.C. v Weir*, 208 AD3d 1098, 1099 [1st Dept 2022]).

"The reasonableness of delay in objecting" to an invoice, however, "usually presents an issue of fact" (*Dreyer & Traub v Rubinstein*, 191 AD2d 236, 237 [1st Dept 1993]). One-month and two-month delays have been held reasonable, while a five-month delay in objecting to a bill has been deemed unreasonable (*see Healthcare Capital Mgt. v Abrahams*, 300 AD2d 108, 108 [1st Dept 2002] [approximately one-month delay held to be reasonable]; *Herrick, Feinstein v*

Stamm, 297 AD2d 477, 478-479 [1st Dept 2002] [defendant's alleged statement during phone conversation with plaintiff, two months after receipt of first invoice, that he was "very troubled by the size of the bills," sufficiently specific and timely to negate inference of assent]; *Shea & Gould v Burr*, 194 AD2d 369, 371 [1st Dept 1993] [account stated arose from failure to object to bill for five months, along with the making of partial payment]).

Here, the record demonstrates that plaintiff emailed the invoices to defendant on January 24, 2022 (NYSCEF Doc. No. 116) and that defendant disputed the invoices, in writing, roughly two months later on April 4, 2022 (NYSCEF Doc. No. 120). It cannot be said that this objection "came so late that the delay constituted, as a matter of law, an unequivocal assent to the balance[s] stated" (*Herrick, Feinstein v Stamm*, 297 AD2d at 478 [internal quotation marks and citation omitted]). This is especially true when juxtaposing the case at bar with *Healthcare Capital v Abrahams* where, as noted, the court held one-month and two-month delays were reasonable, whereas a five-month delay in objecting has been deemed unreasonable. As such, just as the timing was not an issue in *Abrahams*, the roughly two-month lapse here, is also a non-issue as it falls squarely within the parameters provided for by the court in *Abrahams*.

Thus, that branch of plaintiff's motion which is for partial summary judgment on the second cause of action seeking unjust enrichment is denied.

Third Cause of Action – Quantum Valebant

The third cause of action denominated "Quantum Valebant," alleges that plaintiff "consigned the Lab Grown Diamond Goods referenced herein to [defendant] in good faith and with the expectation of being compensated therefore by" defendant (Complaint at ¶ 26) and seeks the "[t]he fair and reasonable value of the . . . Goods received and retained by [defendant] but not paid for" (Complaint at ¶ 27).

There is a dearth of recent New York cases involving claims seeking to recover uder a theory of quantum valebant. At common law, this claim was "a count in an assumpsit action to recover payment for goods sold and delivered to another" (Black's Law Dictionary [11th ed. 2019]). In its motion papers, plaintiff characterizes this cause of action as a claim to recover payment for "goods sold and delivered." To recover under a claim for goods sold and delivered, the plaintiff must "establish[] a sale and delivery of the goods in question, the defendant's acceptance of the goods and its failure either to pay the agreed upon price or raise an objection to the sale terms, as reflected in the invoices, when the goods were delivered or within a reasonable time thereafter" (*Sunkyong Am. v Beta Sound of Music Corp.*, 199 AD2d 100, 100-101 [1st Dept 1993]; *see A&W Egg Co., Inc. v Tufo's Wholesale Dairy, Inc.*, 169 AD3d 616, 617 [1st Dept 2019]).

Plaintiff is not entitled to summary judgment under this theory because questions of fact exist as to whether there was an agreed upon price for the goods sold to defendant's customers. To the extent plaintiff is seeking the "fair and reasonable value" of the goods (Complaint at ¶ 27), as opposed to the price set forth in the invoices, questions of fact exist as to the amount of goods retained without payment. There is no evidence establishing the reasonable value of any of the merchandise at issue. This also presents an issue of fact for trial.

Thus, that branch of plaintiff's motion for partial summary judgment on the third cause of action is denied.

Sixth Cause of Action – Attorney's Fees

"Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). In

support of its motion, plaintiff argues that a provision of the Consignment Agreement entitles plaintiff to attorney's fees and costs in this action. As such, the cause of action seeking attorney's fees hinges on the validity of the Consignment Agreement. Because the validity of the Consignment Agreement remains an issue, plaintiff is not entitled to summary judgment.

Thus, that branch of plaintiff's motion which is for partial summary judgment on the sixth cause of action is denied.

DEFENDANT'S MOTION

Fourth Cause of Action – Breach of the Business Agreement

Defendant moves for summary judgment dismissing the fourth cause of action for breach of the parties' purported business agreement. As noted above, plaintiff alleges that on or about September 2019, the parties

> "entered into an agreement whereby, among other things, [plaintiff] agreed to invest certain agreed upon funds in, and to supply loose lab grown diamonds on consignment to, Quantum which Quantum would then incorporate into finished jewelry items and provide same to its customers for sale, with [plaintiff] and [defendant] sharing an agreed upon percentage amounts of any profits therefrom, to wit, 70% to [plaintiff] and 30% to [defendant] in the first year of the agreement and 65% to [plaintiff] and 35% to [defendant] in and after the second year of the agreement"

(Complaint at ¶ 30). Plaintiff alleges that in accordance with the agreement, it contributed $400,100.00 in capital to defendant and that according to defendant's books and records, plaintiff's share of the profits generated under the agreement totaled "no less than $349,972.00, all of which is currently due and owing to [plaintiff]" (*id.* at ¶¶ 31, 34).

Defendant moves for summary judgment dismissing this claim, inter alia, based upon the statute of frauds. It contends that the duration of the alleged agreement exceeds one year and must therefore be in writing. Pursuant to General Obligations Law § 5-701 (a) (1):

> "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking . . . [b]y its terms is not to be performed within one year from the making thereof."

"Only those agreements which, by their terms, have absolutely no possibility in fact and law of full performance within one year will fall within the statute of frauds" (*JNG Constr., Ltd. v Roussopoulos,* 135 AD3d 709, 710 [2d Dept 2016] [internal quotation marks and citations omitted]; *see also LHWS LLC v S.L. Green Realty Corp.*, 206 AD3d 411, 412 [1st Dept 2022]). Thus, "[i]n order to remove an agreement from the application of the statute of frauds, both parties must be able to complete their performance of the contract within one year" (*Sheehy v Clifford Chance Rogers & Wells LLP*, 3 NY3d 554, 560 [2004]).

Here, under the alleged agreement, as defendant delineated in the contested "business plan" (EDOC. 140, p.2), the defendant had an obligation to make payments during the first and second years of the agreement and every year thereafter. The parties exchanged a "business plan" in or around November 10, 2019 (EDOC. 142, pp. 2-3). Defendants argue that the parties did not agree to the plan. However, according to the terms of the purported plan, both plaintiff and defendant were to make a capital investment, with the former also providing loose lab grown diamonds, in addition to cash for gold, labor, and all expenses (EDOC. 140, p.3). In return, plaintiff and defendant were to share equity in the alleged joint venture for an indefinite period of time, but <u>at least</u> two years (*id.*). Thus, according to the terms of the business plan, the plan's performance could not have been completed within one year of the agreement's formation because defendant's obligation to pay plaintiff a share of profits extends beyond one year. This brings the agreement within the parameters of the statute of frauds. As such, it was necessary that the agreement be reduced to writing and subscribed by the parties' representatives.

To that point, plaintiff does not dispute that the Business Plan could not be fully performed within one year. Rather, it contends that the Business Plan constitutes a written contract between the parties that is both binding and enforceable (EDOC. 152, p.10 [Plaintiff's mem. in opp.]). Specifically, plaintiff alleges that the business agreement was in the nature of a partnership agreement between plaintiff and defendant wherein the parties were to work together in a new business venture (*id.* at p.13). Further, if it is a valid agreement, the business plan may create a joint venture between the parties.

Here, defendant fails to establish its prima facie entitlement to dismissal of the fourth cause of action. There is an issue of fact as to whether the parties intended to enter a joint venture pursuant to the business plan. Also, the documents plaintiff relies upon (primarily EDOCS 140-148), satisfy the statute of frauds.

The elements of a joint venture are

> "acts manifesting the intent of the parties to be associated as joint venturers, mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill or knowledge, a measure of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses"

(*Lebedev v. Blavatnik*, 193 A.D.3d 175, 142 N.Y.S.3d 511 [2021] [citation omitted]).

Here, plaintiff's submissions raise a triable issue of fact. Specifically, GoGreen submits the business plan, additional emails, and lengthy WhatsApp messages. These documents raise an issue of fact that the parties may have effectuated the business plan over the course of several years. First, on November 10, 2019, **defendant's** principal, Robin Gandhi, sent an email to plaintiff's principal, Tonybhai; with the subject of the email being "Quantum Jewelry Business Plan" (EDOC. 142, p.2). The contents of this email include spreadsheets detailing salaries and other expenses, in addition to a provision for profit sharing (*id.* at p.3). Moreover, on November

12, 2019, Robin sent Tonybhai a new email with the subject line "New Beginnings!!" (EDOC. 140 p.2). This email makes several changes to the spread sheet initially provided in EDOC 142.

Specifically, the new spreadsheet included a provision wherein Tonybhai would receive 70% of equity within the first year and 65% in the second year and onwards, and Robin would receive the remaining 30% and 35%, respectively (EDOC. 140, p.3). This is a change from the 50/50 split contained in the initial spreadsheet that Robin provided (see EDOC. 142 at p. 3). Moreover, the November 12th email also provided that Tonybhai would supply "[a]ll Lab Grown loose [diamonds]" and buy the needed "goods from the market . . . and supply [them] to Quantum Jewelry" (EDOC. 140, p.3). Further, this email also called for capital contributions to from Tonybhai and Robin, in the amounts of $400,000 and $100,000, respectively (*id.*). This email was subsequently forwarded to plaintiff on October 28th, 2020, to the email "accounts@gogreendiamonds.com" and Cc'd to Tonybhai (*id.* at p.1). It is unclear why defendant would send these emails if there was no intention to enter into a business agreement.

Even more, on November 11, 2020, someone named "Danny" forwarded GoGreen an email exchange that was originally from Shemal Gandhi, to Danny, and CC'd Robin (EDOC. 146, p.2). The forwarded email contained "Quantum Jewelry Accounts- Supporting File[s]", including accounting tabs and ledgers for Quantum Jewelry (EDOC. 146, pp. 2-5). Plaintiff contends that the Depak "Danny" Rao was an independent accountant that GoGreen and Quantum were to share. (EDOC. 152, p.8 [Plaintiff's memo. In opp.]). However, this also raises an issue of fact because if Danny was indeed an independent accountant, then why was he using an email address Quantum provided: (ds@quantumjewelry.com)? (See EDOC. 146 at p.2). Moreover, these accounting documents also appear to be a byproduct of the business agreement; otherwise, why are they being shared between plaintiff and defendant?

Further, on November 18, 2020, Danny forwarded an email from Robin from earlier that day, wherein Robin provided the "Cash Salary Working" (EDOC. 143, pp. 2-3). Moreover, Danny emailed GoGreen documents summarizing the "NY Cash Breakup" on January 31, 2021, and Cc'd Robin (EDOC. 144, p.2). Also, on February 17th, 2021, Shemal Gandhi, using the email "shemal@quantumjewelry.com", sent an email to Danny and Cc'd Robin, detailing "monthly fixed expense[s]" (EDOC. 142, p.4). Moving forward, Shemal also emailed Danny on March 22nd, 2021, with the subject line "India Team Structure", and included a spreadsheet purporting to lay out said team structure (EDOC. 142, p.5). These emails appear to be subsequent actions Robin and other Quantum employees took, as they continued fleshing out the details within the business agreement in EDOCS. 140 and 142.

This pattern of seemingly acting in accordance with the purported joint venture continued when Shemal emailed GoGreen on July 1,2021, and Cc'd Robin, providing information pertaining to Quantum's payables and receivables (EDOC. 147, pp. 2-4). Lastly, Robin and Tony appear to discuss the alleged joint venture at length in WhatsApp messages exchanged between November of 2019 and March of 2021 (EDOC. 145, pp. 2-11).

Accordingly, plaintiff's submissions raise triable issues of fact as to whether the parties entered a joint venture or partnership of some kind. Specifically, the emails in EDOCS 140 and 142 creating the purported business agreement could be acts manifesting the intent of the parties to associate as joint venturers. There also appears to be mutual capital contributions to the joint undertaking based on the financial resources provided through the investments by Tonybhai and Robin in the amounts of $400,000 and $100,000, respectively. This is in addition to Quantum's utilization of GoGreen's access to diamonds, in conjunction with Quantum's skill in selling finished jewelry in retail and wholesale channels. Additionally, there appears to be a measure of

joint proprietorship and control over the enterprise given the agreement to divide equity in the venture. To that point, any contention that there was no provision providing for the sharing of losses also raises an issue of fact. That is, the business plan provides for sharing equity, but it does not explicitly state that the parties would share only profits. All of the foregoing raise issues of fact that require a trial.

To the extent that defendant relies on the contention that the business plan is not binding because it was not codified into one single document, this argument is also unavailing, "To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound (22 NY Jur 2d, Contracts § 9)" (*Kowalchuk v Stroup*, 61 AD3d 118, 121 [2009]). Further, "[a]n exchange of emails may constitute an enforceable agreement if the writings include all of the agreement's essential terms, including the fee, or other cost, involved (*see Mark Bruce Intl., Inc. v Blank Rome,* LLP, 60 AD3d 550, 551 [2009]; *Williamson v Delsener*, 59 AD3d 291 [2009]; *see generally Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989], *cert denied* 498 US 816 [1990])." Lastly,

As noted, there is evidence to support that plaintiff and defendant entered into a business agreement over the course of several years (EDOCS. 140, 142-148). Specifically, Quantum's principal, Robin Ghandi, sent an email to plaintiff's principal, Tonybhai, wherein he made an initial offer that is detailed in a spread sheet on November 10, 2019 (EDOC 142, p.3). Robin then seemingly makes a counteroffer on November 12, 2019, when he sent a new email containing an updated spreadsheet which included new terms (EDOC. 140, p.2-3). Pursuant to the new offer by defendant, Tonybhai would make a $400,000 capital investment; and Robin would make a $100,000 capital investment (*id.* at p.3)

The spreadsheet also provided that Tonybhai would supply loose lab grown diamonds on consignment to defendant, which defendant would then incorporate into finished jewelry items and sell to its customers (*id.*). In exchange, plaintiff and defendant would share equity in the joint venture: 30% to defendant, and 65% to plaintiff in the first year of the agreement, and 35% to defendant in and after the second year of the agreement (*id.*). This proposal wherein Robin and Tonybhai would both make contributions, with the latter suppling all lab grown loose diamonds, in exchange for shared equity in the joint venture, appears to be a legitimate offer. The spread sheet Robin provided reflects this arrangement (EDOC. 140) as does (EDOC. 142 [Robin's initial proposal]). Again, plaintiff's submissions raise triable issues of fact precluding summary judgment dismissing the fourth cause of action.

To the extent that defendant contends that it never accepted the terms of the agreement as a defense to establishment of a binding contract, this argument is also unavailing. Specifically, defendant may have accepted Robin's counteroffer by its conduct in response to Robin's spreadsheet included in EDOC. 140. "[A] counteroffer may be accepted by conduct" (*Savignano v. Play*, 210 A.D.3d 1228, 178 N.Y.S.3d 595 [2022], citing *Daimon v. Fridman*, 5 A.D.3d 426, 773 N.Y.S.2d 441 [2004], [citation omitted]). This is apparent by: defendant's employee developing a team in India (EDOC. 142, p.5), his sharing of Quantum's account's payables and receivables with GoGreen; the parties' "independent accountant" sharing cash salary workings (EDOC. 143), Cash Breakups (EDOC. 144), and accounting tabs (EDOC. 146). Additionally, Robin and Tony's conversation via WhatsApp (EDOC. 145) demonstrates that there are issues of fact with respect to Tony's acceptance of Robin's counteroffer. Specifically, they clearly discuss salaries, profit sharing, expenses, etc. Thus, there are issues of fact as to acceptance.

There also appears to be consideration within the disputed business plan. Specifically, Robin and Tony were to share equity in the newly created joint venture, and both parties were to make capital contributions (EDOC. 140, p.3). Further, Quantum was to receive lab grown loose diamonds in addition to cash for gold, labor, and all expenses (*id.*) Accordingly, this could constitute adequate consideration.

Lastly, there also seems to be mutual assent and intent to be bound based on the parties' aforementioned conduct in response to the purported business agreement. Specifically, there would be no reason for the parties to behave this way, except if they were acting pursuant to a meeting of the minds regarding the business plan and their intent to be bound. Consequently, when viewed in the light most favorable to plaintiff, both the emails and WhatsApp messages appear to establish the terms of an agreement, satisfying the statute of frauds writing requirement. As such, there exists a triable issue of fact as to whether the parties did in fact enter into a joint venture by way of the business agreement, precluding summary judgement to dismiss this claim.

Therefore, that part of defendant's motion for summary judgment to dismiss the fourth cause of action for breach of the Business Agreement is denied.

Fifth Cause of Action – Unjust Enrichment

To maintain an action for unjust enrichment, "[a] plaintiff must show that (1) the other party was enriched; (2) at that party's expense; and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." *Mandarin Trading Ltd. V. Wildenstein*, 16 N.Y.3d 173, 182 (2011). Further, "[a]n unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790). Here, plaintiffs claim for unjust enrichment is

based on the same set of facts in which it bases its claim for breach of the business agreement. Specifically, plaintiff re-alleges that defendant was enriched by the capital contributions it received from plaintiff which allowed it to operate and expand its business. This is in addition to the salaries plaintiff paid and the interest-free loans it provided. However, these facts are uniform with those pled in action for breach of the business agreement, and therefore simply duplicate the conventional contract claim. As a result, the claim for unjust enrichment is rendered unavailable.

Accordingly, that part of the part of the defendant's motion for partial summary judgment dismissing the fifth cause of action for unjust enrichment is granted as duplicative of the action for breach of the business agreement.

Finally, defendant's argument that this court should dismiss any part of the claims on forum non conveniens grounds has been waived. Defendant makes this argument for the first time, after (1) it answered, (2) the completion of discovery, and (3) the filing of the note of issue. Having acquiesced in this forum to all activities leading up to trial, defendant cannot now complain that the forum is inconvenient (*Kefalas v. Kontogiannis*, 44 A.D.3d 624, 848 N.Y.S.2d 180 [2007]). Moreover, this case is between New York companies. How then this New York forum could possibly be inconvenient is difficult to conceive.

CONCLUSION

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that plaintiff GoGreen Diamonds, Inc.'s motion is denied (mot seq 002); and it is further

ORDERED that defendant Quantum Jewelry LLC's motion is granted in part, and denied in part, with the fourth cause of action in the complaint being sustained, and the fifth cause of action in the complaint being hereby severed and dismissed (mot seq 003); and it is further

ORDERED that there shall be no further motion practice without a pre-motion conference with the court; and it is further

ORDERED that the parties must appear for a pretrial conference over Microsoft Teams on December 17, 2024 at 3:30 p.m.

12/9/2024
DATE

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