SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 48

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WASHINGTON DIAMONDS CORP. d/b/a WD LAB GROWN DIAMONDS,

Plaintiffs,

-against- Index No. 656450/16

DIAMONDS BY ISRAEL STANDARD, INC., d/b/a AMERICAN GROWN DIAMONDS,

Defendants.

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MASLEY, J.:

This action arises out of a series of business transactions between plaintiff Washington Diamonds Corp., d/b/a WD Lab Grown Diamonds, now known as M7D Corp., a manufacturer and distributor of lab-grown diamonds, and defendant Diamonds by Israel Standard, Inc. d/b/a American Grown Diamonds, a business engaged in the wholesale and retail sale and distribution of gems and jewelry. Both parties allege that these transactions were governed by an oral contract. Plaintiff contends that defendant has sold, but not compensated plaintiff, for at least $523,565.26 in diamonds supplied to it by plaintiff, and that defendant is still holding inventory worth $89,756.97. Defendant contends that the basis for its failure to pay plaintiff is an offset to the amount it owes, based on an alleged oral referral fee agreement entered into by the parties.

Motion sequences nos. 003 and 004 are consolidated for disposition. In motion sequence no. 003, defendant moves, pursuant to CPLR 3025 (b) and 3211 (e), for an order granting it leave to serve and file an amended answer with affirmative defenses and counterclaims.

In motion sequence no. 004, plaintiff moves, pursuant to CPLR 3212, for an order granting its motion for partial summary judgment on its claims against defendant for breach of contract (counts one and two of the amended complaint), account stated (count three) and unjust enrichment

(count six).

For the reasons set forth below, defendant's motion is denied, and plaintiff's motion is granted in part with respect to its claims for breach of contract and account stated, and denied with respect to its claim for unjust enrichment.

FACTS

Plaintiff is a manufacturer and seller of lab grown diamonds (amended complaint, ¶¶ 1, 7, 11; 12/9/16 aff of Yarden Tsach, ¶ 2 [Tsach aff 1]). During the period at issue in this action, defendant sold gems and jewelry, including lab grown diamonds on a wholesale and retail basis (amended complaint, ¶¶ 1, 8, 12). Plaintiff contends that, beginning in late 2013, it began supplying defendant with lab grown diamonds on a consignment, or "memo" basis (the Memo Inventory), a practice in the diamond industry under which a diamond owner (such as plaintiff) supplied diamonds to another party for sale to third parties, with the understanding that the seller will pay for diamonds once they are sold to a third party (*id.*, ¶13; 12/20/16 Tsach aff, ¶¶ 4, 10 [Tsach aff 2]).

Defendant was supposed to report to plaintiff monthly which, if any, of the diamonds plaintiff had provided to it on a memo basis had been sold, after which plaintiff would invoice defendant for the sold diamonds (Tsach aff 1, ¶ 14). The invoices provided for payment to plaintiff within 15 days (amended complaint, ¶ 14; 4/19/18 Tsach aff, ¶ 14 [Tsach aff 3], although, at defendant's request, plaintiff orally modified those terms in specific instances to permit payment within 30, or even 60 days (amended complaint, ¶ 14; Tsach aff 1, ¶ 14).

Plaintiff provided Memo Inventory to defendant on a consignment basis for defendant to display and present the consigned diamonds to its customers. Plaintiff agreed that if defendant

accepted full responsibility for all Memo Inventory, then it could be further consigned to third parties (amended complaint, ¶ 14). Plaintiff orally agreed to pay defendant a 5% referral fee (in the form of a credit against timely paid invoices) from time to time to for two specific customers only (*see id.*, ¶¶ 19-21).

Plaintiff contends that defendant sought to expand the referral fee arrangement to include other customers, but that it did not agree (*id.*, ¶¶ 22-23). Conversely, defendant contends that, in early 2016, the parties amended their agreement to include a 5% offset credit against future bills, instead of a straight payment obligation from defendant to plaintiff for goods purchased (answer and counterclaims, ¶ 62).

Although plaintiff originally provided small quantities of diamonds to defendant, over time that amount grew, as defendant's business expanded, as its business shifted from resale to wholesale, and as its relationship with plaintiff became more established (Tsach aff 2, ¶ 6). From time to time, at plaintiff's request, defendant would return Memo Inventory it was holding to plaintiff, unless the Memo Inventory in question was with an active potential buyer (Tsach aff 2, ¶¶ 20-21).

Defendant frequently made late payments on its invoices, even beyond the extended payment terms to which plaintiff had agreed (Tsach aff 1, ¶ 19). Defendant admits this, and contends that it started slowing down its payments in 2016 because plaintiff was not complying with the alleged 5% offset agreement (aff of Daniel Baruch, defendant's vice president, ¶ 7).

By the middle of August 2016, defendant's unpaid balances on past due invoices had risen to more than $238,000 (amended complaint, ¶ 26; Tsach aff 3, ¶ 2), and plaintiff notified defendant that it would not continue to do business with it if it persisted in delinquent payments

(Tsach aff 1, ¶ 20).

Defendant never disputed any of the $238,074.44 that it had been invoiced (Tsach aff 3, ¶ 3). In fact, on August 16, 2016, defendant even made a partial payment of $58,155.12 toward the then overdue amount (Tsach aff 1, ¶ 21; Baruch aff, ¶ 8). Even after that payment, however, defendant continued to owe plaintiff $179,919.32, with some invoices still outstanding for 90 days or more (Tsach aff 1, ¶ 21). At that time, defendant also had Memo Inventory from plaintiff valued at $433,403 (amended complaint, ¶ 26; Tsach aff 1, ¶ 21).

On August 22, 2016, plaintiff sent defendant a Memorandum of Understanding memorializing the business terms and conditions under which plaintiff would continue to conduct business with defendant (amended complaint, ¶ 32; *see* Tsach aff 1, exhibit C). Defendant declined to sign the Memorandum of Understanding (Tsach aff 1, ¶ 23), and on September 16, 2016, through a Notice of Intent to Terminate Agreement, plaintiff terminated its business relationship with defendant (amended complaint, ¶¶ 33-35; *see* Tsach aff 1, exhibit D). An attachment to the Notice contained a full list of the Memo Inventory plaintiff had supplied to defendant, that defendant had not reported sold as of September 16, 2016 (Tsach aff 1, exhibit D).

By letters dated November 10 and November 21, 2016, plaintiff informed defendant that it was no longer authorized to continue selling or distributing the Memo Inventory, and demanded return of the Memo Inventory in defendant's possession (amended complaint, ¶ 40; *see* Tsach aff 1, exhibits E and F). Plaintiff also demanded an accounting of the Memo Inventory, listing (1) the Memo Inventory that remained in defendant's possession as of November 10, 2016; (2) any Memo Inventory that had been transferred or consigned to any third

party; and (3) any Memo Inventory that defendant had sold as of November 10, 2016 (*see* Tsach aff 1, exhibit E). Defendant failed to return any Memo Inventory to plaintiff, and failed to provide plaintiff with the requested information concerning the Memo Inventory (Tsach aff 1, ¶ 28).

Defendant contends that the inventory that was purchased after the winter of 2015 and not yet paid for, as well as the inventory that has since been sold, are all subject to recoupment and offsets pursuant to the alleged offset agreement, which fully cancel out all sums asserted by plaintiff as due (Baruch aff., ¶ 10).

On December 12, 2016, plaintiff filed a complaint and order to show cause seeking an order of seizure of those diamonds in defendant's possession transferred to defendant by plaintiff on a memo basis, and a temporary restraining order (TRO) barring plaintiff from transferring, selling or otherwise disposing of any such diamonds. The TRO was granted on December 12, 2016, and vacated during a December 21, 2016 hearing. The court determined that the seizure order was premature, as defendant argued that the parties were operating under a sale or return contract, rather than a consignment agreement.

On December 19, 2016, defendant acknowledged that it had sold Memo Inventory valued at $219,558.18 that it had not previously reported as sold to plaintiff (*see* defendant's affidavit in opposition to plaintiff's motion seeking an order of seizure, ¶ 31, exhibit C [aff of Judith L. Mogul, exhibit 4]). At the December 21, 2016 hearing, David Feder (Feder), counsel for defendant, also admitted that, even under the sale or return agreement that defendant claimed was in place, defendant is liable to plaintiff for any Memo Inventory it had already sold, or that it would sell in the future. Feder: "we can return them, or sell them and pay for them, we have a

reasonable amount of time to do so" (transcript of 12/1/16 hearing at 21 [Mogul aff, exhibit 1). The Court: "Once they're sold, guess what? They move to the other side of the ledger, which is what you owe them." D. Feder: "Correct" (*id.* at 37).

On March 17, 2017, plaintiff filed an amended complaint. On March 31, 2017, defendant answered the amended complaint, asserting nine counterclaims for breach of contract (first), recoupment (second), malicious prosecution (third), quantum meruit (fourth), unjust enrichment (fifth), money had and received (sixth), tortious interference with contract (seventh), specific performance (eighth), and an accounting (ninth). Most of these counterclaims were predicated upon the alleged indefinite oral referral agreement which defendant claimed entitled it, among other relief, to an offset of amounts it owed to defendant.

Plaintiff moved to dismiss defendant's counterclaims in their entirety. On November 3, 2017, this court granted the motion, and dismissed defendant's counterclaims for breach of contract, recoupment, quantum meruit, unjust enrichment, money had and received, specific performance and an accounting, all based on the alleged oral referral fee agreement, as barred by the Statute of Frauds. This court dismissed the two remaining counterclaims for malicious prosecution and tortious interference with contract for failure to state a cause of action.

On December 21, 2017, this court directed defendant to provide plaintiff with an update of the Memo Inventory it had sold since its last update on December 19, 2016, as well as a list of the Memo Inventory that it was still holding. On January 19, 2018, defendant reported that it had sold an additional $124,087.76 of the Memo Inventory, and that it continued to retain $89,765.97 worth of Memo Inventory (1/19/18 Schedule of Synthetic Diamonds Sold and On Hand [Mogul aff, exhibit 5]).

According to plaintiff, defendant has now sold diamonds from plaintiff valued at least $523,565.27 ($179,919.32 in Invoiced Inventory, plus $219,558.18 of Memo Inventory that defendant reported as sold on December 19, 2016, and an additional $124,087.76 in Memo Inventory reported as sold on January 19, 2018), for which it must pay plaintiff and which it has not paid. Plaintiff further contends that, as of January 19, 2018, defendant was holding $89,765.87 of Memo Inventory (the Retained Memo Inventory) – diamonds that plaintiff demanded be returned almost two years ago in September 2016 (*see* Tsach aff 1, exhibit D).

DISCUSSION

Defendant's Motion to Amend (Motion Sequence No. 003)

Defendant seeks leave to allow it to serve and file an amended answer to plaintiff's amended complaint, with affirmative defenses and counterclaims. Defendant contends that the purpose of the proposed amended answer is to clarify some of the allegations made in the original answer, and to correct some typographical errors therein. Among those amended provisions in the proposed amended answer are: (1) correcting the date of the inception of the 5% offset against plaintiff's Bills agreement made by the parties from the erroneous 2016 date set forth in the answer to its actual commencement date in 2015; (2) clarifying the fact that plaintiff's offset credit obligation was limited to offsets from obligations due from defendant to plaintiff for defendant's purchase of Synthetic Lab Grown Diamonds from plaintiff; (3) making it clear that the 2015 offset against the Bills agreement was an addition to the parties' ongoing joint venture relationship that began in 2013; and (4) clarifying the distinction between defendant's and plaintiff's promotional usage of the descriptive term "American Grown Diamonds" to distinguish them from diamonds grown in labs outside of America, and the separate business

entity American Grown Diamonds, Ltd., formed by defendant's principals in New York in 2015. Defendant contends that its amended answer also reframes, enhances and clarifies the nature of the joint venture relationship between the parties so as to better clarify the facts of the case. Finally, defendant contends that the proposed amended answer does not contain any allegations that are a surprise to plaintiff, and would not prejudice plaintiff at this early stage of the action.

Pursuant to CPLR 3025 (b), "[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties." As a general proposition, leave to amend pleadings "should be freely granted" (*RBP of 400 W42 St., Inc. v 400 W. 42nd St. Realty Assoc.*, 27 AD3d 250, 250 [1st Dept 2006]), although the court retains the sound discretion over whether to permit the amendment (*see Pellegrino v New York City Tr. Auth.*, 177 AD2d 554, 557 [2d Dept 1991]). When the court is presented with a motion to amend the pleadings, "in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted" (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009]).

On a motion for leave to amend, plaintiff must establish "that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]; *see also Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 [1st Dept 2011]). Where the proposed amendment is palpably devoid of merit, the motion to amend should be denied (*Kulansky v Kulansky, Robbins, Stechel & Cunningham, LLP*, 50 AD3d 1101, 1101 [2d Dept 2008] ["a court need not grant leave to amend a pleading where the proposed amendment is palpably without merit"] [internal quotation marks and citation omitted]; *David & Davis, P.C. v Morson*, 286 AD2d 584, 585 [1st Dept 2001] ["leave to

amend will be denied where the proposed pleading fails to state a cause of action"]).

Moreover, a motion for leave to amend in response to a dispositive motion is "futile" and should be denied where "the defects [in the complaint] are [not] cured by the proposed . . . amended complaint" (*Meimeteas v Carter Ledyard & Milburn LLP*, 105 AD3d 643, 643 [1st Dept 2013], and/or the proposed amendment "suffers from the same fatal deficiency as the original claims" (*"J. Doe No. 1" v CBS Broadcasting Inc.*, 24 AD3d 215, 216 [1st Dept 2005]; *see also CARI, LLC v 415 Greenwich Fee Owner, LLC*, 91 AD3d 583, 583 [1st Dept 2012]; *Pearl Cash, LLC v EMD Produce Corp.*, 2013 NY Slip Op 31451[U], *4, [Sup Ct, NY County 2013] ["(i)f the proposed amended complaint contains the same defects as the original complaint, leave should be denied as futile"]).

Defendant acknowledges that the assessment of whether an amendment is palpably insufficient is based on affidavits of merit "showing 'good ground' for the proposed causes of action" (defendant's memorandum at 10; *see Katz v Bach Realty, Inc.*, 192 AD2d 307, 307 [1st Dept 1993]). In other words, the moving party mut submit evidentiary proof in support of its proposed amendment (*see Velarde v City of New York*, 149 AD3d 457, 457 [1st Dept 2017] ["a plaintiff must submit evidentiary proof of the kind that would be admissible on a motion for summary judgment" in order to obtain leave to amend a pleading]; *Wing Wong Realty Corp. v Flintlock Constr. Servs., LLC*, 71 AD3d 537, 537-538 [1st Dept 2010] [affirming denial of leave to amend pleadings, noting that the lower court "correctly examined the proposed amended complaint to determine if there was evidentiary proof that could be considered on a summary judgment motion and correctly determined that plaintiff failed to allege facts that would support (the proposed amendment)"] [internal citation omitted]; *American Theatre for Performing Arts,*

Inc. v Consolidated Credit Corp., 45 AD3d 506, 506 [1st Dept 2007] ["(a) request to amend a pleading, regardless of the statutory imperative that it be freely granted, requires an examination of the underlying merit to determine if there is evidentiary proof that could be considered on a motion for summary judgment. Affirmance is warranted here because there is no showing of merit to the amended pleadings"] [internal citations omitted]).

Defendant has failed to demonstrate that its proposed amendments have merit. At the core of defendant's proposed amendments is its effort to relabel the alleged oral referral fee arrangement upon which most of the dismissed counterclaims were based as part of a joint venture arrangement, so as to remove that agreement from the Statute of Frauds. Specifically, defendant renames the "Referral Fee Agreement" that it alleged in its now dismissed original answer and counterclaim as an "Indebtedness Offset Referral Fee portion of the Joint Venture Agreement between the Parties" (proposed amended answer and counterclaims, ¶ 75).

However, defendant has submitted no proof of any purported joint venture arrangement between the parties. The allegations in its proposed amended pleading and its supporting affidavits are almost entirely conclusory, simply denominating the business arrangement between the parties as a joint venture. For instance, defendant alleges that the Joint Venture between the parties was "for the purposes of them jointly promoting Plaintiff's sale of its Washington Diamonds, and the Parties' joint effort to also sell Plaintiff's Goods under the brand name 'American Grown Diamonds'" (*id.*, ¶ 36); that, in the winter of 2015, "Plaintiff proposed to Defendant that they supplement their 2013 Joint Venture Agreement" because it would be potentially beneficial to both parties (*id.*, ¶¶ 71-72); and that the parties entered into a "supplemental offset agreement" in the winter of 2015 "as part of their ongoing 2013 Joint

Venture Agreement" (*id.*, ¶ 74). Defendant also references emails to third parties in which defendant referred to plaintiff as its "parent company" of its "facility in Maryland" and plaintiff referred to defendant as "in [plaintiff's] network" and "an extension of [plaintiff's sales" (*id.*, ¶ 35; *see* Baruch aff, exhibits U, V, W, X, Y, Z, AA, BB, CC, DD).

However, defendant's allegations supporting its motion are insufficient to meet the requirements for alleging a joint venture. New York law makes clear that a joint venture agreement is not simply created when two parties have agreed together to act in concert to achieve some stated economic objective (*Matter of Steinbeck v Gerosa*, 4 NY2d 302, 317-18 [1958]). Rather, a joint venture agreement "'arises upon the coagulation of property, profits or other interest which the parties can then be said to hold jointly and which are made accessible to each other in terms of the confidential relationship which exists between joint associates'" (*id.* at 318 [citation omitted; *see also Richbell Information Servs. v Jupiter Partners*, 309 AD2d 288, 298 [1st Dept 2003] [joint venture is demonstrated by "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, efforts, skill or knowledge, a measure of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses"]). Most significantly, "[a]n indispensable essential of a contract of partnership or joint venture, both under common law and statutory law, is a mutual promise or undertaking of the parties to share in the profits of the business and submit to the burden of making good the losses" (*Matter of Steinbeck*, 4 NY3d at 317 [emphasis omitted]; *see also Tilden of N.J., Inc. v Regency Leasing Sys., Inc.*, 230 AD2d 784, 785-786 [2d Dept 1996] [affirming dismissal of counterclaim where defendants failed to allege that the parties intended to share profits and losses, an

"essential element" of a joint venture]).

Defendant fails to allege in its proposed amended answer and counterclaims or supporting affidavits the key requirement of a joint venture: that it shared profits and losses with plaintiff. In fact, defendant asserts an arrangement antithetical to a joint venture, dispelling any notion that it shared in profits or losses, or made decisions regarding profits in concert with plaintiff.

Specifically, defendant asserts, both in its original answer and counterclaims and the proposed pleading that, with respect to the memo inventory provided by plaintiff to defendant, it "had total and exclusive control over the prices it offered the Goods for sale to purchasers, and Defendant was free to seek such profit margins as it determined to be in its best interests" (answer and counterclaims, ¶ 49, proposed answer and counterclaims, ¶ 50; Baruch aff, ¶ 28). In addition, in a sworn statement filed with the court and dated December 19, 2016, Baruch stated that defendant "was free to set any terms of sale it decided to apply, and to keep anything it received from a subsequent buyer. These sales *did not involve a sharing of profits"* (12/19/16 Baruch aff, ¶ 23 [emphasis added]). Thus, defendant argues that it worked completely independently from plaintiff to make its own profits, thus eliminating any basis for the purported joint venture it now seeks to allege.

Although defendant also argues that an alleged non-solicitation arrangement evidences a joint venture between the parties (*see* defendant's memorandum at 1-3), in fact, such an obligation is inconsistent with a joint venture. Defendant argues that plaintiff agreed "not to interfere with Defendant's relationship with, or circumvent Defendant's exclusive protection of its relationship with [its] customers" (defendant's memorandum at 2). This arrangement, however, is incompatible with a joint venture (*see Gersten-Hillman Agency, Inc. v Heyman*, 68

AD3d 1284, 1289 [3d Dept 2009] [affirming denial of motion to amend answer seeking addition of counterclaim alleging an oral non-compete agreement because agreement was barred by the Statute of Frauds]).

The various email exchanges relied upon by defendant also fail to support the existence of a joint venture between the parties. In these documents, defendant erroneously refers to plaintiff as its parent company, an assertion contradicted by defendant's allegations in both its answer and counterclaims (¶¶ 27-32) and its proposed amended answer and counterclaims (¶¶ 27-32). Although it also cites emails in which plaintiffs refers to defendant as an "extension of [plaintiff's] sales" and characterizes defendant as "within [plaintiff's] network", these assertions do not provide evidence of a joint venture, as they do not speak to the sharing of profits and losses. Rather, they evidence the consignment arrangement at the heart of plaintiff's claims against defendant, under which defendant sold plaintiff's products.

Courts have routinely rejected similar efforts to evade the Statute of Frauds by reframing the nature of the relationship between parties as a joint venture. For instance, in *Seiff v Cantor, Fitzgerald & Co., Inc.* (40 AD2d 655, 656 [1st Dept 1972]), the Appellate Division affirmed the denial of a motion for leave to serve an amended pleading where, like here, the original pleading sought a finder's fee based on an oral agreement, and the amended pleading "recited the identical transaction, merely changing the label in attempted avoidance of the Statute of Frauds by terming the transaction a joint venture" (*id.*). The Court explained that the amended pleading did not even meet the minimal standards for consideration as, like here, it was not accompanied by any proof showing good ground to support its allegations (*id.*; *see also Baytree Assoc., Inc. v Forster*, 240 AD2d 305, 306 [1st Dept 1997] ["(t)he alleged oral agreement was nothing more than a

finder's agreement, void under the Statute of Frauds at General Obligations Law § 5-701 (a) (1)), and plaintiffs' attempts to characterize, alternatively, as a shareholders', partnership or joint venture agreement . . . (was) to no avail"]; *Andrews v Cerberus Partners*, 271 AD2d 348, 348 [1st Dept 2000] [holding that the plaintiff failed to establish an agreement to enter into a joint venture and plaintiff's argument that it was entitled to an equity interest was barred by GOL § 5-701 (a) (10)]).

Likewise, here, defendant's proposed amended answer and counterclaims is merely a label change. Indeed, defendant has alleged none of the indicia for a joint venture to permit it to amend its dismissed counterclaims on this basis. Instead, defendant has consistently alleged, both in its original answer and counterclaims and the proposed amended pleading, that the referral fee arrangement was for a fixed 5% commission (*see e.g.* answer and counterclaims ¶¶ 62, 66, 68; proposed answer and counterclaims, ¶¶ 63, 75 78). Defendant plainly seeks a finder's fee and does not allege any sharing of profits and losses. Thus, the arrangement cannot be characterized as a joint venture, and falls squarely within the Statute of Frauds (*see Snyder v Bronfman*, 13 NY3d 504, 509 [2009] [affirming dismissal of the plaintiff's claims, explaining that the plaintiff's reframing of its claims as a joint venture did not alter the fact that it sought compensation for finding and negotiating a business transaction, which was barred by GOL § 5-701 (a) (10)]).

Defendant also proposes additional amendments to its counterclaims that would reframe and materially alter the length and scope of the referral fee arrangement it alleged in its initial counterclaims. According to defendant, these new allegations are intended to "clarify[] the fact that the Plaintiff's 5% offset credit obligation was limited to offsets from obligations due from

Defendant to Plaintiff for Defendant's purchase of Synthetic Lab Grown Diamonds from Plaintiff," thereby changing the duration of the alleged referral agreement from indefinite to terminable on "the final date on which sums were still due and unpaid from Defendant to Plaintiff" (defendant's memorandum at 7; proposed amended answer and counterclaims, ¶¶ 3, 75, 182).

However, these proposed amendments to change the material terms of the alleged oral agreement for commissions are likewise completely without merit. In its original answer and counterclaims, defendant alleged that it was owed referral fees for "so long as Plaintiff elects to continue to make sales to those referred purchasers" (answer and counterclaims, ¶¶ 3, 62). In dismissing defendant's counterclaims, this court found that defendant alleged an agreement of indefinite duration that was unenforceable under GOL § 5-701 (a) (1), and dismissed defendant's counterclaims in their entirety (*see* 11/3/17 order at 9-12).

Defendant now claims that the oral referral fee arrangement would last for "the shorter of (a) so long as plaintiff elects to continue to make sales to those referred purchasers . . . or (b) the final date on which sums were still due and unpaid from Defendant to Plaintiff for those purchases made by Defendant from Plaintiff, from which Bills those indebtedness offsets would be credited" (proposed answer and counterclaims, ¶¶ 3, 75, 182).

However, courts routinely reject parties' attempts set forth allegations in a proposed amendment that are inconsistent with previous pleadings and sworn statements (*see DeLuca v Pecoraro*, 109 AD3d 636, 638 [2d Dept 2013] [affirming denial of application for leave to amend answer because "the proposed amendments, which were entirely inconsistent with the allegations contained in the defendant's original answer and counterclaims, surprised the

plaintiffs . . . [and] would result in prejudice to them"]; *Trataros Constr., Inc. v New York City School Constr. Auth.*, 46 AD3d 874, 875 [2d Dept 2007] [affirming denial of application for leave to amend answer where defendant's "litigation stance up to the point at which it sought to amend its pleading was inconsistent with the assertion of (the) (proposed) defenses and counterclaims"]). Defendant's proposed amendments are factually at odds with its previous pleadings and submissions to the court, and thus, must be rejected.

In addition, defendant's proposed amendments attempting to reframe the length and scope of the alleged referral fee arrangement are completely devoid of merit, as they would not cure the fact that defendant's claims are barred by GOL § 5-701 (a) (10). In dismissing defendant's claims based on the alleged referral fee arrangements, this court held that the referral fee arrangement alleged by defendant is barred by both GOL §§ 5-701 (a) (1) and (a) (10). Thus, even if defendant were allowed to plead new terms sufficient to avoid the writing requirement under GOL § 5-701 (a) (1), defendant's proposed amended claims remain subject to GOL § 5-701 (a) (10) (*see Saratoga Assocs. Landscape Architects, Architects, Engineers & Planners, P.C. v Lauter Devel. Grp.*, 77 AD3d 1219, 1222 [3d Dept 2010] [affirming denial of motion to amend and noting "(w)hile leave to amend pleadings is ordinarily freely granted, the proposed amendment was without merit," as it was barred by the Statute of Frauds]; *McKernin v Fanny Farmer Candy Shops*, 176 AD2d 233, 234 [2d Dept 1991] [denying request for leave to amend pleading where "(t)he proposed factual allegations which the plaintiff sought to add would radically alter the terms of the alleged . . . contract and are not supported by the record," and noting that "even if the proposed amendment were permitted, the second cause of action would still be barred by the Statute of Frauds"]).

Thus, because GOL § 5-701 (a) (10) would still bar defendant's counterclaims even if it satisfied GOL § 5-701 (a) (1), defendant's proposed amendments must be denied.

The additional amendments proposed by defendant are similarly meritless. Defendant's proposed amendment changing the date of inception of the alleged referral fee arrangement does not change the fact that the arrangement is barred by the Statute of Frauds. Moreover, defendant's attempt to cure a deficiency noted in the order dismissing defendant's quantum meruit counterclaim – specifically, that it "[did] not seek the reasonable value of the services defendant allegedly rendered" (order at 19) – does not alter the fact that the claim is barred by the Statute of Frauds. In fact, the order made clear that the quantum meruit claim failed for the separate reason that it asserts no basis for recovery other than the enforcement of the unenforceable oral contract (*id.* at 18).

Finally, defendant seeks to amend its counterclaims to "clarify[] the distinction between Defendant's and Plaintiff's promotional usage of the descriptive term 'American Grown Diamonds' to distinguish them from diamonds grown in labs outside of America, and the separate business entity American Grown Diamonds, Ltd., formed by Defendant's principals in New York in 2015" (defendant's memorandum at 7). Defendant also proposes to add American Grown Diamonds, LLC (AGD LLC) as a third party plaintiff, and add the allegation that:

> "In June 2015 the Defendant's principals determined that their interests in promoting the sale of lab grown diamonds would be enhanced by the formation of a separate independent entity so as to separate their retail sales from their wholesale sales, and therefore formed a new separate Limited Liability Company under the name American Grown Diamonds, LLC in New York on June 19, 2015"

(proposed amended answer and counterclaims, ¶ 51).

However, defendant makes no allegations that would support adding AGD LLC as a third party plaintiff with claims against plaintiff. Defendant has not alleged facts regarding any relationship between AGD LLC and plaintiff, or any facts supporting a claims against plaintiff. Hence, the proposed amendment seeking to assert third-party claims against plaintiff on behalf of AGD LLC is denied.

Accordingly, defendant's motion for leave to amend its answer and counterclaims is denied.

Plaintiff's Motion for Summary Judgment (Motion Sequence No. 004)

"'[T]he proponent of a summary judgment motion 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'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1062 [1993] [citation omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]). The court is required to examine the evidence in a light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Summary judgment may be granted only when it is clear that no triable issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), and "should not be granted where there is any doubt as to the existence of a triable

issue" of fact (*American Home Assur. Co. v Amerford Intl. Corp.*, 200 AD2d 472, 473 [1st Dept 1994]).

Plaintiff moves for summary judgment on its claims against defendant for breach of contract, account stated, and unjust enrichment, on the ground that defendant's sole defense for its continued failure to pay defendant has been an alleged offset to the amounts that it owes, based primarily on the alleged oral referral fee agreement. Given the fact that the counterclaims through which defendant has asserted this offset, as well as its other counterclaims, have already been dismissed by this court, and since the motion to amend those counterclaims is being denied, plaintiff's motion for summary judgment is granted on its claims for breach of contract and account stated. However, plaintiff's motion for summary judgment on its claim for unjust enrichment is denied.

The diamonds plaintiff supplied to defendant, and for which defendant owed plaintiff payment can be broken down into three categories. First, defendant owed plaintiff $179,919.32 for inventory sold by defendant during the course of its business relationship with plaintiff and invoiced by plaintiff between April 2016 and July 2016 (the Invoiced Merchandise). Second, defendant owed plaintiff $343,654.94 for inventory that defendant reported as sold during the pendency of this litigation and was therefore not invoiced (the Uninvoiced Merchandise). Third, defendant owed plaintiff $89,756.97 for Retained Memo Inventory that, as of January 19, 2018, remained in defendant's possession. Defendant has acknowledged that it is liable to plaintiff for these amounts absent any basis for an offset.

Invoiced Merchandise

Under New York law, breach of contract is established where there is proof of (1) a contract; (2) plaintiff's performance under the contract; (3) defendant's breach; and (4) damages (*Second Source Funding, LLC v Yellowstone Capital, LLC*, 144 AD3d 445, 445-446 [1st Dept 2016]). When a contract is unambiguous, its interpretation is a question of law, and summary judgment is appropriate (*South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272 [2005]; *Modell's N.Y. v Noodle Kidoodle*, 242 AD2d 248 [1st Dept 1997]; *see e.g. Daiichi Seihan USA v Infinity USA*, 214 AD2d 487, 488 [1st Dept 1995] [granting summary judgment "(i)n light of the unambiguous contract between plaintiff and (defendant), and (defendant's) failure to continue to make its monthly payments pursuant to said contract"]; *CMI II, LLC v Interactive Brand Devel., Inc.*, 13 Misc 3d 1214[A], 2006 NY Slip Op 51818[U], *5 [Sup Ct, NY County 2006] ["Thus, in light of IBD's failure to make the dividend payments owed to plaintiff, plaintiff's motion for summary judgment on its sixth cause of action must be granted"]).

The undisputed facts demonstrate that defendant is liable for breach of contract to plaintiff for failing to pay the $179,919.32 for Invoiced Merchandise. Specifically, defendant has breached its agreement to pay plaintiff for Memo Inventory it sells, as well as the series of contracts with plaintiff, reflected in the unpaid invoices for diamonds supplied to defendant by plaintiff which defendant then sold to third parties. Plaintiff provided invoices to defendant as attachments to emails (*see* Tsach aff 3, exhibit A), each of which included a due date of 15 days from the date of receipt, with the parties agreeing to modify payment terms to 30 and 60 days in specific instances (Tsach aff 1, ¶ 14). Defendant has never challenged or disputed the invoiced amounts, and has never paid those invoices.

Significantly, counsel for defendant has already admitted that defendant is liable to plaintiff for any inventory that it sells, regardless of whether it obtained those stones from plaintiff on a consignment or a sale of return basis (*see* transcript of 12/21/16 hearing at 21, 37). Given that defendant does not dispute the invoiced amounts, and acknowledges that it owes plaintiff for the Invoiced Merchandise, and in light of the fact that its counterclaims for any offsets have been dismissed, there are no remaining factual issues to be determined. Accordingly, plaintiff is entitled to summary judgment in the amount of $179,919.32, plus interest, on count one of the amended complaint (*see Perine Intl. Inc. v Bedford Clothiers, Inc.*, 143 AD3d 491, 492 [1st Dept 2016] [granting summary judgment where plaintiff presented prima facie evidence that parties entered into agreements for plaintiff to sell apparel to defendants, and defendant acknowledged that payment was due]; *McFadyen Consulting Group, Inc. v Puritan's Pride, Inc.*, 87 AD3d 620, 621-622 [2d Dept 2011] [finding plaintiff was entitled to summary judgment for breach of contract where plaintiff had submitted invoices but defendant did not submit the invoices and failed to pay the amounts due]; *see also House of Diamonds v Borgioni, LLC*, 737 F Supp 2d 162, 167 [SD NY 2010] [awarding summary judgment for breach of contract where parties had agreement to sell diamonds because when defendant "refused to pay for or return the diamonds, there is no material factual issue"]).

Alternatively plaintiff is also entitled to judgment as a matter of law on its account stated claim based on defendant's failure to pay for the Invoiced Merchandise. "'An account stated is an agreement between parties to an account based upon prior transactions between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due'" (*Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 250 [1st Dept

2007] [citation omitted]). Even in the absence of a formal agreement to pay the accounts, "either retention of bills without objection or partial payment may give rise to an account stated" (*Morrison Cohen Singer and Weinstein, LLP v Waters*, 13 AD3d 51, 52 [1st Dept 2004] [reversing lower court and granting plaintiff's motion for summary judgment on account stated claim based upon attorney invoices]).

Here, the undisputed evidence establishes that plaintiff and defendant entered into a course of dealing where plaintiff would issue invoices by email to defendant detailing the price of the merchandise when defendant reported to plaintiff that it had sold Memo Merchandise, or when plaintiff sold diamonds directly to defendant. During the course of their business relationship, defendant would pay the invoices received from plaintiff, even though some of those payments were later than the agreed upon terms. Plaintiff issued a series of invoices between April 2016 and July 2016 for diamonds sold to defendant or that defendant reported to plaintiff that it had sold, with each invoice clearly reflecting the amount defendant owed plaintiff (*see* Tsach aff 3, exhibit A). Defendant never disputed any aspect of those invoices (Tsach aff 3, ¶ 3), but has retained the invoices without payment for more than 20 months.

Given defendant's lack of objection to the invoices, it is "deemed by [its] silence to have acquiesced, and will be bound by it as an account stated" (*Peterson v Schroder Bank & Trust Co.*, 172 AD2d 165, 166 [1st Dept 1991]). Therefore, defendant's retention of the invoices for between 20 and 23 months is sufficient evidence to grant judgment for plaintiff as a matter of law on its account stated claim (*see Perine Intl. Inc.*, 143 AD3d at 493 [plaintiff was entitled to summary judgment on account stated where it submitted "documentary evidence showing that [defendant] received and retained the invoice without objection" and defendant failed to raise any

factual issues in response]; [internal quotation marks and citation omitted]; *Spectra Audio Research v 60-86 Madison Ave. Dist. Mgt. Assn.*, 267 AD2d 23, 23 [1st Dept 1999] [upholding summary judgment for account stated claim when defendants accepted and retained rent bills for five months without objection]).

Because there is no dispute that defendant owes plaintiff for the Invoiced Merchandise, plaintiff is entitled to summary judgment on count three of the amended complaint for account stated in the amount of $179,919.32, plus interest.

The Uninvoiced Merchandise

Plaintiff is also entitled to summary judgment on its claims relating to the second category of diamonds sold by defendant and for which defendant has not paid. As with the Invoiced Merchandise, no factual issues remain in dispute because defendant has acknowledged that it owes plaintiff for all sold merchandise, including the Uninvoiced Merchandise.

Defendant's failure to pay plaintiff for the Uninvoiced Merchandise constitutes a distinct breach of its contract with plaintiff requiring it to account and pay for Memo Inventory that it sold. Defendant stopped reporting its sales of Memo Inventory to plaintiff in August 2016, and disregarded plaintiff's September 12, 2016 demand for return of the remaining Memo Inventory. Defendant continued to sell plaintiff's merchandise to third parties, while pocketing the purchase price. During the course of this litigation, defendant has acknowledged that it sold to third parties $343,645.94 of the Memo Inventory that it received from plaintiff (*see* Mogul aff, exhibits 4 and 5), yet it has provided no compensation to plaintiff for the goods sold.

There is no dispute that defendant owes plaintiff for all of the Uninvoiced Merchandise. Defendant has admitted that it is liable for all sold merchandise regardless of whether defendant

received an invoice for it or not (transcript of 12/21/16 hearing at 21, 37). Therefore, defendant is liable to plaintiff as a matter of law for count two of the amended complaint for breach of contract in the amount of $343,654.94, plus interest, due to its failure to pay for the Uninvoiced Merchandise.

The Retained Memo Inventory

Plaintiff is also entitled to summary judgment on its claims pertaining to the Retained Memo Inventory. The sole issue raised by defendant regarding the Retained Memo Inventory is whether it obtained the Memo Inventory from plaintiff on a sale or return basis, under which titled passed to defendant along with possession of the diamonds, and it could either sell, return or hold the diamonds for a reasonable length of time, as it contends, or on a consignment basis (as plaintiff contends), under which title remained with plaintiff until the diamonds were sold to a third party and plaintiff could demand their return at time prior to a sale. Although this issue is sharply disputed, it is not material to this motion, because, even if the parties' arrangement were characterized as sale or return, plaintiff is still entitled to summary judgment because defendant has failed to return the Retained Memo Inventory within a reasonable period of time.

As defendant itself has acknowledged, a sale or return agreement does not permit the party receiving the merchandise to hold goods indefinitely, without compensating the other party (*see* 12/21/16 hearing transcript at 21 ["we can return them, or sell them and pay for them, we have a reasonable amount of time to do so"]). Instead, under a sale or return arrangement, title in the goods shifts to the party holding the merchandise, with the holder retaining the option to return the goods to the seller within a reasonable time (*see* UCC §§ 2-327 [stating the option to return "must be exercised seasonally"]; 1-204 [3] ["An action is taken 'seasonally' when it is

take at or within the time agreed or if no time is agreed at or within a reasonable time"]). If the party receiving merchandise on a sale or return basis does not opt to return the goods within a reasonable time, it must pay for the goods (*see Sternheim v Silver Bell of Roslyn*, 66 Misc 2d 726, 729 [Civ Ct, NY County 1971] [noting that in a "sale-or-return transaction, it is the buyer's obligation to pay the price quoted or return the merchandise"]).

In examining whether a period or retention is reasonable or unreasonable, courts take into account "'the nature, purpose and circumstances'" of the period of retention (*see New York City Off-Track Betting Corp. v Safe Factory Outlet, Inc.*, 28 AD3d 175, 179 [1st Dept 2006]; *see also* UCC § 1-205 [2], comment 2 [noting that "the circumstances of the transaction, including course of dealing or usages or trade or course of performance may be material. On the question what is a reasonable time these matters will often be important"]). The issue becomes a question of law when "there could be no conflicting inferences drawn as to whether the delay was reasonable" (*Brown & Lowe Co. v Potolski*, 221 App Div 299, 301 [3d Dept 1927]). When examining sale or return agreements, courts have held that retaining goods for fourteen months was unreasonable as a matter of law – a period far shorter than that at issue here (*see id.* at 300-301 [finding period of time defendant held goods was unreasonable as a matter of law where defendant retained goods from plaintiff for a year and fourth months because "there could be no conflicting inferences drawn as to whether the delay was reasonable"]).

Here, it is undisputed that defendant has held onto the Retained Memo Inventory for an unreasonably long period. A number of factors support the unreasonableness of defendant's retention of the diamonds, including the parties' prior course of dealing, the termination of the parties' business relationship, and defendant's failure to pay for the sold merchandise.

First, defendant has held onto the Retained Memo Inventory for longer than it held the Memo Inventory – approximately nine months on average versus between 20 and 31 months (*see* Tsach aff 2, ¶ 12). Second, given the fact that the parties are no longer engaged in an ongoing business relationship, as plaintiff terminated its business agreement with defendant in September 2016, defendant's retention of the Retained Memo Inventory is no longer reasonable. Third, the parties' past practice was that defendant would return plaintiff's Memo Inventory when plaintiff asked for it back (Tsach aff 2, ¶¶ 20-21). Yet when plaintiff demanded return of the Retained Memo Inventory on September 16, 2016, defendant refused to return it. This refusal underscores the unreasonableness of defendant's position, where there is no business relationship between the parties. Finally, defendant's failure to pay for the diamonds it received from plaintiff that it has sold to third party customers adds to the unreasonableness of its continued retention of plaintiff's diamonds that it has not sold.

These facts support the conclusion that defendant's continued retention of the Retained Memo Inventory is unreasonable as a matter of law. Accordingly, plaintiff is entitled to summary judgment in the amount of $89,756.97, plus interest, on count two of the amended complaint for breach of contract relating to the Retained Memo Inventory (*see Rahanian v Ahdout*, 258 AD2d 156, 160 [1st Dept 1999] [noting remedy for nonpayment under sale or return contract is action for breach of contract]).

In opposition to the motion, defendant argues that, despite the dismissal of its counterclaims, its offset and recoupment defenses remain viable, and are sufficient to defeat plaintiff's motion for summary judgment. Defendant argues that its "assertions of entitlement", entitled "Setoffs, Recoupments and Counterclaims" in its answer, contained "separate assertions"

of defenses for recoupment and offset based upon the alleged oral referral fee agreement, independent of the dismissed counterclaims (defendant's opposition memorandum at 17-19). This argument completely lacks merit, as the prior order was explicit that its dismissal of defendant's counterclaims as barred by the Statute of Frauds applied across the board to all of defendant's "assertions" based on the alleged referral fee agreement. Indeed, the court dismissed defendant's second counterclaim for "Recoupment" because "it relies on identical allegations to those which make up defendant's breach of contract claim, which is barred as premised on an unenforceable oral contract" (order at 20).

Moreover, claims for recoupment or offset require an independent legal basis (*see Bendat Premier Broadcast Group*, 175 AD2d 536, 538-539 [3d Dept 1991] ["'Recoupment or setoff can be claimed, even though a counterclaim has not or cannot be filed'; however, 'a party must have a legally subsisting cause of action upon which it could maintain an independent claim'"] [citations omitted]). Thus, a party that lacks a cause of action against a plaintiff cannot assert a defense for recoupment (*see Telmark, Inc. v C&R Farms, Inc.*, 115 AD2d 966, 967 [4th Dept 1985] [when defendants had no cause of action against plaintiff for damages, they could not assert recoupment defense because "(i)n order to assert the defense of equitable recoupment, a party must have a legally subsisting cause of action upon which it could maintain an independent claim"]; *see also Oneida Indian Nation v Hunt Constr. Group, Inc.*, 108 AD3d 1195, 1196 [4th Dept 2013] [where recoupment was based upon previously dismissed extra-contractual claims, defendant could not assert recoupment counterclaims or defenses based upon the dismissed claims]). Here, the court's previous holding that the oral fee agreement is barred by the Statute of Frauds removes the legal basis for defendant's counterclaims, offsets and recoupments.

Without an enforceable referral fee agreement, no legally subsisting cause of action supports any claim or defense for recoupment or offset by defendant.

Defendant also argues that its affirmative defenses of unclean hands and equitable estoppel bar plaintiff's motion for summary judgment. The court rejects this argument. Defendant's unclean hands defense turns on plaintiff's alleged failure to honor the referral fee agreement. Because "[t]he doctrine of unclean hands is applicable only when the party seeking to invoke it was injured by the wrongful conduct" (55 NY Jur2d Equity, § 112), the fact that no payment is owed from plaintiff to defendant undermines this defense. Morever, defendant fails to identify any facts establishing grounds for its defense of equitable estoppel. Defendant's bare assertion that "the doctrine of 'equitable estoppel' should bar the Plaintiff from benefitting from same" (defendant's opposition memorandum at 25), is insufficient to establish a defense that would prevent summary judgment (*see Fairbanks Co. v Simplex Supply Co., Inc.*, 126 AD2d 882, 882 [3d Dept 1987] [finding facts alleged as an affirmative defense in a defendant's answers are "insufficient to defeat a motion for summary judgment"]).

Accordingly, defendant is entitled to summary judgment on counts one and two of the amended complaint for breach of contract, and count three for account stated. However, plaintiff is not entitled to summary judgment on its sixth count for unjust enrichment, as the cause of action for unjust enrichment is duplicative of the breach of contract claim (*see Galopy Crop. Intl. N.V. v Deutsche Bank, AG*, 150 AD3d 416, 417 [1st Dept 2017]).

The court has considered the remaining arguments, and finds them to be without merit. Accordingly, it is

ORDERED that defendants' motion to amend the answer (motion sequence no. 003) is

denied; and it is further

ORDERED that plaintiff's motion for partial summary judgment on the amended complaint (motion sequence no. 004) is granted with respect to its claims for breach of contract (counts one and two) and account stated (count three); and denied with respect to count six for unjust enrichment, and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of $613,331.14, together with interest at the statutory rate per annum from the date of November 21, 2016, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: August 16, 2018

ENTER:

J.S.C.

HON. ANDREA MASLEY