

Grat Am. Ins. Cos. v Five Star Precious Metals, LLC
2015 NY Slip Op 32072(U)
April 16, 2015
Supreme Court, New York County
Docket Number: 107467/2011
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

GREAT AMERICAN INSURANCE COMPANIES as
Subrogee for BEI SENSORS & SYSTEMS
COMPANY, INC.,

INDEX No. 107467/11

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. No. 001

FIVE STAR PRECIOUS METALS, LLC,

Defendant.

MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion for _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1, 2

Answering Affidavits- Exhibits _____

FILED, 4

Replying Affidavits _____

APR 20 2015

CROSS-MOTION: YES NO

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COUNTY CLERK'S OFFICE**

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Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM

DECISION AND ORDER.

Dated: 4/16/15

Donna M. Mills
J.S.C.

DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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GREAT AMERICAN INSURANCE COMPANIES as
Subrogee for BEI SENSORS & SYSTEMS
COMPANY, INC.,

Index No. 107467/2011

Plaintiff,

- against-

DECISION AND ORDER

FIVE STAR PRECIOUS METALS, LLC,

Defendant.

FILED

APR 20 2015

**NEW YORK
COUNTY CLERK'S OFFICE**

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MILLS, J.S.C:

Plaintiff moves for summary judgment on its complaint.
Defendant cross-moves for summary judgment dismissing the
complaint.

These competing summary judgment motions arise in a
subrogation action under commercial crime insurance policy, no.
SAA 517-77-45-03 (exhibit A to Dratch affirmation), issued by
plaintiff Great American Insurance Companies (Great American) to
nonparty Schneider Electric Holdings, Inc. (Schneider), covering
the period May 1, 2007 through May 1, 2008 (the Policy).
Schneider became the ultimate parent of plaintiff's subrogor, BEI
Sensors & Systems Company, Inc. (BEI) in 2005. BEI is a named
insured under the Policy (Dratch affirmation, exhibit J).

This action arises from a \$20 million claim (the Claim) made
by BEI, arising from the admitted theft of industrial gold from

BEI by non-party Carlos Coronado (Coronado), a dishonest employee of a division of BEI, who, in league with others, stole gold that was used to coat electronic sensors, and sold it to pawn shops and gold buying services, including defendant Five Star Precious Metals, LLC (Five Star), and its predecessor entities. Coronado was convicted in federal court in California. Great American settled the Claim for \$7.75 million. Great American now seeks to recover part of its settlement in subrogation against The Claim

By instrument dated April 8, 2011 (exhibit J to Dratch affirmation), Schneider assigned its claims against Coronado and other employees to Great American. Great American has demonstrated that it is both contractually and equitably subrogated to the claims of BEI.

"[S]ubrogation is an equitable doctrine that allows an insurer to stand in the shoes of its insured to seek indemnification from third parties whose wrongdoing has caused a loss for which the insured is bound to reimburse [internal quotation marks and citation omitted]" (*Travelers Indem. Co. v AA Kitchen Cabinet & Stone Supply, Inc.*, 106 AD3d 812, 813 [2d Dept 2013]). In a subrogation action, a subrogee is subject to the same statute of limitations applicable to the claims of the subrogor" (see *Allstate Ins. Co. v Stein*, 1 NY3d 416, 420 [2004]).

According to the verified complaint, Coronado began selling

stolen gold in 2004 to nonparty Linton Hinds (Hinds), who is the principal of Five Star, which was incorporated on November 8, 2006, and is located in New York. Prior to that date, beginning in 2002, Hinds had operated under the name New Five Star Refinery, which was apparently unincorporated.

Coronado sent the gold through the mail and by UPS and FedEx, and received payment, sometimes in cash and sometimes by check, sent through the mail, from Five Star, or one of its two predecessor entities. The evidence shows that Coronado received \$255,060 in checks for gold sold to Five Star, plus an unknown amount paid in cash by Five Star for gold.

At his deposition (exhibit D to Dratch affirmation), Hinds testified that Coronado called him, using the number posted on New Five Star Refinery's website, and told Hinds that he wanted to sell gold. Hinds requested and received by fax a copy of Coronado's driver's license (which Hinds was unable to provide in discovery), and told Coronado to send the gold. After several transactions, Hinds traveled to California where he met with Coronado for two hours to perform due diligence, to satisfy himself that Coronado was not engaged in international money laundering.

Hinds testified that he received the gold in plastic packaging variously through the mail or by delivery service. He would weigh the package and then confirm delivery with Coronado.

The gold was in "stripping form," which means that it was in a thin layer that looked like it had been stripped off of something. It contained chrome and had to be smelted, meaning that it would be melted, assayed, and made into gold bars, which were then sold to two end buyers, Max Kahan and MGS. Hinds did not further identify either Max Kahan or MGS. The dates of such end sales are not in the record. Nor is there any evidence of the timing of the smelting after receipt of the gold. It is also unclear whether the gold as shipped by Coronado was alloyed or merely mixed with the chromium.

The complaint contains seven causes of action. The first seeks a constructive trust on the ground that Five Star was unjustly enriched. The second sounds in fraud. The third is for conversion. The fourth is for money had and received. The fifth is for equitable subrogation. The sixth alleges that Five Star aided and abetted the theft of the gold, and the seventh sounds in negligence, based on an alleged duty of Five Star to determine the source of the gold.

The factual allegations of the complaint plead a cause of action for conversion, which, if established, would afford complete relief to Great American. "Conversion is the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights [internal quotation marks and citation omitted" (*Vigilant*

Ins. Co. of Am. v. Housing Auth. of City of El Paso, Tex., 87 NY2d 36, 44 [1995]).

This action was commenced on June 27, 2011, more than three years after December 12, 2006, when the last transaction in which Coronado sent gold to Five Star was completed. Conversion is subject to a three-year limitation period (CPLR 214 [3]).

The complaint also contains causes of action that are subject to a six-year statute of limitations, including unjust enrichment, constructive trust, and money had and received.

The threshold issue on these motions is timeliness, and the three-year limitation period for conversion should apply to all the causes of action because the remedies available in conversion would afford complete relief to Great American (see *Gold Sun Shipping v Ionian Transp.*, 245 AD2d 420, 421 [2d Dept 1997]; see also *DiMatteo v Cosentino*, 71 AD3d 1430, 1431 [4th Dept 2010]).

DiMatteo involves a claim to recover a portion of the proceeds of a sale of real property, based on a theory of conversion. The complaint in *DiMatteo* also states causes of action for unjust enrichment, breach of fiduciary duty and the imposition of a constructive trust, as well as fraud. The Appellate Division, Fourth Department, held that the three-year statute of limitations for conversion should apply to all the causes of action, "based upon the allegations of the complaint and the relief sought" (71 AD3d at 1431). In *Gold Sun Shipping*,

the Appellate Division, Second Department, dismissed causes of action for unjust enrichment, a constructive trust, fraud and breach of fiduciary duty, in a conversion context, on the ground that the "legal remedy for conversion would have afforded the plaintiffs full and complete relief" (245 AD2d at 421). The same rationale applies in the present case.

This action involves the same causes of action as in *DiMatteo*, as well as negligence, which is also subject to a three-year statute of limitations (CPLR 214 [4]). Additionally, the complaint in this action includes a cause of action for aiding and abetting conversion, which is also subject to the three-year limitations for conversion, because persons who participate in a conversion may be liable as converters, even if they are corporate officers acting for the benefit of the corporation (*Key Bank of N.Y. v Grossi*, 227 AD2d 841, 843 [3d Dept 1996]).

The equitable causes of action based on unjust enrichment, or constructive trust, which are governed by a six-year statute of limitations (CPLR 213 [1]) are all dismissed under the rule of *DiMatteo* and *Gold Sun Trading*.

Also, the second cause of action, alleging fraud, is dismissed. In addition to failing to meet the pleading with particularity requirements of CPLR 3016 (b), the second cause of action is "merely incidental to the conversion cause of action,

and the only purpose it serves in the complaint is to avoid the [s]tatute of [l]imitations" (*Gold Sun Shipping v Ionian Transp.*, 245 AD2d at 421).

The money had and received cause of action is dismissed for failure to state a cause of action because the relationship between Five Star and BEI did not have "its genesis in the contractual relationship of the parties [internal quotation marks and citation omitted]" (*Wikiert v City of New York*, ___AD3d___, 2015 NY Slip Op 02960, * 5 [2d Dept 2015], quoting *Baratta v Kozlowski*, 94 AD2d 454, 461 [2d Dept 1983]).

Great American argues that the action is timely because accrual of the conversion cause of action should be measured from the date of a demand for return of the stolen property, despite the fact that the complaint seeks only damages, and not replevin. Great American cites no date of any such demand, arguing instead that the date of commencement of this action should serve as the date of demand. The rationale for the demand/refusal rule is that there has been no conversion where the possessor lawfully obtained possession.

"Although seemingly anomalous, a different rule applies when the stolen object is in the possession of the thief. In that situation, the Statute of Limitations runs from the time of the theft" (*Solomon R. Guggenheim Found. v Lubell*, 77 NY2d 311, 318 [1991]). The rationale is that upon the converter unlawfully

taking possession, "all of the facts necessary to sustain the cause of action have occurred, so that a party could obtain relief in court [internal quotation marks and citation omitted]" (*State of New York v Seventh Regiment Fund*, 98 NY2d 249, 259 [2002]); *Pecoraro v M&T Bank Corp.*, 11 AD3d 950, 951 [4th Dept 2004]). The anomaly is that application of the accrual rule for the statute of limitations on conversion makes it harder to recover from a thief than from a good faith purchaser.

In support of its argument for accrual measured from the date of demand, Great American relies upon stolen art cases, which sound in replevin, such as *Solomon R. Guggenheim Found. v Lubell* (77 NY2d 311), and *Matter of Peters v Sotheby's, Inc.* (34 AD3d 29, 33 [1st Dept 2006]).

Great American argues that the demand/refusal rule should apply because Five Star contends that it is a good faith purchaser, despite the facts that the complaint alleges that Five Star was an active participant in the theft; that there is no demand for replevin in the complaint, only damages; and there is no allegation that Five Star still had possession of the gold at the time of commencement of the action.

Even if a replevin action were properly pleaded, Great American's argument for the demand/refusal rule would fail because Five Star's initial possession would have to be lawful if it was a good faith purchaser, and "[w]here a defendant lawfully

obtains possession of property and has not wrongfully disposed of it, the action is not maintainable unless the defendant had possession of the property at the commencement of the action [citation omitted]" (*Gonzalez v Port Auth. of N.Y. & N.J.*, 119 AD2d 628, 629 [2d Dept 1986]). There is no allegation or evidence that Five Star had possession of the gold at the time of commencement of this action.

By submitting the uncontroverted Hinds deposition testimony (exhibit D to Dratch aff at 44) that the gold was smelted and sold, Five Star has demonstrated prima facie entitlement to judgment as a matter of law on any replevin claim that would be timely under the demand/refusal accrual rule.

The court holds that this action sounds in simple conversion and not replevin, and, that the statute of limitations accrued on each delivery of the gold. In light of the fact that the complaint and bill of particulars allege that Five Star's initial possession of the gold was unlawful, and because the action was commenced more than three years after the transactions, the action is time-barred and no demand and refusal was necessary (see *Close-Barzinex v Christie's, Inc.*, 51 AD3d 444 [1st Dept 2008]).

Accordingly, it is

ORDERED that the motion of plaintiff Great American Insurance Companies as Subrogee for BEI Sensors & Systems

Company, Inc., for summary judgment on its verified complaint, is denied; and it is further

ORDERED that the cross motion of defendant Five Star Precious Metals, LLC., for summary judgment dismissing the verified complaint in its entirety, is granted, with costs, and disbursements as taxed by the Clerk of the Court upon the presentment of an appropriate bill of costs; and it is further

ORDERED that the verified complaint is dismissed, and the Clerk shall enter judgment accordingly.

Dated: 4/16/15

E N T E R:



J. S. C.

DONNA M. MILLS, J.S.C.

FILED
APR 20 2015
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