

Sher v Drapeau

2003 NY Slip Op 30020(U)

June 7, 2003

Supreme Court, Queens County

Docket Number: 0001357/3572

Judge: Arnold N. Price

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ARNOLD N. PRICE IA Part 6
Justice

RICHARD SHER and MARK SHER, x

Index
Number 1357 2003

- against -

Motion
Date May 20, 2003

GEORGE DRAPEAU III, CHRISTIE'S
INTERNATIONAL PLC, CHRISTIE'S SOUTH
KENSINGTON, LIMITED, and CHRISTIE'S
INC.

Motion
Cal. Number 39

x

The following papers numbered 1 to 9 were read on this motion by the defendants, Christie's International PLC, Christie's South Kensington, Limited and Christie's Inc., pursuant to CPLR 3211[a][7], to dismiss the complaint for failure to state a cause of action or, in the alternative, pursuant to CPLR 327[a], to dismiss the action based upon forum non conveniens.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1 - 4
Answering Affidavits - Exhibits	5 - 7
Reply Affidavits	8 - 9

Upon the foregoing papers it is ordered that the motion is determined as follows:

I. The Relevant Facts

The plaintiffs Richard Sher and Mark Sher (collectively, "the Shers") commenced this action alleging that sometime prior to November 13, 2002, non-party Daniel Draley ("Draley") informed them that a Golden Period Stradivarius ("Strad") would become available for public auction to be conducted in London, United Kingdom, by the defendant Christie's International, PLC ("Christies I") or the defendant Christie's South Kensington, Limited ("CSK").

The Shers approached the defendant George Drapeau III ("Drapeau") and agreed that the Shers and Drapeau would purchase of the Strad and share any profits upon its resale. Believing that the maximum cost would be \$1.6 million, Drapeau stated that he could raise \$1.2 million, and the Shers agreed to contribute \$400,000. The parties agreed to pay a finder's fee to Draley and then divide the profits of resale with 50% to the Shers, and 50% to Drapeau.

The Shers subsequently sent \$400,000 to Drapeau and notified Draley of this fact; however, Drapeau informed the Shers that he had reconsidered, and could not put together the \$1.2 million. As a result, the Shers decided not to go forward, and Drapeau returned their \$400,000. Thereafter, Drapeau instructed Draley to bid on the Strad and, at an auction held on November 13, 2002, Drapeau successfully purchased the Strad through Draley at a price of \$800,000.

Upon learning of the sale, on November 15, 2002, the Shers informed CSK of their agreement with Drapeau and demanded that CSK not deliver the Strad to Drapeau or his representative without their consent. On or about November 19, 2002, CSK, through its legal advisor, advised the Shers' attorney that since the purchase was made in Drapeau's name, title would pass to him upon payment of the purchase price and CSK would complete that sale.

On the same day, the Shers sent a follow-up letter to the defendant Christies Inc., stating that it was on notice of a dispute as to the right to the Strad, and the Strad should be held until the dispute was resolved.¹ Apparently, the Strad was delivered to Drapeau in December 2002, upon payment of the purchase price and, allegedly, its resale value is between \$3-4 million.

The third cause of action against Christies I, CSK and Christies, Inc. (collectively, "the Christies defendants"), alleges that they had notice of the dispute and were asked to hold the Strad as stakeholder, but released the Strad to Drapeau, causing the Shers damages. The sixth cause of action alleges that the Shers are entitled to an accounting from the Christies defendants.

II. Motion

The Christies defendants move to dismiss the complaint for failure to state a cause of action, contending that they did not owe any legal duty to the Shers and, instead, they were obligated

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The complaint alleges that Christies I owns all shares of CSK and Christies, Inc., and that Christies I and CSK conduct business in New York through Christies, Inc.

to turn the Strad over to Drapeau once it was paid for. In the alternative, they assert that the causes of action interposed against them should be severed and dismissed under the doctrine of forum non conveniens, as they have no nexus to New York, the auction occurred in England, the notice was sent there, the violin was turned over there and their obligations in conducting the auction are governed by English law.

The Shers oppose the motion contending that once the Christies defendants received notice of the dispute, they were obligated to act as a stakeholder by taking advantage of either CPLR 1006[a] or UCC § 7-603 to maintain the status quo. The Shers assert that the doctrine of forum non conveniens does not apply as they and Drapeau are all New York State residents, the agreement between them and Drapeau, as well as the breach, occurred in New York, and the letter putting the Christies defendants on notice, as well as the Christies defendants' reply, were sent from and to New York. They urge that the convenience of the witnesses is not at issue as the Christies defendants would not have to be deposed in New York, and could provide documents without coming to New York.

The Christies defendants reply that although they could have commenced an interpleader action they were not obligated to do so, and England is the proper forum for any claims against them.

III. Decision

Pursuant to New York law, an auction house acts a agent on behalf of its consignors, and an auctioneer is the agent of the consignor (see, Brown v Doherty, 185 NY 383; Cristallina S. A. v Christie, Manson & Woods Int'l, Inc., 117 AD2d 284, 292; see also, Mickle v Christie's Inc., 207 F Supp 2d 237). Thus, under New York law, the Christies defendants owed no legal duty to the Shers, notwithstanding the Shers' claim that they had a right to the violin which had been successfully bid on by Drapeau. The Shers' asserting that the Christies defendants owed a legal duty to the Shers to commence an interpleader action lacks merit (see, CPLR 1006, UCC § 7-603).

Accordingly, the branch of the motion by the Christies defendants to dismiss the causes of action interposed against them for failure to state a cause of action is granted.²

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In view of this disposition, the court does not address the alternative argument of the Christies defendants that the action should be dismissed based upon forum non conveniens (see, Islamic Republic of Iran v Pahlavi, 62 NY2d 474, cert denied, 469 US 1108; CPLR 327).

Conclusion

Accordingly, based upon the papers submitted to this court for consideration and the determinations set forth above, it is

ORDERED that the branch of the motion by the defendants Christie's International PLC, Christie's South Kensington, Limited and Christie's Inc. to dismiss the complaint for failure to state a cause of action is granted, and the complaint and causes of action interposed against those defendants are dismissed; and it is further

ORDERED that the branch of the motion by the same defendants, in the alternative, to dismiss the action based upon forum non conveniens is denied as moot.

Dated: July ¹3, 2003

MR. ARNOLD H. PRICE

J.S.C.