

**Ganz v Sotheby's Fin. Servs., Inc.**

2004 NY Slip Op 30367(U)

October 12, 2004

Supreme Court, New York County

Docket Number: 114827/01

Judge: Barbara R. Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IA PART 12

-----X  
JERRY GANZ,

Plaintiff,

- against -

DECISION/ORDER  
Index No. 114827/01  
Motion Seq. Nos. 004  
and 005

SOTHEBY'S FINANCIAL SERVICES, INC.  
and SOTHEBY'S, INC.,

Defendants.

-----X

BARBARA R. KAPNICK, J.:

Motions sequence numbers 004 and 005 are consolidated for disposition herein.

This action concerns the ownership of a 1977 oil painting by Marc Chagall, Soleil couchant á Saint-Paul, also known as Half Moon over St. Paul, and as St. Paul au soleil couchant (the Painting).

**FILED**  
OCT 14 2004

Defendant Sotheby's Financial Services, Inc. (SFS) now moves under motion sequence number 004 for summary judgment dismissing the complaint and for a ruling that SFS's interest in the Painting is superior to any interest plaintiff may have. Plaintiff Jerry Ganz moves under motion sequence number 005 for summary judgment declaring that he is the true owner of the Painting, and ordering

that it be returned to him, or awarding him damages as compensation for its wrongful retention and conversion by SFS.<sup>1</sup>

### Background

In September 1997, Ganz paid then art dealer Michel Cohen \$1.2 million for the Painting.<sup>2</sup> In early 2000, Cohen and Ganz verbally agreed that Cohen would resell the Painting at a profit of at least \$100,000.00, and remit \$1.3 million to Ganz. On February 2, 2000, Ganz shipped the Painting to Cohen's account at the Cirker Hayes warehouse in New York City. There is no dispute that plaintiff did not file a "UCC-1" statement of ownership with respect to the painting at the time of this transaction or at any other subsequent time.

Between February and May 2000, Cohen appears to have made at least two attempts to sell the Painting. However, on May 8 or 9, 2000, Cohen delivered the Painting to Sotheby's as collateral for a \$1 million increase to a prior secured loan that he had from SFS.

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<sup>1</sup> The Painting is currently in the possession of Sotheby's, which has represented that it will not sell the Painting without prior notice to Ganz.

<sup>2</sup> The insurance policy on the Painting was held by former plaintiff Peggy Gateway Trust, one of the four trusts that Ganz has created for his children. By Decision dated September 4, 2003 on mot. seq. no. 003, this Court dismissed the complaint as to Peggy Gateway Trust on the ground that it lacked standing to bring the lawsuit.

SFS had previously extended a loan of \$3.7 million to Cohen, his wife Ulrike Cohen, and the Cohen Gallery (collectively, the Debtors) on June 4, 1997, and had then made an additional loan of \$3 million on July 24, 1997. The Painting had been added as part of the collateral for the July 24, 1997 loan. At that time, the Debtors had represented that they were the sole and absolute owners of the Painting and of the other items of collateral. In September 1997, after Cohen had paid SFS \$642,546.67, SFS released the Painting from its collateral. Cohen's invoice to Ganz is dated August 28, 1997. It appears that Cohen used some of the money that Ganz paid him to pay down his loan from SFS, which released the Painting on September 4, 1997, whereupon Cohen sent the Painting to Ganz.

At the time that the May 2000 loan increase was made, the Debtors represented to SFS that their 1997 representations as to the Painting were true, as of the date of the loan increase. On May 11, 2000, and May 16, 2000, SFS filed UCC financing statements for the Painting. By letter dated June 5, 2000, SFS agreed to let the Debtors show the Painting to a prospective buyer, and required that they remit the proceeds of any sale to SFS within 24 hours of such sale, or return the Painting no later than the close of business on June 16, 2000. SFS subsequently extended that deadline to September 30, 2000.

Instead, on June 6, 2000, Cohen shipped the Painting to art dealer Larry Ross, who had it shown four times at a storage facility maintained by Day and Myers in New York. Between September 12 and October 6, 2000, the Debtors had the Painting shipped to one Joan Michelman. The Painting was returned to Mr. Ross' account on October 6, 2000, and on October 10, 2000, it was transferred back to Cohen's account at Cirker Hayes.

Meanwhile on July 19, 2000, while the Painting was in the possession of Mr. Ross, SFS and the Cohens entered into a new Security Agreement, which provided that the 1997 loan would be rolled over into a new loan of \$1,473,384.39, with no additional cash extended, but with additional collateral pledged. With respect to the Painting, Michel Cohen and Ulrike Cohen reconfirmed their assignment to SFS of a "continuing security interest of first priority in and first lien upon all of the right, title and interest of the [Cohens] in and to the [c]ollateral and the proceeds thereof,..." On October 12, 2000, Cohen shipped the Painting to a warehouse in Geneva, Switzerland, and by letter dated October 23, 2000, he requested that the Painting, and two other paintings, be placed under the control of Dalinger Securities, Inc., at the direction of art dealer Jean Francois Gobbi.

In November 2000, Ganz instructed Cohen to return the Painting to him or to pay Ganz the \$1.2 million that Ganz had paid Cohen in September 1997. On November 28, 2000, Cohen wrote an unsolicited

letter to Ganz, stating that he was buying the Painting, and promising to pay the \$1.2 million for it in two checks, to be dated December 15, 2000 and December 30, 2000, respectively, each in the amount of \$600,000. Cohen sent the checks, but when Ganz tried to deposit them, they bounced. In or about January 2001, Ganz tried, unsuccessfully, to contact Cohen.

In January 2001, Cohen told SFS where the Painting was, and on February 1, 2001, Mr. Gobbi and Sotheby's reached an agreement, pursuant to which the Painting was transferred to a Sotheby's representative in Geneva, shipped to London, and scheduled to be sold at auction in June 2001.

That sale did not occur. The Debtors had defaulted on their debt to SFS on December 31, 2000 by sending SFS several checks that bounced. SFS and Sotheby's filed suit against the Cohens in January 2001 in New York and in California, alleging fraud and conversion, among other wrongs. The Cohens appeared in the New York action, but thereafter defaulted and fled the country. The FBI requested that no paintings connected to Cohen be sold pending the investigation.<sup>3</sup>

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<sup>3</sup> Mr. Cohen was reportedly arrested in Brazil on or about May 6, 2003 on charges of interstate transportation of a Picasso painting that Cohen knew was stolen and, separately, with wire fraud involving a Monet painting that the Metropolitan Museum of Art was holding.

By letter addressed to counsel for SFS and Sotheby's dated March 9, 2001, the insurers of the Painting demanded that it be returned to a trust controlled by Ganz. By letter dated April 3, 2001, SFS and Sotheby's stated that they held a perfected security interest in the Painting, and that in any event, the FBI had requested that the Painting neither be moved nor sold. This action was then commenced on or about August 3, 2001.

A judgment was entered on default in the New York action on March 1, 2002 in favor of SFS and Sotheby's and against Michel Cohen in the sum of \$8,624,308.75, and against both Michel and Ulrike Cohen in the sum of \$1,490,674.79.

It is undisputed that neither SFS nor Sotheby's knew of Ganz's interest in the Painting until they were first contacted by the insurance carrier in February or March 2001; and that until January or February 2001, Ganz did not know that SFS and Sotheby's had any interest in the Painting, or had ever had it in their possession.

Ganz contends that the February 2, 2000 transaction (i.e., Ganz's initial shipment of the painting to Cohen) was an "entrustment", within the meaning of Uniform Commercial Code (UCC) § 2-403 (2) and (3), but argues that defendant SFS was not a "buyer in [the] ordinary course of business," within the meaning of UCC § 1-201(9), and thus did not obtain any rights to the painting.

Defendants contend that the February 2, 2000 transaction was a "transaction of purchase" within the meaning of UCC § 2-403 (1), and that SFS, as "a good faith purchaser for value", subsequently obtained voidable title to the painting. In the alternative, defendants argue that the February 2, 2000 transaction was a "consignment" within the meaning of UCC § 9-319, and that Cohen transferred Ganz's rights and titles to the painting to SFS.

### Discussion

#### "Voidable Title Under UCC § 2-403(1)"

UCC § 2-403 (1) provides, in relevant part, as follows:

A purchaser of goods acquires all title which his transferor had or had power to transfer \* \* \*. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

\* \* \*

(b) the delivery was in exchange for a check which is later dishonored, or

\* \* \*

(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

[Emphasis added].

In order for a seller to have at least voidable, rather than void title under this section, the seller must have obtained delivery of the goods through a "transaction of purchase." American Standard Credit, Inc. v. National Cement Co., 643 F2d 248 (5th Cir 1981). UCC 1-201 (15) defines "delivery" to mean a

"voluntary transfer of possession." It is undisputed that on February 2, 2000, Ganz voluntarily shipped the Painting to Cohen's account at Cirker Hayes.

The next question is whether that delivery was "under a transaction of purchase." UCC 1-201 (29) defines "purchase" as ... "taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue gift, or any other voluntary transaction creating an interest in property." Defendants advance three grounds for finding that Ganz's transfer of the Painting to Cohen constituted a "transaction of purchase." First, defendants cite In re Sitkin Smelting & Ref., Inc. v. Harrison (648 F2d 252 [5th Cir 1981]), for the proposition that where there is a promise to purchase the item with payment in the form of a purchase price established by an agreed-on formula there is a 'transaction of purchase' under 2-403 (1).

However, there is no evidence in the record that Cohen promised to purchase the Painting in January or February 2000, when Ganz transferred it to him, or at any other time prior to May 7, 2000, when Cohen pledged it to SFS as security. Indeed, when Cohen did promise to pay for the Painting in November 2000, the promise appears to have been, as Ganz understood it, a tactical stall. The only available evidence as to the transfer from Ganz to Cohen indicates that at the time of the transfer, and indeed until at least sometime in November 2000, Ganz expected that Cohen would sell the Painting for \$1.3 million or more, and remit \$1.3 million to Ganz.

At his deposition held on August 6, 2002, Ganz testified that:

the deal was it was 100,000 profit. I paid one million two, and he was going to pay one million three, and I don't know what he was getting for it.

Q And then, --

A. I think, if I remember right, this has been going on for some time. I have been asking him for the money for a long time. And, it was coming and coming and coming. And, I said, look, either give me the painting, or just give me the million two that I paid for it.

\* \* \*

If he [Cohen] wanted to pay the agreed price of a million three, I wouldn't care who paid for it or bought it.

\* \* \*

Q. And, the expectation was that at some point in time [Cohen] would send you \$1,300,000 for that painting, is that correct?

A. After he sold it, right.

While an "unconditional promise to purchase and pay indicates a sale" (Sitkin, supra at 254), there is no evidence in this case that Cohen made such a promise at any time prior to November 2000, or that he could not have returned the Painting to Ganz at any time between February 2000 and May 2000 when he pledged it as collateral. The fact that in November 2000 Ganz appears to have agreed to sell the Painting to Cohen for \$1.2 million, that Cohen subsequently sent Ganz two (bad) checks for \$600,000 each, and that Ganz accepted those checks, do not retroactively establish the February 2000 transfer as a "transaction of purchase." Indeed, Ganz testified that even when he received Cohen's November 28th letter promising to send two checks, he couldn't understand it, because he believed that the Painting was in Switzerland, which it then was, and that Cohen had found a buyer for it. Moreover, Erich Kuersten, who was employed as Cohen's administrative assistant from October 1993 through January 2001, states that, to the best of his

knowledge, Cohen did not own the Painting, but was supposed to find a buyer for it.

Defendants also rely on a September 27, 2001 letter from plaintiff's counsel to an insurance adjuster as evidence that Ganz sold the Painting to Cohen prior to May 7, 2000. In fact, the letter says the opposite. It states that Cohen's November 2000 letter to Ganz

reflects the nature of the arrangement. Cohen took the painting and when sold to a third party, he sent a check to Ganz. The use of the phrase "I am buying" means Cohen had a buyer and, therefore, he "was buying" the painting from Ganz to resell at a profit. In this case, the painting was delivered to Cohen in February of 2000 and the letter generated in November of 2000. Obviously, the pledging of the painting as collateral by Cohen to Sotheby's in July of 2000 was not only unauthorized but a fraud upon Sotheby's as Cohen had no interest in the painting at the time. (emphasis supplied).

Finally, defendants rely on the deposition testimony of Gregory Smith, an insurance adjuster, who testified that in a telephone call he made to Ganz on February 12, 2001, Ganz told him that he had sold the Painting to Cohen. Leaving aside the fact that this discussion took place while Ganz was seriously ill and under heavy sedation in a hospital, there is no evidence, and thus no reason to infer, that even if Ganz made this statement that he was referring to the February 2000 transaction, rather than to his dealings with Cohen in November and December 2000. Mr. Smith expressly testified that Ganz did not indicate when he had sold the painting.

In sum, defendants have failed to show that the February 2000 transfer of the Painting was a "transaction of purchase."<sup>4</sup> Accordingly, they have failed to show that Cohen had even voidable title under UCC § 2-403(1) in May 2000.<sup>5</sup>

"Consignment Under UCC § 9-319(a)"

Defendants alternatively argue that SFS has a superior interest in the painting under Article 9 of the UCC which applies to consignments. Plaintiff, on the other hand, argues that the February 2, 2000 transfer of the painting constituted an entrustment within the meaning of Article 2, rather than a consignment within the meaning of Article 9.

UCC § 2-403(3) defines "Entrusting" as "any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods has been such as to be larcenous under the criminal law."

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<sup>4</sup> Contrary to defendants' contention, neither Heinrich v Titus-Will Sales, Inc. (868 P2d 169 [Wash Ct App 1994]) nor Mid-Tenn. Ford Truck Sales, Inc. v Lease Plan USA, Inc. (1993 WL 266865 [Tenn Ct App 1993]) holds that the mere transfer of merchandise from one person to another, with the intent that the recipient sell the merchandise, conveys an interest in the property transferred and, therefore, constitutes a "transaction of purchase." In Heinrich, the Court found that the recipient of the merchandise had paid for it with its own checks. In Mid-Tenn. Ford Truck Sales, the Court found that the recipient was free to modify the merchandise (automobile chassis), before reselling it to others.

<sup>5</sup> Thus, this Court need not reach the issue as to whether or not SFS was a "good faith purchaser."

Plaintiff argues that this action is thus governed by UCC § 2-403(2) which provides that "[a]ny entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business."

Plaintiff's position is that he must prevail herein because the terms of this section have not been met. Specifically, plaintiff argues that SFS was not a "buyer in [the] ordinary course of business" (UCC § 2-403 [2]; see also, American Standard Credit, Inc. v. National Cement Co., supra), because Cohen did not "sell" the painting to SFS but merely gave it to SFS as collateral for a loan.

However, even were this Court to adopt plaintiff's line of reasoning and find that the terms of UCC § 2-403(2) have not been met, plaintiff has not set forth any reason why this Court should not also consider the provisions of Article 9 applicable to consignments.

As part of a wider revision of Article 9, UCC §§ 9-102 (20) and 9-319 (a), as well as UCC § 9-102 (19) and (21) (defining, respectively, "consignee" and "consignor"), took effect in New York on July 1, 2001, replacing, with regard to consignments, former UCC 2-326. The provisions of revised Article 9 apply to this action, which was commenced on August 3, 2001. See, In re Trico Steel Co., LLC, 282 BR 318, 327 n 4 (Bankr Del 2002).

UCC § 9-319(a) ("Consignee has consignor's rights") provides that:

[e]xcept as otherwise provided in subsection (b) [which is inapplicable here], for purposes of determining the rights of creditors of, and purchasers for value of goods from, a consignee, while the goods are in the possession of the consignee, the consignee is deemed to have rights and title to the goods identical to those the consignor had or had power to transfer.

UCC § 9-102(a)(21) defines "consignor" as "a person that delivers goods to a consignee in a consignment," and UCC § 9-102 (a) (19) defines "consignee" as "a merchant to which goods are delivered in a consignment."

UCC § 9-102 (a) (20) defines "consignment" to mean:

a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale and:

(A) the merchant:

- (i) deals in goods of that kind under a name other than the name of the person making delivery;
- (ii) is not an auctioneer; and
- (iii) is not generally known by its creditors to be substantially engaged in selling the goods of others;

\* \* \*

(D) the transaction does not create a security interest that secures an obligation.

It is undisputed that Cohen was a merchant; that he dealt in art solely under names other than "Ganz"; that he was not an auctioneer; and that Ganz's delivery of the Painting to him did not create a security interest. Accordingly, UCC § 9-319 (a) will apply, if it is shown that Cohen "was not generally known by [his] creditors to be substantially engaged in selling the goods of others."<sup>6</sup>

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<sup>6</sup> SFS's president testified at his deposition that SFS did not know that Mr. Cohen was engaged in selling the goods of others.

Under former UCC § 2-326 (3), the phrase "generally known" was construed to mean "known by a majority of creditors." See, In re BRI Corp., 88 BR 71 (Bankr ED PA 1988); In re State St. Auto Sales, Inc., 81 BR 215 (Bankr D Mass 1988).

Under section 2-326(3), the burden of making this showing was placed on "the person making delivery" which, in this case, would be Ganz. See, e.g., White v. Globe Auction Co., Inc., 116 Misc.2d 832 (Dist. Ct., Suffolk Co. 1982).

Although UCC § 9-102(a)(20)(A) does not contain a specific allocation of the burden of proof, the general policy of Article 9 is to place the risk of the transferee's dishonesty on the transferor, rather than on the transferee. See, generally, Kenyon v. Abel, 36 P.3d 1161 (Wyo. 2001); Welch v. Clayton, 183 W.Va.252 (1990).

Moreover, the Official Comment to UCC § 9-319 specifies that "[i]nsofar as creditors of the consignee are concerned, this Article to a considerable extent reformulates the former law, which appeared in former Sections 2-326 and 9-114, without changing the results (emphasis supplied)."

Indeed, the one case cited by the parties which was decided under § 9-319(a) held that in order to prevent the application of former UCC § 2-326(3) or revised UCC § 9-319(a), the consignor (i.e., Ganz) "must either have (1) filed a UCC-1 financing statement as required under U.C.C. Article 9", which Ganz did not, "or (2) [must] prove that the deliverer is generally known by his

creditors to be substantially engaged in selling the goods of others (citation omitted)." In re Valley Media, Inc., 279 B.R. 105, 123 (Bankr. D. Del. 2002).

Therefore, this Court finds that plaintiff has the burden of proving in this case that Cohen was generally known by his creditors to be substantially engaged in selling the goods of others.

In this regard, plaintiff has submitted a copy of an affidavit from Susan T. Aberbach, an individual plaintiff and the President of co-plaintiff S.T. Aberbach Enterprises, Ltd. d/b/a Susan Aberbach Fine Art, in an action against Zurich Insurance Company (Supreme Court, New York County, Index No. 605171/01) regarding coverage of a Picasso painting which had been delivered to Cirker's Hayes Storage Warehouse, Inc. on consignment to Michel Cohen. Ms. Aberbach claims that Cohen was a well-known "runner" in the art industry (i.e., "a middleman between the undisclosed buyers of high-end art and the undisclosed sellers of such precious pieces of art") with an excellent reputation. According to Ms. Aberbach, Mr. Cohen was known in the industry for buying and selling fine art, "having bought and sold for some of the world's most renown art housing and galleries, including Sotheby's Holdings, Inc., Richard Gray Gallery, the Gallerie Beyeler and the William Beadleston Gallery, to name a few."

Although defendant contends that many of Cohen's other creditors did not know Cohen was acting as a middleman (and defendant's own witness, Shelly Fischer, testified that SFS

believed that Cohen was the owner of the subject painting), this Court finds that there is an issue of fact as to whether the 'majority' of Cohen's creditors knew that he was engaged in selling the goods of others, which precludes the granting of summary judgment in favor of either party.

Accordingly, defendant's motion and plaintiff's motion are both denied.


A pre-trial conference shall be held in IA Part 12, 60 Centre Street, Room 341 on November 10, 2004 at 10:00 a.m. in order to schedule a trial date.

This constitutes the decision and order of this Court.

Dated: October 12 2004



BARBARA R. KAPNICK  
J.S.C.



**FILED**  
OCT 14 2004  
NEW YORK  
COUNTY OF ...