

**Matter of Alexander v Spanierman Gallery, LLC**

2006 NY Slip Op 30820(U)

April 26, 2006

Supreme Court, New York County

Docket Number: 117221/05

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

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In the Matter of NORMAN ALEXANDER,

Petitioner,

-against-

to Compel the Examination Before Trial of  
SPANIERMAN GALLERY, LLC, UNIVERSE  
ANTIQUES, INC., and THE RAFAEL  
COLLECTION, LTD.,

Respondents,

Prior to Instituting Suit.  
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**Decision/Order**

Index No.: 117221/05

Seq. No. : 001

Present:

Hon. Judith J. Gische

J.S.C.

**FILED**

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NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Pet's motion [EBT] w/NA affid in support, affirm in support (RSC), exhs .....	1
Resp's Spanierman affid in oppos (JPR) w/exhs .....	2
Pet's reply affirm in further support (RSC) w/exhs .....	3

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*Upon the foregoing papers, the decision and order of the court is as follows:*

This motion seeks discovery in advance of petitioner filing and serving a complaint against the named respondents, Spanierman Gallery, LLC, Universe Antiques, Inc., and the Rafael Collection, Ltd. CPLR § 3102 (c)<sup>1</sup>. Petitioner has additionally moved under CPLR § 7112, which allows for an examination before trial of an adverse party so the alleged aggrieved party can ascertain the location of chattel.

<sup>1</sup>Despite continued references to "petitioner" and "respondent," no separate petition was served. In actuality, Mr. Alexander brought this motion using the same index number he hopes to serve the complaint in. He filed a summons with notice in December 2005. This procedural matter is addressed further below in this decision.

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Only respondent Spanierman Gallery, LLC opposes the motion. The other named respondents have not appeared.

### **Background**

Petitioner alleges that a certain Degas sculpture was removed from his home or otherwise stolen by a person (Mr. Doyle) who claimed to be “art expert.” Mr. Doyle took the piece under the guise of having it authenticated. At some point, Mr. Doyle represented to petitioner that the Degas had been damaged while in his custody and control. He offered to purchase the sculpture for \$600,000 and petitioner accepted. Only \$100,000 was ever tendered on the sale. Mr. Doyle is now incarcerated on an unrelated charge. Petitioner claims that, in fact, the Degas was never damaged and that Mr. Doyle had previously sold the sculpture without petitioner’s knowledge or consent. Petitioner claims he was unaware of Doyle’s activities at the time he made any contract letting Doyle purchase the sculpture.

Petitioner contends the sale was to one of Doyle’s business partners, Jack Shaoul. Petitioner believes Mr. Shaoul is the principal of respondent Universe Antiques, Inc. [“Universe”]. Petitioner contends further that Universe, in turn, sold the sculpture to The Rafael Collection, Ltd. [“Rafael”]. Rafael is believed to be the nominee of Benjamin Aryeh, one of Mr. Shaoul’s business partners. Finally, petitioner claims that respondent Spanierman Gallery, LLC [“Spanierman”] obtained the Degas and advertised the piece as being “sold” on its Internet website.

Petitioner has made a complaint to the District Attorney’s office. He also filed a separate civil action against Mr. Doyle (Norman Alexander v. Thomas A. Doyle, III, Supreme Court, NY Co., Index Number: 601228/05) (“Doyle action”). In the Doyle

action, petitioner sought monetary damages for breach of contract. Mr. Doyle defaulted in that action and petitioner has now obtained a judgment for breach of contract in the amount of \$500,000, plus interest.

### Discussion

Under CPLR § 3102 (c), a petitioner may petition the court to obtain discovery before service of a complaint. Pre-action discovery may be appropriate to preserve evidence or to identify potential defendants; however, it cannot be used by a prospective plaintiff to ascertain whether he has a cause of action at all. Holtzman v. MABSTOA, Cite as: 271 AD2d 346, 347 (1<sup>st</sup> dept. 2000). Such a petition should only be granted when the petitioner demonstrates that he has a meritorious cause of action and that the information sought is material and necessary to the actionable wrong. Holtzman v. MABSTOA, *supra* at 347. This includes disclosure to identify potential defendants. The Public Relations Society of America Inc. v. Road Runner High Speed Online, 6/9/2005, NYLJ, p. 19 col. 1.

Spanierman's primary contention is that petitioner has no meritorious claim against it for replevin based upon the doctrine of collateral estoppel.<sup>2</sup> It claims that in obtaining a judgment against Mr. Doyle for breach of contract, petitioner is precluded from claiming a title to the Degas sculpture, and, thus, cannot make out a cause of action for replevin.

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<sup>2</sup>Spanierman originally argued that any action against it was barred by the doctrine of judicial estoppel based upon the claimed inconsistent positions taken by petitioner in this and the Doyle action. Now, however, that judgment has been entered in favor of petitioner in the Doyle action, Spanierman argues that collateral estoppel principles bar petitioner's claim.

The doctrine of collateral estoppel precludes a party from relitigating an issue that was previously decided against him in a proceeding in which he had a fair opportunity to litigate the point. The two requirements for its application are that: [1] the identical issue must have been decided in the prior action and be decisive in the present action, and [2] the precluded party had a full and fair opportunity to contest the prior determination. In re: Abady, 22 AD3d 71 (1<sup>st</sup> dept. 2005). In general, collateral estoppel will not apply to default determinations, unless the party against whom the doctrine is invoked has actually appeared or has deliberately refused to appear in the prior action. In re: Abady, *supra*.

Collateral estoppel is an issue preclusion doctrine that has traditionally been held to apply to matters that have actually been litigated in the prior proceeding. Schuykill Fuel Corp. v. B & C Nieberg Realty Corp., 250 NY 304 (1929). Where, however, a judgment of a particular kind can be accounted for legally only by the existence of a certain combination of findings, each of those findings will be deemed established by the judgment. Siegel, NY Practice (5<sup>th</sup> ed.) § 464, p. 779.

Spanierman argues that the judgment for breach of contract necessarily establishes that Mr. Doyle, not petitioner, has title to the Degas sculpture. Title it claims passed when there was physical delivery of the Degas sculpture to Mr. Doyle. UCC § 2-401. It argues that petitioner not only appeared in the Doyle action, but that he successfully advocated the position that a sale had taken place. It concludes that no meritorious action for replevin, therefore, lies.

Petitioner argues that title could not have passed as contemplated under the UCC § 2-401 because at the time of the delivery of the Degas sculpture to Mr. Doyle, it was only for him to have the art work authenticated; no sale was even contemplated at the time. Petitioner further argues that Mr. Doyle, unbeknownst to him, sold the sculpture, before petitioner made a contract with Mr. Doyle based upon a false representation that it was damaged. In any event, petitioner argues that his claim for replevin is not inconsistent with his breach of contract action against Mr. Doyle.

A claim for replevin is not dependant upon establishing title to the property. A plaintiff need only establish a superior possessory right in the chattel to that of defendant. Pivar v. Graduate School of Figurative Art, 290 AD2d 212 (1<sup>st</sup> dept. 2002); Bendheim v. Butler, 255 AD2d 664 (3<sup>rd</sup> dept. 1998). In addition, replevin also carries with it the right to claim monetary damages for the loss of the use of the property. CPLR § 7108 (a).

At bar, given the circumstances of the delivery and sale, the court cannot conclude that, as a matter of law, title of the Degas sculpture passed to Mr. Doyle. Physical delivery of the art was not made in furtherance of the sale. Documents of ownership were never delivered. The existence of a contract to sell was necessarily determined in the Doyle action; the delivery of title to the vendee was not a necessary finding and not alleged in the Doyle action complaint.

Even if title is deemed to have passed, petitioner still can go forward to establish a greater possessory right in the sculpture than these defendants.

Finally, at the very least, petitioner has a claim for a deprivation of property prior to the time any sales contract was made with Mr. Doyle.

Thus, petitioner's claims have sufficient merit to go forward at his time. He is entitled to pre-action discovery.

Although, petitioner already knows the names of Mr. Doyle, his business partners, their nominees and even knows that Spanierman listed the sculpture on its website as "sold," he is missing a critical piece of information: the identity of the person who bought the sculpture. Stump v. 209 East 56th St. Corp., 212 AD2d 410 (1<sup>st</sup> dept. 1995). Without this information, his complaint for replevin is incomplete. Knowing who bought the sculpture will assist him in framing his complaint by identifying a potential defendant - exactly what CPLR § 3102 (c) is intended to accomplish.

Spanierman alternatively claims that it has a right to keep its clients confidential; therefore, it is entitled to a protective order barring disclosure. The party seeking a protective order, however, bears the burden of establishing the need for it. See, e.g. Nab-Tern-Betts v. City of New York, 209 AD2d 223, 224 (1<sup>st</sup> dept. 1994); Flores v. City of New York, 207 AD2d 302 (1<sup>st</sup> dept. 1994).

Spanierman has not met its burden to prevent petitioner from ever learning the identity of its client. The identity of the person or entity who bought the sculpture is presumably contained in its books and records. Since Spanierman will be a named defendant, such disclosure would be demanded during the proceeding anyway. Thus, respondent's arguments in opposition (e.g. this is a specious claim) are outweighed by petitioner's need for the information. Spanierman shall provide the identity and address

of the person, entity, etc. who purchased the sculpture that is the subject of the proposed complaint within Ten (10) Days of being served with a copy of this decision/order by the petitioner.

The court will, however, address Spanierman's concerns about the need for privacy of the identity of its clients by ordering the disclosure of this information with restrictions. See, e.g. Krygier v. Airweld, Inc., 176 AD2d 701 (2<sup>nd</sup> dept. 1991); Van Eycken v. Van Eycken, 142 AD2d 576 (2<sup>nd</sup> dept. 1988); Tymko v. K-Mart Discount Stores, 75 AD2d 987 (4<sup>th</sup> dept. 1980). The identity of this person, entity, etc., shall not be disclosed to anyone other than petitioner, his attorneys, their immediate staff, and retained experts who shall use the information only in connection with this action.

Having failed to appear or oppose the within motion, it is granted as well against both defaulting respondents (Universe and Rafael). They too shall provide the identity and address of the person, entity, etc. who purchased the sculpture that is the subject of the proposed complaint within Ten (10) Days of being served with a copy of this decision/order by the petitioner.

Petitioner also seeks an order directing the respondents to appear for examinations before trial so that it can determine the location of the chattel. CPLR § 7112. This relief is denied. Petitioner has not indicated why he needs to know the location of the chattel prior to commencing an action. Denying this branch of petitioner's motion does not preclude him from taking such deposition(s) after the complaint has been served. Finally, the person with the best knowledge about the location of this chattel is further down the line, e.g. presumably, the purchaser who

bought it from Spanierman. Therefore, the denial is without prejudice. For the same reasons, this branch is denied against both defaulting respondents (Universe and Rafael).

Since this action has been styled as one for pre-action discovery, and the relief has been granted, petitioner can no longer use this index number to bring his complaint. Petitioner must start a new action with the attendant fee.


**Conclusion**

Petitioner Norman Alexander's motion for disclosure and examinations before the commencement of an action is granted in part as to all respondents and denied in part as to all respondents, in accordance with this decision.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
April 26, 2006

So Ordered:  
  
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HON. JUDITH L. GISCHE, J.S.C.

**FILED**  
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