

**Lichtman v Gibbons**

2007 NY Slip Op 30824(U)

April 4, 2007

Supreme Court, New York County

Docket Number: 0100075/2003

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 100075/2003

LICHTMAN, MARILYN

vs

INDEX NO. \_\_\_\_\_

GIBBONS, JOSEPH G.

MOTION DATE \_\_\_\_\_

Sequence Number : 007

MOTION SEQ. NO. \_\_\_\_\_

SUMMARY JUDGMENT

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits + memo

PAPERS NUMBERED

1, 2

Answering Affidavits — Exhibits (memo's)

5

Replying Affidavits \_\_\_\_\_

6, 7

Cross-Motion:  Yes  No

3, 4

Upon the foregoing papers, it is ordered that this motion by defendant for summary judgment & cross-motion by plaintiff to amend are decided in accordance with the attached memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**

APR 20 2007

NEW YORK COUNTY CLERK'S OFFICE

**HON. DORIS LING-COHAN**

Dated: 4/20/07

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 36

-----X  
MARILYN LICHTMAN,

Plaintiff,

Index No.

-against-

JOSEPH G. GIBBONS,

Defendant

**FILED**

100075/03

APR 20 2007

Motion Seq No. 007

NEW YORK  
COUNTY CLERK

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DORIS LING-COHAN, J. :

Defendant moves for summary judgment dismissing the complaint. Plaintiff cross-moves for leave to amend the complaint.

This is an action alleging fraud and conversion. Plaintiff is the owner-operator of a private nursing home facility. Defendant was a food service manager for a vendor to plaintiff's nursing home facility. The parties entered into a romantic relationship from May to December 2002. During the course of their relationship, defendant moved into plaintiff's penthouse apartment on the Upper East Side of Manhattan, where he lived with plaintiff except when visiting his family on weekends. Plaintiff does not dispute that, at such time, she knew defendant was married, with two young children, and lived in Pennsylvania. Plaintiff alleges that defendant claimed he was in the process of commencing divorce proceedings against his wife, when both parties became romantically involved.

In the course of their relationship, plaintiff gave defendant money and property, which among other items, consisted of the following: a payment of \$5,000; a \$5,000 watch; payments of \$37,500 and \$65,000 to pay defendant's mortgage to facilitate what plaintiff believed to be an "amicable" divorce between defendant and his wife; and a \$49,000 check which was used to

purchase a Lincoln Town Car. The complaint alleges that plaintiff relied on misrepresentations made by defendant when she gave him the money and property. In December 2002, defendant terminated the relationship with plaintiff.

In this action, plaintiff is seeking compensatory damages, as well as the recovery of the Lincoln Town Car, from defendant. After extensive depositions and two prior unsuccessful motions to dismiss, defendant moves for summary judgment dismissing the complaint.

The sole basis asserted by defendant in his motion for summary judgment is that this action is barred by Article 8 of the New York Civil Rights Law. Specifically, defendant asserts that Section 80-a of such statute bars causes of action for alienation of affection, criminal conversion, seduction and breach of contracts to marry.<sup>1</sup> Defendant argues that the misrepresentations that form the basis of plaintiff's fraud and conversion claims are based on his intention to get a divorce and marry plaintiff. Defendant contends that plaintiff was engaged to him, and that although plaintiff claimed the engagement would be in perpetuity, she admitted that she expected and desired to have a "monogamous relationship", which defendant asserts amounted to a common law marriage with him.<sup>2</sup>

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<sup>1</sup> New York Civil Rights Law, Article 8, Section 80-a specifically states:  
"The rights of action to recover sums of money as damages for alienation of affections, criminal conversion, seduction, or breach of contract to marry are abolished. No act done within this state shall operate to give rise, either within or without this state, to any such right of action. No contract to marry made or entered into in this state shall operate to give rise, either within or without this state, to any cause or right of action for its breach."

<sup>2</sup> The Court notes that New York State does not recognize common law marriages.

Defendant also claims that the action is barred by Section 80-b of the Civil Rights Law.<sup>3</sup> Defendant argues that such section - which allows for the recovery of gifts given in contemplation of marriage - does not extend to actions to recover property given in the course of an illicit relationship (i.e. a relationship in which one of the parties is already married). Defendant argues that plaintiff cannot avoid summary judgment by claiming fraud and conversion, because courts have rejected such attempts to plead around Article 8 of the Civil Rights Law.

Plaintiff opposes the motion and cross-moves for leave to amend the complaint to include a claim for conversion of a telescope. Plaintiff argues, in opposition, that there was never a promise to marry and that she rejected "proposals" made by defendant in the course of their relationship. According to plaintiff, defendant said that he wanted to leave his marriage to his wife with "only the shirt on [his] back" which would allow him to give his wife a house that was free and clear of any outstanding mortgage. Plaintiff claims that this was the expressed reason for the payments of \$65,000 and \$37,500, but that defendant was actually defrauding her. With respect to the Lincoln Town car, plaintiff avers that defendant simply took \$49,000 from her, bought the car and kept it, although the car was meant to be hers.

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<sup>3</sup> New York Civil Rights Law, Article 8, Section 8-b provides as follows:  
"Nothing in this article contained shall be construed to bar a right of action for the recovery of a chattel, the return of money or securities, or the value thereof at the time of such transfer, or the rescission of a deed to real property when the sole consideration for the transfer of the chattel, money or securities or real property was a contemplated marriage which has not occurred, and the court may, if in its discretion justice so requires, (1) award the defendant a lien upon the chattel, securities or real property for monies expended in connection therewith or improvements made thereto, (2) deny judgment for the recover of the chattel or securities or for rescission of the deed and award money damages in lieu thereof.

On a motion for summary judgment, the moving party must first establish through evidentiary proof in admissible form, that the court is warranted in directing judgment in his/her favor, as a matter of law. See Bush v St. Clare's Hospital, 82 NY2d 738, 739 (1993). Where the moving party has established an entitlement to summary judgment, the burden shifts to the party opposing the motion, to demonstrate by admissible evidence, the existence of a factual issue requiring trial. Zuckerman v City of New York, 49 NY2d 557 (1980). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v Ceppos, 46 NY2d 223 (1978). In "determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility". Garcia v J.C. Duggan, Inc., 180 AD2d 579, 580 (1st Dept 1992), citing Assaf v Ropog Cab Corp., 153 AD2d 520, 521 (1st Dept 1989).

Applying such principles to this case, defendant's motion for summary judgment is denied as defendant failed to establish entitlement to judgment of dismissal as a matter of law. Specifically, defendant seeks dismissal of the complaint on the exclusive basis that this case is barred by Civil Rights Law Article 8. Defendant maintains that despite plaintiff's claims of fraud and conversion, this action is, in essence, one for the breach of a promise to marry, which cannot be maintained as provided by such statute. However, from the voluminous submissions before the Court, it is unclear whether Civil Rights Law Article 8 actually bars this case, as the facts pertaining to the statute's applicability are in dispute.

If there was a contract to marry between the parties as argued by defendant in the moving papers (a fact which is *both* disputed and conceded by each of the parties at various portions of

the record before the Court), any such contract would be void as against public policy since defendant was married at the time of the parties' relationship, and admittedly, plaintiff was aware of defendant's marriage. See Lowe v Quinn, 27 NY2d 397, 400 (1971)(an agreement to marry is void as against public policy where one of the parties is already married to a third party and it is not saved by the fact that the married individual contemplates divorce and that the agreement is conditioned on the procurement of the divorce). Moreover, any property given by plaintiff to defendant in contemplation of such contract to marry, would be barred from recovery, since such property would have been given during the course of an illicit relationship. Leeman v Wicke, 216 AD2d 272 (2d Dept 1995)(property given in contemplation of marriage is barred from recovery where party already married to another). In the moving papers, however, defendant failed to establish as a matter of law that the parties in fact entered into a contract to marry and that the property, which is the subject of this lawsuit, was given by plaintiff to defendant in contemplation of such marriage.

Moreover, there is a triable issue of fact as to whether the subject property was actually given to defendant in the course of the parties' illicit relationship as merely gifts, or obtained by defendant based on false pretenses, through a scheme of fraud and/or conversion, as alleged by plaintiff. The Court notes that issues of credibility are not to be determined on a motion for summary judgment. See Garcia v J.C. Duggan, Inc., 180 AD2d at 580.

The evidence submitted on this issue is conflicting and warrants that this case go to trial. For example, the complaint and plaintiff's deposition testimony suggest that defendant proposed marriage to plaintiff on several occasions and that plaintiff refused. Plaintiff testified that she had no interest in marrying defendant. [Plaintiff's Affidavit in Opposition, Exh. 4, Plaintiff's

had no interest in marrying defendant. [Plaintiff's Affidavit in Opposition, Exh. 4, Plaintiff's Deposition Transcript ("Plaintiff's EBT"), at 22-23, lines 23-25; 1-2; at 25, lines 22-25]. This is contradicted, however, by plaintiff's testimony that she was willing to be "engaged" to defendant in order to "pacify" him. [Plaintiff's EBT, at 29, lines 2-17; at 37-38, lines 12-25, 1-4; at 142, lines 4-6]. Additionally, defendant's ex-wife testified that she received a phone call from plaintiff who was seeking the return of the Town Car, and during such call, plaintiff informed her that plaintiff was having an affair with defendant and that an engagement "party" was being planned for plaintiff and defendant. [Plaintiff's Affidavit in Opposition, Exh. 3, Catherine Gibbons' Deposition Transcript, at 95-96].

Defendant's deposition testimony reveals that he claims not to have ever proposed marriage to plaintiff. [Plaintiff's Affidavit in Opposition, Exh. 5, Defendant's Deposition Transcript ("Defendant's EBT"), at 152-53, 269-70, 370, 407-08, 437]. Defendant maintains that he never planned to divorce his wife and he regarded his relationship with plaintiff as a "fling." [Defendant's EBT, at 63, lines 8-9; at 269, lines 12-21; at 370 lines 3-6; at 408, lines 1-2; at 437, lines 1-8]. Defendant regards the Town Car as a gift from plaintiff, while plaintiff claims that the Town Car was bought by defendant for her use and ownership. As defendant failed to prove entitlement to judgment as a matter of law, and factual issues exist, defendant's motion for summary judgment is denied.

Plaintiff's cross-motion to amend the complaint, to add a cause of action for conversion of a telescope is denied. Movant failed to include a copy of the proposed amended pleadings, as required. See Goldner Trucking Corp. v Stoll Packing Corp., 12 AD2d 639 (2<sup>nd</sup> Dept 1960); Sirohi v Lee, 222 AD2d 222 (1<sup>st</sup> Dept 1995). Further, such claim for conversion may be time-

barred, as it is undisputed that the relationship between the parties ended in December 2002, and the statute of limitation on a claim for conversion is three years. See CPLR §214(3). The within defective cross-motion to amend the pleadings was not filed until on or about May 31, 2006.


Accordingly, it is

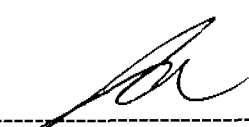
ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that plaintiff's cross-motion for leave to amend the complaint is denied; and

it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendant with notice of entry.

DATED: 

  
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Hon. Doris Ling-Cohan, J.S.C.

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**FILED**  
APR 20 2007  
NEW YORK  
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