

**Goldsmith v Sotheby's, Inc.**

2007 NY Slip Op 31019(U)

April 27, 2007

Supreme Court, New York County

Docket Number: 0603504/2004

Judge: Carol R. Edmead

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

HON. CAROL EDMEAD

PRESENT: \_\_\_\_\_

PART 35

Justice

Index Number : 603504/2004

GOLDSMITH, ISABEL

vs

SOTHEBY'S

Sequence Number : 006

SUMMARY JUDGMENT

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

MOTION DATE 3/16/07

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

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

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

MAY 02 2007

NEW YORK COUNTY CLERK'S OFFICE

Motions sequence 006 and 007 are consolidated for joint disposition and resolved as follows:

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant Sotheby's, Inc. for summary judgment dismissing the complaint is granted, and the Clerk may enter judgment accordingly; and it is further

ORDERED that the motion by plaintiff for partial summary judgment is denied; and it is further

ORDERED that defendant Sotheby's, Inc. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 4/27/07

HON. CAROL EDMEAD

J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY I.A.S. PART 35

-----X  
ISABEL MARCELLE CHRISTINE GOLDSMITH  
and ORPHEUS FINANCIAL CO., INC.

Plaintiff,

-against-

Index No. 603504/04  
Mot. Seq. Nos. 006 and 007

SOTHEBY'S, INC.

Defendant.

-----X  
SOTHEBY'S, INC.

Third-Party Plaintiff,

-against-

**FILED**  
MAY 02 2007  
NEW YORK  
COUNTY CLERK'S OFFICE  
Index No. 59116004

TEMPERA TRADING CORPORATION and  
EDRIC VAN VREDENBURGH,

Third-Party Defendant.

-----X

MEMORANDUM DECISION

This action involves a unique 17<sup>th</sup> Century Italian baroque marble inlaid tabletop (the "Tabletop") once belonging to Antenor Patiño, a Bolivian tycoon known as "the King of Tin." Patiño's daughter, Maria Isabel, who was married to James Goldsmith, a British billionaire businessman and founder of the Eurosceptic Referendum Party, died giving birth to the plaintiff herein, Isabel Marcelle Christine Goldsmith ("Ms. Goldsmith").<sup>1</sup> Upon the death of her

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<sup>1</sup><http://www.lasalamandas.com/eng/goldsmith.php>;  
<http://www.travclandleisure.com/articles/castle-in-the-sand/?page=2>;  
<http://www.time.com/time/magazine/article/0,9171,986774,00.html>

grandfather Patiño, Ms. Goldsmith and two other heirs inherited the Tabletop. Ms. Goldsmith later purchased the interests in the Tabletop from the other two heirs, and transferred her interest in the Tabletop to her company, plaintiff Orpheus Financial Co., Inc. (“Orpheus Financial”). When last noted, the Tabletop was on display at a museum in Madrid.

The impetus of this action stems from Ms. Goldsmith’s storage of the Tabletop at a London warehouse, Pitt & Scott, Ltd. (“Pitt & Scott”) in 1985. Ms. Goldsmith claims that she is the rightful owner of the Tabletop, which was ultimately sold at auction by defendant/third-party plaintiff Sotheby’s, Inc. (“Sotheby’s”) in New York on November 5, 1998 to the government of Spain without her permission or knowledge.<sup>2</sup>

Sotheby’s now moves for summary judgment dismissing plaintiffs’ Complaint.

In response, Ms. Goldsmith moves for partial summary judgment ordering that (1) plaintiffs were the rightful owners of the Tabletop at the time that Sotheby’s sold the Tabletop in November 1998, and that Sotheby’s fourth and fifth affirmative defenses alleging lack of standing fail; (2) Sotheby’s held the Tabletop without plaintiffs’ authorization; (3) the sale of the Tabletop by Sotheby’s as auctioneer acted to exclude the rights of plaintiff; (4) Sotheby’s third and eighth affirmative defenses are dismissed; or in the alternative (5) pursuant to CPLR 3212(g), Pitt & Scott did authorize the removal of the Table from its warehouse, and that Sotheby’s eighth affirmative defense alleging that Vrendenburgh/Tempera had good title is stricken. Plaintiffs also seek an *in limine* order precluding Sotheby’s and Vrendenburgh and

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<sup>2</sup> For purposes of this motion, Sotheby’s assumes that the Tabletop sold at auction was the same table stored by Ms. Goldsmith in Pitt & Scott in London.

Tempera from introducing into evidence any of the hearsay testimony.

#### Factual Background

In her Complaint, Ms. Goldsmith asserts that she placed the Tabletop in storage at Pitt & Scott in 1985.<sup>3</sup>

According to the deposition testimony of Pitt & Scott employee Alan Sprake and former employee Ernest Luckins, almost ten years later in April 1995 Pitt & Scott closed its Eden Grove facility, where the Tabletop was located, and designated certain items be either moved to other warehouses or destroyed. According to Luckins, when the facility was closing, he was told to put the Tabletop along the wall; Roz Piper, a Pitt & Scott manager in 1995, informed Luckins to “break it up.” Luckins testified that when Sprake approached him and asked what was being done with the Tabletop, Luckins replied that he was told “to get rid of it.”

When Sprake learned that the Tabletop was being thrown away, he asked Luckins whether he could have it. Sprake testified that “days later,” Luckins said “that was fine. . . . Ernie said that he had checked it and it was fine, it was being thrown away, I could have it.” (EBT pp. 19-20; 22). However, Luckins testified that when Sprake asked if he could have it, Luckins advised Sprake to ask Piper. Days thereafter, Mike Wright, Sprake’s supervisor, approached Luckins and asked about the Tabletop. Luckins recounted that he advised Sprake to ask Piper. According to Luckins, Mike agreed, showing him a form consisting of “one paragraph,” stating that Sprake was going to have it, but said that he had to “show her [Piper] first, then she’s got to sign it.”

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<sup>3</sup> Ms. Goldsmith asserts that in 1986, she had Pitt & Scott deliver the Tabletop to her house in London. However, the Tabletop was too large to get through the front door; it was also made apparent that the house could not support the weight of the Tabletop. Therefore, the Tabletop was returned to Pitt & Scott.

According to Sprake, he left the Tabletop in the warehouse's yard until he finished moving everything else out. On "the last weekend," Sprake took a truck from Pitt & Scott, "took out some final pieces for records management and put the table on [the truck] at that time." Once at King's Cross, Sprake then asked Mike Wright where he could put it so it would be out of the way. Wright showed Sprake "a position which was in the bottom of Old Bullen's warehouse . . . that it where it was and that is where it stayed." (EBT p. 23).

In early 1996, Sprake decided to transport the Tabletop from King's Cross to his home, intending to put the Tabletop in his garden. According to Sprake, he "just asked Roz [Piper] if [he] could borrow the lorry [truck] on Saturday to move that container, the box, the table top . . . . She said yes, because we used to borrow the lorry sometimes to do certain jobs if we wanted to. . . . She said: "Yes, go and see one of the girls in the office to give you permission and get a piece of paper. Sprake received a "piece of paper" authorizing him to take the Tabletop out of King's Cross, past security, and to use a Pitt & Scott truck to transport the Tabletop to his home. Sprake recalled that the paper was signed "by one of the office girls" and was "sure it was not Roz . . . ." (Sprake EBT 21-22).

Once home, Sprake opened the box to find the Tabletop in "horrible" condition, with "lots of pieces missing."

It is uncontested that in April 1996, the Tabletop was sold to third-party defendant Eric van Vredenburgh ("Vredenburgh"), who had it restored, and then transferred to his holding company, third-party defendant Tempera Trading Corporation ("Tempera Trading"). According to Vredenburgh, he actually purchased the Tabletop from Sprake's "partner," Sally Leach, who told him that Sprake "had gotten the [Tabletop]" from his employer Pitt & Scott as "the

warehouse was closing down” and “throwing everything away.” Vrendenburgh testified that Ms. Leach gave him a letter which stated in sum and substance that “Pitt & Scott was giving her or her husband” the “title” of the Tabletop. However, the letter is now missing.<sup>4</sup>

According to her affidavit, Ms. Goldsmith visited Pitt & Scott on June 4, 1996 in order to look at other items she had placed in storage, and asked to see the Tabletop. She was told that since she had not given advance written notice to see the Tabletop, it would not be possible to view it. However, Pitt & Scott assured her that the Tabletop was safe and sound at the premises.

Approximately two years later, in May 1998, Sotheby’s visited Vredenburgh to view the Tabletop to discuss the possibility of selling it through auction in New York. In November 1998, Tempera Trading signed a consignment agreement<sup>5</sup> with Sotheby’s, and the Tabletop was sold at auction on November 5, 1998 to a Spanish institution. According to Sotheby’s, prior to the sale and consistent with its normal business practices, Sotheby’s checked the Art Loss Register and confirmed that there was no report that the Tabletop was stolen. Sotheby’s also advertised the sale of the Tabletop in its publication, Preview.<sup>6</sup>

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<sup>4</sup> According to his deposition testimony, the last time Vrendenburgh saw the letter was in 1998. After he received communication from Sotheby’s, Vrendenburgh contacted Ms. Leach in 2001 and obtained a “receipt for the money [he] paid Mrs. Leach.”

<sup>5</sup> Pursuant to its consignment agreement with Tempera Trading, Tempera Trading:

. . . represent[s] and warrant[s] to us [Sotheby’s] and each purchaser that you [Tempera Trading] have the right to consign the Property for sale; that it is now, and through and including its sale will be kept, free of all liens, claims and encumbrance of others including, but not limited to, claims of governments or governmental agencies; that good title and right to possession will pass to the purchaser free of all liens, claims and encumbrances; that you have provided us with any information you have concerning the provenance of the Property; that you have no reason to believe that any lot of Property is not authentic or is counterfeit . . .

(Consignment Agreement, ¶6).

<sup>6</sup> At the deposition of Sotheby’s representative, Philips Hathaway, Preview was sent to thousands of collectors, including Ms. Goldsmith.

In 1999, Ms. Goldsmith began making plans to ship the Tabletop to her Mexico property, and notified Pitt & Scott that she intended to remove the Tabletop from storage. After months of requests, Pitt & Scott notified Ms. Goldsmith in November 1999 that it could not locate the Tabletop.

Finally, in 2000, a family friend informed Ms. Goldsmith that he had previously seen a photograph of the Tabletop in a 1998 Sotheby's catalogue of items for sale at auction in New York. When she learned that the Tabletop was on display at the Prado Museum in Madrid, Ms. Goldsmith visited the museum in 2001 and identified the Tabletop as hers.

This action against Sotheby's ensued.

#### Motion by Sotheby's

Sotheby's argues that English law applies to Ms. Goldsmith's claim and that pursuant to English law, Ms. Goldsmith did not have legal title at the time this action was commenced. Thus, her conversion claim should be dismissed. Sotheby's contends that actions relating to the transfer of personal property are governed by the law of the state where the property is located at the time of the alleged transfer. Further, under New York choice of law rules, if there is a conflict of laws, New York courts will apply an "interest analysis" standard, under which the law of the jurisdiction having the greatest interest in the litigation is applied. Therefore, since the key events, including the acquisition of the Tabletop by Sprake and the consignor, Vredenburg, all took place in London, and the Tabletop remained in London for ten years before its sale in New York, English law should apply to this suit.

In support, Sotheby's submits an affidavit of Brian Doctor, a barrister at the English Bar at Fountain Court Chambers, Temple London. Under English law, where chattel is dealt with in

circumstances amounting to a conversion, the true owner's title is extinguished by operation of the law of limitation after the expiration of six years from the date the cause of action accrues, provided that the transaction did not constitute a theft and that defendant was not guilty of actual fraud or fraudulent concealment in relation to the claimant. The time runs even if the true owner was unaware of the conversion or the identity of the defendant. Further, the six-year period runs from the date of the original conversion, which in this case, is April 1995, when Pitt & Scott gave the Tabletop to Sprake. As a new cause of action does not accrue each time a new conversion is committed, and there is no evidence of theft or fraud, or fraudulent concealment by Sotheby's, Ms. Goldsmith lost title to the Tabletop in April 2001, before filing the instant action.

Sotheby's further argues that the Complaint, which is essentially one for aiding and abetting a conversion by Vrendenburgh, should be dismissed pursuant to New York law, because Sotheby's had no knowledge of the wrongful conduct. Under recent caselaw, claims against auction houses for conversion have been dismissed where there is no evidence that the auction house intentionally interfered with the plaintiff's rights. Here, it is argued, there is no evidence that Sotheby's had any knowledge of infirmities in Vrendenburgh's title to the Tabletop or his ability to pass title to the purchaser at the auction.

#### Opposition and Motion by Ms. Goldsmith

In opposition and support of her motion for partial summary judgment, Ms. Goldsmith initially argues that Sotheby's failure to attach the pleadings to its motion is fatal to the relief it seeks.

Ms. Goldsmith also argues that under New York conflicts of law, New York law applies to this action since the place where Sotheby's tortious act occurred, *i.e.*, the sale of the Tabletop

at auction, is New York. And, Ms. Goldsmith notes, Sotheby's place of business is located in New York. Further, New York has the greater interest in the conversion by Sotheby's, since New York was the place selected by Vredenburg as having the "best purchaser." Thus, since Ms. Goldsmith had the right to possess the Tabletop at the time of Sotheby's conversion in November 1998, the action is timely. And, even if New York conflicts of law analysis dictates that a foreign jurisdiction's substantive law governs the conversion, New York procedural law, including New York's statute of limitations, still applies. It is also argued that although the exception to this rule found in CPLR 202 permits New York to borrow a foreign jurisdiction's shorter statute of limitations, by its express terms, CPLR 202 does not apply since the conversion by Sotheby's occurred in New York. Also, the legal conclusions reached by Mr. Doctor, who cannot give expert opinion on conclusions of law, should be disregarded as they were based on a false set of assumptions.<sup>7</sup> Further, the aiding and abetting cases relied upon by Sotheby's should be disregarded.

Furthermore, there is no evidence to support the assertion that the conversion occurred in April 1995, or that the Tabletop transferred out of Pitt & Scott's custody and control and into Sprake's in April 1995. Instead, the evidence only shows that Sprake did not exercise dominion over the Tabletop and did not treat the Tabletop in a manner inconsistent with Mrs. Goldsmith's rights until sometime in 1996 when he took the Tabletop home. Thus, this action, commenced within six years thereafter, is timely. Ms. Goldsmith contends that there is no evidence that Pitt & Scott "gave" Sprake the Tabletop or permitted him to borrow a Pitt & Scott truck for the

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<sup>7</sup> Mr. Doctor's conclusions were based on, *inter alia*, the assumption that Pitt & Scott consigned the Tabletop for destruction and disposal in April 1995, but at Sprake's request, permitted him to take the Tabletop for himself.

purpose of moving the Tabletop as his own property. Ms. Goldsmith points out that Peter Gower, the Group Legal Services Manager of Pitt & Scott, (“Gower”) testified at his deposition that Piper denied giving Sprake or Luckins authority to remove the Tabletop from Pitt & Scott. Also, there is no evidence that Pitt & Scott ever determined to discard the Tabletop. Further, Sprake’s statement that Luckins spoke to an unidentified manager who advised Luckins that the Tabletop was being given to Sprake is inadmissible hearsay and contradicted by Luckins. Such hearsay statements do not fall within any of the recognized exceptions to the rule and are demonstrably unreliable. Sprake’s self-serving testimony that he “believed” the Tabletop at the time of the April 1995 move to be “his” because Luckins told him it was cannot constitute evidence that Pitt & Scott divested itself of custody and control over the Tabletop. Further, Vrendenburgh’s testimony that he once held a note from Pitt & Scott to Sprake transferring title to Sprake is inadmissible. And, since Mike Wright is deceased, his testimony is not only hearsay, but would be barred by the Dead Man’s statute.

Even if the Court credits Sprake’s testimony that he was “given” the Tabletop by Pitt & Scott in April 1995, then Pitt & Scott’s actions would constitute a theft, since Pitt & Scott knew that it did not own the Tabletop and had not asserted any legal right to take ownership over or dispose of the Tabletop. If Pitt & Scott’s actions constitute a theft, any subsequent conversion by Sprake would be a conversion relating to such theft under Section 4(2) of the Limitation Act 1980, and neither conversions are subject to the six-year statute of limitations.

Additionally, it is well settled that an auctioneer such as Sotheby’s is liable for conversion regardless of whether the auctioneer has acted in good faith in the regular course of business. It cannot be disputed that the Tabletop sold by Sotheby’s is Ms. Goldsmith’s. And, given that

Sotheby's sold the Tabletop to which its principal did not have good title, Sotheby's is liable in conversion to the true owner, Ms. Goldsmith, for the value of the property. Furthermore, Ms. Goldsmith's right to possession of the Tabletop was superior to that of Sotheby's consignors. For these reasons, argues Ms. Goldsmith, she is entitled to partial summary judgment, and Sotheby's fourth and fifth affirmative defenses alleging lack of standing fail.

Sotheby's Reply and Opposition to Motion for Partial Summary Judgment

Sotheby's argues that the pleadings attached to its reply papers cure the alleged procedural defect in its motion papers. Sotheby's also points out that Courts have rejected conversion claims without a showing that the agent knew about the illegal conduct. Also, Ms. Goldsmith's unsupported allegation that she lives in Mexico to support the contention that no party resides in the UK is untrue. Both Ms. Goldsmith and Vredenburgh resided in London. Further, the six-year English rule is not a statute of limitations, but a substantive rule that extinguishes the right of the original owner. And, applying English law is consistent with the public policy in protecting New York residents from defending against stale claims brought by non-residents under applicable foreign laws. Sotheby's also claims that since Sprake testified that he owned the Tabletop in April 1995 that he had permission to take the Tabletop, he exercised dominion and control over the Tabletop in April 1995. Sprake made all decisions regarding the Tabletop, which was not stored with the rest of Ms. Goldsmith's items or in any organized fashion with other items stored at Pitt & Scott. Nothing prevented Sprake from taking the Tabletop home in April 1995, and there is no evidence that a theft occurred.

Sotheby's further argues that Ms. Goldsmith relies entirely on hearsay to support her argument that Sprake did not have permission to take the Tabletop, including testimony and

documents drafted by Gower and three unsworn letters, two of which were not even signed by Piper, written seven years after the events in question. Unlike Sprake and Luckins, who were each directly involved in the events that took place in 1995, Gower's testimony clearly shows that he had no personal knowledge regarding what happened at Pitt & Scott in 1995. And, Sprake and Luckins' testimony that Pitt & Scott agreed that Sprake could have the Tabletop and provided him with authorization to use Pitt & Scott's truck for its transport is a non-hearsay act; out-of-court statements that constitute the granting or denial of permission are non-hearsay because they demonstrate that the statements were actually made. Indeed, Luckins' testimony that Sprake had permission to take the Tabletop was based on his personal observation of seeing Sprake transport the Tabletop on the Pitt & Scott truck, which, under his understanding of Pitt & Scott protocols, would have required consent by Pitt & Scott. Thus, any statement by Pitt & Scott granting permission to Sprake to take the Tabletop and use its truck gives meaning to what otherwise might appear to be equivocal conduct by Sprake. In addition, the Dead Man's statute does not apply to opposing motions for summary judgment. Notably, Pitt & Scott never referred the matter to the police, and even promoted Sprake numerous times, including to a management position in 2001 after Ms. Goldsmith complained to Pitt & Scott about her missing Tabletop. And, under English law, actual manual delivery by the donor to the donee is not required to establish conversion. That Sprake permitted the Tabletop to remain on Pitt & Scott's premises in 1995 constitutes intentional conduct inconsistent with the rights of Ms. Goldsmith.

In addition, there are issues of fact as to whether the Tabletop sold at auction was the same table supposedly stored by Ms. Goldsmith. The memorandum written by Gower on October 28, 1999 constitutes double hearsay, the conclusions in a letter written by an attorney at

Sotheby's are contradicted by deposition testimony, and the deposition testimony of Gower are insufficient to demonstrate that the Tabletop sold at auction was in fact the same table stored by Ms. Goldsmith. Notably, the Spanish government rejected Ms. Goldsmith's application for the return of the Tabletop on the ground that it was "not possible to conclude that the marble table claimed [by Ms. Goldsmith] is the same as the seventeenth century semi-precious stone tabletop . . . ."

Further, an auctioneer such as Sotheby's cannot be held liable since issues of fact exist as to whether Ms. Goldsmith constructively or expressly consented to, or acquiesced in, the sale of the property, or otherwise engaged in negligent or intentional conduct which misled the principal. Here, Ms. Goldsmith claims to have seen the Tabletop in 1986, but never again saw the Tabletop until 15 years later in Spain; the Tabletop was stored outside for years without any marking of ownership and was designated to be broken up and discarded before it was given to Sprake; Goldsmith never reported the Tabletop stolen to the Art Loss Register; the Tabletop was in horrible condition from being stored outside, with pieces falling off and other pieces missing; Sotheby's sent Ms. Goldsmith a copy of Sotheby's Preview magazine; and the auction was advertised and held in a public setting. Ms. Goldsmith also showed she abandoned the Tabletop by insuring "one marble table" stored at Christie's or in her home.

Ms. Goldsmith's Reply in Support of Motion for Partial Summary Judgment

Ms. Goldsmith contends, *inter alia*, that no fact question exists as to whether she constructively acquiesced or consented to the sale. Ms. Goldsmith was under no obligation to inquire into the whereabouts of the Tabletop, and when she did in June 1996, she was assured that it was safe and sound. Ms. Goldsmith also points out that her claim against Sotheby's is

based on auctioneer liability, and not based on “aiding and abetting conversion.”

Further, photographs maintained by the Patiño family and the affirmation by expert Nicholas Kugel, conclusively identify the Tabletop as the one sold at auction. And, Gower’s memorandum which indicates that Pitt & Scott employee, Maria Kyprianou, advised that she recalled the Tabletop “coming into the store” and being “stored in the ‘chapel’ warehouse at Eden Grove” is an admissible business record, demonstrating that the tabletop stored at Pitt & Scott was the one placed by Ms. Goldsmith and later removed by Sprake.

In any event, the Court should find that Pitt & Scott did not “gift” the Tabletop to Sprake, as there is no evidence of the donor’s intent to make a gift, any declaration of a gift, or delivery of a gift. And, Luckins never testified that he observed Sprake using a Pitt & Scott truck to remove the Tabletop from King’s Cross. Even if he did, such observation does not amount to proof that Pitt & Scott had given the Tabletop to Sprake.

### Analysis

#### Summary Judgment Standard

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbindner*, 307 AD2d 230, 762 NYS2d 386 [1<sup>st</sup> Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1<sup>st</sup> Dept 2002]).

Where the proponent of the motion makes a *prima facie* showing of 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 a trial of the action, or to tender an acceptable excuse for his or her failure to do so (CPLR §3212 [b]; *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York*, *supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1<sup>st</sup> Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman*, *supra* at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1<sup>st</sup> Dept 1998]).

### Conversion

Under New York law, a conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]; *State of New York v Seventh Regiment Fund*, 98 NY2d 249, 746 N.Y.S.2d 637, 774 NE2d 702 [2002]). Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006], internal citations omitted); *Employers' Fire Ins. Co. v Cotten*,

245 NY 102 [1927]; *see also* Restatement [Second] of Torts §§ 8A, 223, 243; Prosser and Keeton, Torts § 15, at 92, 102 [5th ed.]; *Vigilant Ins. Co. of America v Housing Authority of City of El Paso, Tex.*, 87 NY2d 36 [1995]; *Bankers Trust Co. v Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 AD2d 384, 590 NYS2d 201 [1<sup>st</sup> Dept 1992]).

Contrary to Sotheby's contention, that Sotheby's lacked knowledge of the underlying wrongdoing is inconsequential to Ms. Goldsmith's conversion claim. It has been held that "an auctioneer may be held liable for conversion where the auctioneer sells property in behalf of a principal who, as it turns out, never actually had title to, or the authority to dispose of, the property" (*Parker v P & N Recovery of New York, Inc.*, 182 Misc 2d 342, 697 NYS2d 462 [Civ. Ct. New York County 1999], *citing* *Sprights v Hawley*, 39 NY 441, 447 [1868]; *Levy Bros. & Adler, Rochester v Karp*, 124 Misc 901, 209 NYS 720 [Supreme Court, Monroe County 1924]; 7 N.Y.Jur.2d., Auction and Auctioneer's Law § 37, at 636; 18 Am.Jur.2d., Conversion § 72, at 193).

It is noted that the claim against Sotheby's is not one for "aiding and abetting." The Complaint alleges that Sotheby's, in its capacity as auctioneers, was in possession of the Tabletop, sold it at auction, and caused it to be delivered to a third party without plaintiff's authority. The Complaint also states that by selling the Tabletop at auction, Sotheby's converted the Tabletop. Upon review of the Complaint, there is no claim alleged against Sotheby's for "aiding and abetting" Vrendenburgh. Thus, the proposition and caselaw on which it rests, that Sotheby's cannot be held liable for "aiding and abetting" the conversion by Vrendenburgh in the absence of knowledge of the wrongdoing does not warrant dismissal of the Complaint.

Second, Sotheby's reliance upon *Paglia v Del Re* (2001 WL 220013 [SDNY 2001]),

which found that auctioneer, Christie's Inc., was not liable for conversion, as there "was no evidence" that Christie's "intentionally interfered with the plaintiff's rights," is misplaced. The decision in *Paglia* does not represent a change in well settled New York law that an auction house may be liable even if the auctioneer acted in good faith and without knowledge of the principal's lack of title or authority to sell (*Parker v P & N Recovery of New York, Inc.*, 182 Misc 2d 342, 697 NYS2d 462 [Civ. Ct. New York County 1999], citing *Sprights v Hawley*, 39 NY at 446; *Levy Bros. & Adler, Rochester v Karp*, 124 Misc 901; 209 NYS 720 [Supreme Court, Monroe County 1924]; 2A N.Y.Jur.2d., Agency § 344, at 383; see also *Glass v Wiener*, 104 AD2d 967, 968, 480 NYS2d 760 [2d Dept 1984] [a *wrongful intention* to possess the property of another [*is not*] an essential element of a conversion") [emphasis added; citation omitted; brackets in original]). Indeed, good faith and lack of knowledge is simply not a defense to conversion (*Paglia v Del Re, supra* at 348).

In view of the above principles of law, the Court concludes that Sotheby's contention that Ms. Goldsmith's "aided and abetted" conversion claim must be dismissed since it had no knowledge of the wrongful conduct of Vrendenburgh lacks merit. Thus, dismissal of the conversion claim on the ground that Sotheby's lacked knowledge of the wrongdoing committed by others, is denied. However, based on the Court's discussion below, this determination is moot.

#### Conflict of Laws

The second basis for dismissal of the conversion claim rests on the contention that pursuant to English law, Ms. Goldsmith no longer had legal title to the Tabletop when she commenced her action on October 31, 2001, and that without legal title, her conversion claim

must be dismissed. Sotheby's argument necessarily rests on the theory that a conflict of laws between New York and the English law exists, and that under New York's conflicts of law analysis, UK law applies so as to extinguish Ms. Goldsmith's title in April 2001. Sotheby's contentions here are overstated.

It is worth noting that Sotheby's sets forth the supposition that "*The effect* of the relevant sections of the applicable English statute is to extinguish the right of the original owner, not merely to bar the remedy . . . ." Upon examination of the sections of the statute cited, however, it is clear to this Court that the English statute is simply a statute of limitations for a claim of conversion. Thus, although the *effect* of the English statute is to extinguish the right of original owner *to assert a claim for conversion* after the expiration of six years from its accrual, this effect does not extinguish the right of the original owner *to title or possession* of one's personal property as Sotheby's suggests. Sotheby's cites no caselaw, either from the UK or New York,<sup>8</sup> that equates a statutory bar to assert a claim with a loss of one's title. In other words, one does not necessarily lose title to one's personal property by virtue of the operation of a statute of limitations. In fact, it has been stated that the expiration of the time period prescribed in a statute of limitations "does not extinguish the underlying right, but merely bars the remedy" (*Tanges v Heidelberg North America, Inc.* 93 NY2d 48 [1999]).

The English statute at issue, 1980 Chapter 58, Part I entitled "Ordinary Time Limits for

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<sup>8</sup> The expiration of the time period prescribed in a statute of limitations does not extinguish the underlying right, but merely bars the remedy (*Tanges v Heidelberg North America, Inc.*, 93 NY2d 48, 687 NYS2d 604 [1999]); "the passing of the applicable period does not wipe out the substantive right; it merely suspends the remedy" (*Tanges v Heidelberg, supra*; Siegel, NY Prac § 34, at 38 [2d ed]).

Different Causes of Action,” states that:

2. An action founded on a tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.

3.—(1) Where any cause of action in respect of the conversion of a chattel has accrued to any person, and before he recovers possession of the chattel, a further conversion takes place, no action shall be brought in respect of the further conversion after the expiration of six years from the accrual of the cause of action in respect of the original conversion.

(2) Where any such cause of action has accrued to any person and the period prescribed for bringing that action has expired and he has not during that period recovered possession of the chattel, the title of that person to the chattel shall be extinguished.

The English statute above clearly renders title of the personal property lost upon the expiration of the statute of limitations. And, it is clear that a cause of action for conversion under English law must be brought within six years from the date the original conversion occurred. Thus, if English law governed Ms. Goldsmith’s instant complaint, such complaint would be untimely, assuming the original conversion occurred in April 1995.

On the other hand, New York CPLR 214(3) provides that the statute of limitations for a conversion claim is three years from the date of the conversion (*Vigilant Ins. Co. of Am.*, 87 NY2d 36, 44 [1995]; accord *State v Seventh Regiment Fund*, 98 NY2d 249, 259 [2002] [a cause of action for conversion accrues when all of the facts necessary to sustain the cause of action have occurred, so that a party could obtain relief in court]).

Unlike English law, New York’s statute of limitations is silent as to how the accrual date of the statute of limitations is affected under circumstances where there is more than one conversion of the personal property at issue. However, in *Rodgers v Roulette Records, Inc.* (677 F.Supp. 731 [SDNY 1988]), the Southern District held that with respect to royalties allegedly

belonging to the plaintiff, the conversion of such royalties “would accrue each time the alleged conversions took place” (*see also Svenska Finans Intern. BV v Scolaro, Shulman, Cohen, Lawler & Burstein, P.C.*, 37 F Supp 2d 178 [NDNY 1999] [stating that plaintiff’s cause of action would have accrued on “each of the dates that Defendants wired the money”]; *Bela Varga v Credit-Suisse* 5 AD2d 289 [1<sup>st</sup> Dept 1958] [stating that cause of action accrued as each wrong occurred, whether the wrong involved was a breach of contract or a conversion]).

Under New York law, the “date of accrual depends upon the *identity of the party* from whom recovery is sought” (*DeWeerth v Baldinger*, 836 F 2d 103, 106 [2d Cir 1987]). Where an owner pursues the party who took his or her property, “the three-year period begins to run when the property was taken” (*Id.*). “Sotheby’s” is the named defendant being pursued in this action. Thus, under New York law, this action against Sotheby’s is timely since it was commenced in October 2001, within three years of its accrual, *i.e.*, November 1998, the date when Sotheby’s sold the Tabletop at auction.

In light of the conflict between the laws of the UK and the laws of New York concerning whether Ms. Goldsmith is barred from bringing suit for conversion against Sotheby’s, the Court must first determine whether English law is considered procedural or substantive for the purpose of New York choice of law analysis.

Since New York is the forum State, the Court must look to New York choice of law rules to determine whether the English statute, Limitation Act 1980, Section 3(2) is procedural or substantive. If the English statute is one of procedure, the matter is “automatically determined by the law of New York, the forum state” (*Federal Ins. Co. v Fries*, 78 Misc 2d 805 [Civ. Ct. New York County 1974]). If the English statute is part of English substantive law, it must be

determined by the law of New York or of the UK, selected in accordance with the choice of law principles of New York (*Tanges v Heidelberg North America*, 93 NY2d 48 [1999]; *Federal Ins. Co. v Fries*, 78 Misc 2d 805]).

This Court determines that the Limitation Act 1980, Sections 3(1) and (2) are not merely statutes of limitations that bar the remedy. Such sections include a repose period, which extinguishes the underlying right to title upon the expiration of the six-year period after the cause of action accrues and plaintiff's failure to recover the possession of the chattel during such period. Thus, the Limitation Act 1980, Section 3(2) is part of English substantive law (*see e.g. Tanges v Heidelberg North America*, 93 NY2d at 54-57), and as such, the Court proceeds to determine whether the choice of law rules of New York warrant the application of UK law to plaintiff's action.

Choice of law conflicts in tort actions had been resolved by applying the law of the place of the wrong (*Roper v Team Fleet Financing Corp.*, 10 Misc 3d 1080, 814 NYS2d 892 [Sup Ct New York County 2006]). However, in *Babcock v Jackson* (12 NY2d 473 [1963]), the Court of Appeals departed from the rule of *lex loci delicti*, holding that "controlling effect" must be given "to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation" (*Roper v Team Fleet Financing Corp.*, 10 Misc 3d 1080, *supra* citing *Babcock v Jackson*, *supra*, at 481). In recognition of the uncertainty created by *Babcock* and its progeny, *Neumeier v Kuehner*, 31 NY2d 121 [1972]; *Tooker v Lopez*, 24 NY2d 569 [1969]; *Miller v Miller*, 22 NY2d 12 [1968]; *Dym v Gordon*, 16 NY2d 120 [1965], the Court of Appeals, in *Schultz v Boy Scouts of America, Inc.*, 65 NY2d 189 [1985], refined the "interest analysis" approach, emphasizing that "the [only]

facts or contacts which obtain significance in defining state interests are those which relate to the purpose of the particular law in conflict” (*Schultz v Boy Scouts of America, Inc.*, *supra*, at 197, quoting from *Miller v. Miller*, *supra*, at 1516). “Under this formulation, the significant contacts are, almost exclusively, the parties’ domiciles and the locus of the tort” (*Schultz v Boy Scouts of Am.*, *supra*, at 197; *Zurich Ins. Co. v Shearson Lehman Hutton, Inc.*, 84 NY2d 309 [1994] citing *Babcock v Jackson*, 12 NY2d 473, 481, *supra*), unless the public policy exception, available only when ““some deep-rooted tradition of the common weal,”” dictates a contrary result (*see, Cooney v Osgood Mach.*, 81 NY2d 66, 78, 595 NYS2d 919).

In this case, Sotheby’s, the named defendant against which the tort of conversion is alleged, is a New York corporation, which does business in New York. Further, Sotheby’s performed the auction of the Tabletop in New York. However, it would appear that the UK has a stronger interest in regulating the conduct of its residents and protecting the reasonable interests of its residents concerning the possession and transfer of title to personal property located within its borders. The primary conduct that triggered the series of conversions of the Tabletop was committed, either by Sprake or Pitt & Scott, in England. Sprake’s actions and acquisition of the Tabletop occurred in England, and Vrendenburgh’s acquisition of the Tabletop from Sprake occurred in England. According to her complaint, Ms. Goldsmith is a resident of England and originally placed the Tabletop in a warehouse located in England. The Tabletop remained in England for more than ten years. That the last transaction involving the Tabletop occurred in New York is fortuitous. All of the critical and key events took place in England. Further, application of UK law would further that country’s interest in enforcing the decision of its domiciliaries to accept the burdens as well as the benefits of the UK’s loss-distribution tort rules.

Although application of UK law does not necessarily advance the substantive law purposes of New York, it cannot be said the application of UK law herein will frustrate those interests since New York has no significant interest in applying its own law to this dispute.

Thus, this Court finds that UK law applies to Ms. Goldsmith's action. The Court next addresses the accrual date of the original conversion.

With respect to the tort of "conversion," the English Torts (Interference with Goods) Act of 1977, Chapter 32, provides that "wrongful interference" or "wrongful interference with goods," means (a) conversion of goods (also called trover), . . . ." Both parties agree that conversion consists of "any act of wilful interference, without lawful justification, with any chattel in any manner inconsistent with the right of another, whereby that other is deprived of the use and possession of it" and that conversion takes on several forms (*MCC Proceeds v Lehman Bros. Int'l.*, 4 All ER 675, 685-6 [1988]; *Kuwait Airways Corp. v Iraqi Airways Co.*, 2 AC 883 (Nos. 4 & 5) [426-7] [2002]; *Clerk & Lindsell on Torts* (19<sup>th</sup> Edition, 2006) 1007).

The primary ways in which a conversion may take place include

- (a) when property is wrongfully taken or received by someone not entitled to do so;
- (b) when it is wrongfully parted with;
- (c) when it is lost by a bailee in breach of his duty to the bailor;
- (d) when it is wrongfully sold, even without delivery, so as to pass good title to the buyer;
- (e) when it is wrongfully retained;
- (f) when it is wrongfully misused or destroyed; and
- (g) when the defendant, without physically interfering with it, wrongfully denies access to it to the claimant.

(*Clerk and Lindsell on Torts (supra* at 1007, 17-08)).

"Wrongfully" in this context means "without the actual permission of the owner" (*id.*).

And, a person "is liable in conversion whether or not he knew, or had reason to know, that what

he was doing infringed the claimant's rights" (*Id.* at 17-68, citing *Lancaster & Yorkshire Ry Co. v MacNicoll*, 88 LJKB 601 [1918]).

To establish conversion by taking or receiving property (subpart (a) above), a plaintiff need only demonstrate (1) "a dealing with goods in a manner inconsistent" with his or her rights and (2) "an intention in the defendant to deny his or her right or *to assert a dominion which is in fact inconsistent with such right*" (*Clerk and Lindsell on Torts (supra* at p. 1008 at 17-09, p. 1038, 17-68; emphasis added).

A conversion committed when one wrongfully parts with chattel (subpart (b)) occurs when "a person who without authority another's goods to a third party by way of sale or gift, *or otherwise in a manner adverse to the right of the person really entitled*" (*Clerk and Lindsell on Torts (supra* at p. 1011 at 17-15, emphasis added).

It is undisputed that when the Eden Grove facility was closing in April 1995, Luckins was told to put the Tabletop along the wall. According to Luckins, Piper advised him that "we'll break [the Tabletop] up." When Sprake approached Luckins and asked what was being done with the Tabletop, Luckins replied that he was told to get rid of it. Sprake's testimony in this regard is consistent. Though Luckins testified that he directed Sprake to get permission from Piper to take the Tabletop, Sprake states that Luckins said it "was fine." However, according to a signed letter from Piper, she denied ever meeting Sprake, discussing the Tabletop with Sprake or Luckins, or giving permission to anyone to "smash" the Tabletop. Two other letters, though unsigned, appear to support Piper's position that she never authorized anyone to take the Tabletop or destroy it. Under such circumstances, and in the event a trier of fact credits the testimony of Luckins, Pitt & Scott converted the Tabletop in April 1995 as defined in subpart (b)

above, when Pitt & Scott took steps to discard the Tabletop by advising Luckins to discard it without Ms. Goldsmith's authority. However, in light of Piper's signed letter, whether Pitt & Scott determined to destroy the Tabletop cannot be decided as a matter of law at this juncture.

Nonetheless, it is undisputed that in April 1995, Sprake believed the Tabletop was his, took a truck from Pitt & Scott, and placed the Tabletop on the truck at that time for transport to the King's Gate facility. When asked what he "physically" did with the Tabletop in April 1995 "at the closing of the facility," Sprake testified that he drove the Pitt & Scott truck to King's Gate, asked his manager where he "could put it so it would out of the way," and put the Tabletop in an area as directed by his manager. In Sprake's opinion, the Tabletop was now his (Sprake EBT, p. 23). Thus, under subpart (a) noted above, Sprake converted the Tabletop when he placed it on the truck for transport to King's Gate for storage in April 1995.

Contrary to Ms. Goldsmith's contention, Section 4 of the Limitations Act does not render the conversion by Pitt & Scott and/or Sprake outside the scope of the six-year statute of limitations. Pursuant to Section 4 of the Limitation Act 1980, the six-year statute of limitations does not begin to run from the date of the conversion where such conversion is a theft or related to a theft. Conversions occurring after a "theft" is "related to" such theft until the chattel at issue is purchased by someone in good faith. In such instance, the time starts to run upon the purchase of the chattel in good faith. Section 4 further provides that "theft" includes "conduct outside England and Wales which would be theft if committed in England and Wales," or "obtaining chattel . . . in the circumstances described section 15(1) of the Theft Act 1968 (obtaining by deception) or by blackmail"<sup>9</sup> pursuant to section 21 of the Theft Act (1968).

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<sup>9</sup> Blackmail is not an issue in this case.

Section 15(1) of the Theft Act 1968 provides that:

(1) A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it . . . .”

Theft Act 1968 expressly provides that a person’s appropriation is “not dishonest” where

(1) “A person’s appropriation of property belonging to another is not to be regarded as dishonest -

(a) if he appropriates the property belonging to another in the belief that he has in law the right to deprive other of it, on behalf of himself . . . .

Here, there is no evidence indicating that Sprake exercised dominion over the Tabletop with the requisite “dishonest” state of mind, so as to deem Sprake’s taking of the Tabletop as a “theft” which would delay the accrual of the statute of limitations. Sprake’s testimony, and the testimony of his then supervisor Luckins, indicate that Sprake was led to believe that the Tabletop was designated to be “smashed.” The record indicates that in April 1995, he believed that he had permission to take the Tabletop for himself. The record fails to raise an issue of fact that Sprake believed he had permission to take the Tabletop. Whether his belief was unfounded is not the issue. The Theft Act requires a dishonest state of mind, and the record fails to contain facts indicating that Sprake took the Tabletop in April 2005 with such mindset. Moreover, Section 2 of the Theft Act noted above excludes the conduct of Sprake from being considered dishonest.

This finding, however, does not necessarily require a likewise finding or an inference that Pitt & Scott’s action constituted a “theft,” so as delay the trigger of the statute of limitations.

Based on the above, this Court finds that the conversion of Ms. Goldsmith’s Tabletop occurred in April 1995. Under Section 3(1) of the English statute, since Ms. Goldsmith did not recover the Tabletop by the time of Sotheby’s alleged conversion in November 1998, no action

may be brought against Sotheby's after April 2001.<sup>10</sup> The complaint was not filed until October 31, 2001, approximately six months after the expiration of the six-year statute of limitations. Since there is no evidence in the record from which it may be inferred that the fraud, concealment, mistake, or theft exceptions to the English statute applies, Ms. Goldsmith's conversion claim is dismissed.

In light of the foregoing, and consistent with the conclusions above, Ms. Goldsmith's motion for partial summary judgment is denied in its entirety.

Accordingly, it is hereby

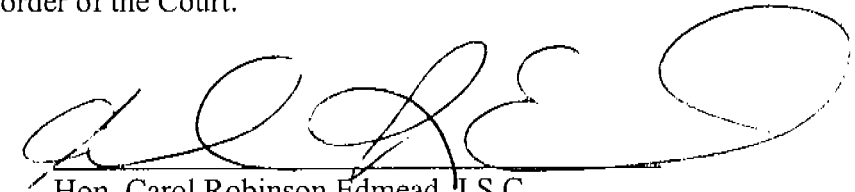
ORDERED that the motion by defendant Sotheby's, Inc. for summary judgment dismissing the complaint is granted, and the Clerk may enter judgment accordingly; and it is further

ORDERED that the motion by plaintiff for partial summary judgment is denied; and it is further

ORDERED that defendant Sotheby's, Inc. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: April 27, 2007

  
Hon. Carol Robinson Edmead, J.S.C.

**GAROL EDMED**  
J.S.C.

**FILED**  
MAY 02 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

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<sup>10</sup> By virtue of Section 3(2) of the 1980 Act, such circumstances warrant a finding that Ms. Goldsmith's title to the Tabletop was also extinguished in April 2001.