

**Newton v Wimberly**

2007 NY Slip Op 31307(U)

May 14, 2007

Supreme Court, New York County

Docket Number: 0103580/2006

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.

PART \_\_\_\_\_

Index Number : 103580/2006

NEWTON, ANTHONY

vs

WIMBERLY, RUSSELL

Sequence Number : 001

DEFAULT JUDGMENT

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

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

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

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 ...

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

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

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

**FILED**

MAY 23 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 5/14/07

JUDITH J. GISCHE, J.S.C. 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  
COUNTY OF NEW YORK: PART 10

-----X

ANTHONY NEWTON,  
  
Plaintiff,

**Decision/Order**  
Index No.: 103580/06  
Seq. No. : 001

-against-

RUSSELL WIMBERLY,  
  
Defendant.

Present:  
Hon. Judith J. Gische  
J.S.C.

**FILED**  
MAY 23 2007  
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>
Pltf's motion [df/jg] w/JAF affirm in support, AN affid, exhs .....	1

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The underlying action is for wrongful possession of artwork allegedly created by and belonging to plaintiff. Plaintiff is now moving, pursuant to CPLR § 3215, for an order directing the Clerk of the Court to enter a default judgment in favor of plaintiff and against defendant Russell Wimberly ("defendant"). The motion itself has been submitted to the court on default.

**Background**

This action is against an individual defendant. Plaintiff served the Summons and Complaint on defendant, personally, on March 20, 2006. Defendant has not appeared, or answered the complaint within the time provided under the CPLR, nor obtained an order from the Court extending their time to do so.

Plaintiff's motion is supported by the affirmation of Jessica A. Feldman and plaintiff's affidavit. Plaintiff is an artist who sold small works of art from a stand in a New

York City public park. Defendant allegedly sold some of plaintiff's artwork in 1997. The parties had little or no contact over the next seven years. In late 2004, defendant and plaintiff entered into an oral contract whereby defendant was plaintiff's manager and displayed plaintiff's art, for sale, in his apartment. Defendant was to earn commissions on the sale of the artwork. Defendant also gave plaintiff a key to his apartment.

Sometime in 2005, the business relationship between defendant and plaintiff fell apart. Defendant allegedly intimidated plaintiff, demanded the key back from plaintiff, and refused to return plaintiff's artwork.

On November 18, 2005, plaintiff's attorneys wrote a letter to defendant which demanded that defendant make plaintiff's artwork available for pick-up, or if unavailable, deliver the fair market value to plaintiff. On January 4, 2006, a woman claiming to be defendant's daughter said her father would surely return the artwork to plaintiff. Defendant has made no attempt to respond to plaintiff's demands.

Plaintiff contends that defendant breached the oral contract in failing to sell plaintiff's artwork, or forward the proceeds from the sale or transfer of that artwork to plaintiff (first cause of action); that defendant breached his fiduciary duty to plaintiff by failing to represent plaintiff's interests or sell the artwork for plaintiff's benefit (second cause of action); and that defendant converted plaintiff's artwork, and any proceeds from the sale or transfer of said artwork, for defendant's own use (third cause of action). For a third cause of action, plaintiff pleads replevin. Plaintiff also contends that he will suffer irreparable harm, unless the court grants a preliminary injunction barring defendant from damaging, selling or transferring to any third party plaintiff's artwork during the pendency of this action (fifth cause of action).

## Discussion

Since a default in answering the complaint constitutes an admission of the factual allegations therein, and the reasonable inferences which may be made therefrom [Rokina Optical Co., Inc. v. Camera King, Inc., 63 NY2d 728 (1984)], plaintiff is entitled to default judgment in its favor, provided it otherwise demonstrates that it has a *prima facie* cause of action [Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3<sup>rd</sup> dept. 2001)].

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. Furia v. Furia, 166 A.D.2d 694 (2<sup>nd</sup> Dept. 1990). "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." Express Industries and Termianl Corp. V. New York State Dept. Of Transportation, 93 N.Y.2d 584 (1999).

Without any explication of the terms of the alleged oral contract, plaintiff generally contends that defendant failed to represent its interests, failed to sell the artwork, failed to return the artwork to plaintiff and failed to forward the proceeds from the sale or transfer of the artwork. Since the court cannot ascertain the exact obligations of the parties under the contract, it cannot make a finding that such obligations were breached. Accordingly, plaintiff is not entitled to entry of default judgment on the first cause of action.

Nonetheless, plaintiff has established at least the basis to conclude there was a relationship of principal and agent. Agency is a fiduciary relationship created as a result

of conduct by the parties manifesting that the principal is willing to allow the other party, upon such other party's consent, to act for it subject to the principal's control and within the limits of the authority conferred. Pensee Associates, Ltd. v. Quon Industries, Ltd., 241 A.D.2d 354 (1<sup>st</sup> Dept. 1997). A fiduciary relationship exists between a commission agent and a principal for the sale of goods, in which title remains in the principal. Id. "Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions." EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11 (2005). Generally, where parties have entered into a contract, courts look to that agreement "to discover ... the nexus of [the parties'] relationship and the particular contractual expression establishing the parties' interdependency." Northeast Gen. Corp. v. Wellington Adv., 82 N.Y.2d 158 (1993). "If the parties ... do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them" Id. "However, it is fundamental that fiduciary liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation" EBC I, Inc., supra.

Plaintiff claims that defendant had actual authority, as a result of a voluntary conferral by plaintiff, to sell plaintiff's paintings on a commission basis. Insofar as plaintiff claims the relationship between the parties is one of agency, defendant, the agent, owes a fiduciary obligation to plaintiff, the principal. While the terms of the contract are unclear, plaintiff alleges sufficient facts to support a conclusion that an agency relationship existed between the parties and that the parties were not operating at arms length.

Plaintiff generally contends that defendant breached his fiduciary duty to plaintiff when defendant failed to represent plaintiff's interests, failed to sell the artwork, failed to return the artwork despite plaintiff's repeated requests, and failed to divert any proceeds whatsoever to Newton from any sale or transfer of that artwork. The above claims are sufficient to establish that defendant breached his fiduciary duty to plaintiff.

Accordingly, the plaintiff is entitled to judgment on liability.

Since damages cannot be ascertained without a hearing, the court directs an assessment of damages at an Inquest before a special referee who shall hear and determine the damages plaintiff may recover from the defendant. Plaintiff shall serve a copy of this order on the office of the Special Referee, 60 Centre Street, Room 119 so that the issues framed herein may be calendared and assigned.

The court's disposition of plaintiffs' motion on the second cause of action renders their motion for default judgment on the third and fourth causes of action moot. Plaintiff may not recover twice because it would be a windfall. Accordingly, the third and fourth causes of action are hereby dismissed.

Plaintiff also seeks a preliminary injunction barring defendant from damaging, selling or transferring to any third party plaintiff's artwork during the pendency of this action. A party seeking preliminary injunctive relief must establish: [a] a likelihood of success on the merits; [b] irreparable injury, and [c] a balancing of the equities to preserve the *status quo*. WT Grant Co. v. Scroggi, 52 NY2d 496 (1981). The granting of any preliminary injunction requires the posting of security. CPLR § 6312 (b). In addition, in connection with any action affecting the use and enjoyment of real property the court may grant an order restraining waste or further damage to the property.

RPAPL § 211.

Plaintiff has made a prerequisite showing that an order barring defendant from damaging, selling or transferring to any third party plaintiff's artwork during the pendency of this action should be ordered. Defendant may have possession of property which, as plaintiff has claimed and defendant is deemed to have admitted by virtue of his default in appearing in this action, rightfully belongs to plaintiff. If the defendant sells, transfers or destroys the subject artwork, plaintiff will be caused irreparable harm because these are, as he claims, "some of his most important work." In addition, if defendant sells these artworks at prices far below their value, this will adversely impact plaintiff's business and reputation.

The court also orders that as a condition of the injunction, One Thousand Dollars (\$1,000) undertaking be filed by plaintiff with the finance administrator of the New York State Supreme Court, New York County, in connection with the preliminary injunction that is granted. This is to secure any damages and costs that may be sustained by reason of the injunction.

#### **Conclusion**

In accordance herewith it is hereby:

**ORDERED** that plaintiff's motion for a default judgment on the first cause of action is hereby denied and the first cause of action is hereby dismissed; and it is further

**ORDERED** that plaintiff's motion for a default judgment on the second cause of action is hereby granted to the extent that the Clerk shall enter judgment on the issue of

liability in favor of the plaintiff Anthony Newton and against defendant Russell Wimberly; and it is further;

**ORDERED** that an Inquest be held before a special referee who shall hear and determine the damages plaintiff may recover from the defendant. Plaintiff shall serve a copy of this order on the office of the Special Referee, 60 Centre Street, Room 119 so that the issues framed herein may be calendared and assigned; and it is hereby

**ORDERED** that plaintiff's motion for a default judgment on the third and fourth causes of action is hereby denied and the third and fourth causes of action are hereby dismissed; and it is further

**ORDERED** that plaintiff's motion for a preliminary injunction on the fifth cause of action is granted to the extent that defendant Russell Wimberly is hereby barred from damaging, selling or transferring to any third party plaintiff's artwork during the pendency of this action; and it is further

**ORDERED** that as a condition to the preliminary injunction plaintiff is to provide an undertaking in the amount of One Thousand Dollars (\$1,000); and it is further

**ORDERED** that any requested relief not expressly granted herein is denied; and it is further

**ORDERED** that this shall constitute the decision and order of the Court.

Dated: New York, New York  
May 14, 2007

So Ordered:

**FILED**  
MAY 23 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.