

Richard Avedon Found. v Nabokov

2007 NY Slip Op 33588(U)

October 31, 2007

Supreme Court, New York County

Docket Number: 0601062/2007

Judge: Helen E. Freedman

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

PRESENT: HELEN E. FREEDMAN

PART 39

Justice

RICHARD AVEDON FOUNDATION

INDEX NO. 601062/07

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. NO. 001

DOMINIQUE NABOKOV

Defendant.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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 is decided in accordance with accompanying memorandum decision.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 119)

Dated: 10/31/07

Helen E. Freedman, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 39

-----X
THE RICHARD AVEDON FOUNDATION,

Plaintiff,

Index No. 601062/07

-against-

DOMINIQUE NABOKOV

Defendant. '1B)

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or a judicial representative must appear in person at the Judgment Clerk's Desk (Room

-----X
HELEN E. FREEDMAN, J.:

In this action, The Richard Avedon Foundation ("plaintiff" or the "Foundation"), sues Dominique Nabokov ("defendant"), for a declaratory judgment adjudicating plaintiff's ownership rights in four gelatin-silver prints created by Henri Cartier-Bresson (the "Photographs"). Defendant filed a counterclaim pursuant to CPLR 7101 (Recovery of Chattel), seeking a determination that she is the rightful owner of the Photographs and their restitution. Plaintiff now moves for summary judgment on the underlying declaratory action and seeks dismissal of defendant's counterclaim. For the reasons set forth below, plaintiff's motion for summary judgment is granted and defendant's counterclaim is dismissed.

The following facts are alleged in defendant's counterclaim based on Dominique Nabokov's affidavit. During the 1930's, the Photographs were given and dedicated to defendant's late husband, Nicholas Nabokov ("Nabokov"), by Cartier-Bresson. Sometime later, the Photographs came into the possession of the late photographer Richard Avedon. In the early 1970's, Nabokov and his wife Dominique Nabokov met Avedon at a party. On that occasion, Avedon told them that he had found the Photographs in his studio and wanted to return them.

Nabokov told Avedon that they were about to leave for Europe, and that Avedon should return the Photographs when they arrived back. A few months later, Nabokov called Avedon to ask about the Photographs. At that time, Avedon replied that he had forgotten where he had put them. Some months later, Nabokov asked again about the Photographs and Avedon told him that they were lost. Nabokov made a few other calls during the early 1970's to inquire about the Photographs, and each time Avedon reiterated that he had lost them.

Nabokov died in 1978, leaving Dominique Nabokov as the only person beneficially interested in his estate. Avedon died in 2004, leaving a will bequeathing the Photographs to his Foundation. The Photographs were distributed to the Foundation in early 2006. Cartier-Bresson also died in 2004.

In September 2006, upon learning that the Photographs were on exhibition in an art gallery in New York City, Dominique Nabokov sent a letter to the art gallery demanding their restitution. Subsequently, the Foundation commenced this lawsuit seeking a declaration that it owns the Photographs. The Complaint alleges that Nabokov "gifted" the Photographs to Avedon in the 1950's, at a time when they had no commercial value, and that they remained in Avedon's possession for over 50 years. It further alleges that Dominique Nabokov's ownership claims have clouded title to the Photographs and rendered them unsaleable. Defendant counterclaimed that Nabokov never "gifted" the Photographs to Avedon and that they belong to her as her husband's sole heir.

Contentions

In its motion, the Foundation asserts that the counterclaim is barred by the statute of limitations and/or the doctrine of laches. The Foundation contends that the applicable three-year

statute of limitations governing actions to recover a chattel or for conversion under CPLR 214(3) began to run in the early 1970's, when Nabokov learned that Avedon possessed the Photographs, but would not return them. Moreover, the Foundation contends that the defendant has waited too long to assert her ownership claims, since she had known for over 30 years that the Photographs were in Avedon's possession. The delay has allegedly prejudiced the Foundation, because the direct witnesses to the transactions concerning the Photographs are deceased and other testimony would be inadmissible as hearsay.

In opposition, defendant contends that her claim for conversion did not accrue until 2006, when she learned that the Photographs had resurfaced and had been bequeathed to the Foundation. Thus, she contends that her claim is not time-barred because it was filed within the relevant three-year statute of limitations.

Discussion

In order to determine whether defendant has a right to possession or recovery of the Photographs, it is essential to determine when the underlying right to recovery or conversion claim accrued. Conversion is defined as any act of dominion wrongfully exerted over another's personal property in denial or inconsistent with that person's rights in the property. *Meyer v. Price*, 250 N.Y. 370 (1929). The two key elements for conversion are (1) plaintiff's possessory right in the property, and (2) defendant's interference with it, in derogation of plaintiff's rights. *Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d 43 (2006). The statutory period for an action in conversion begins to run when the conversion occurs. *Guild v. Hopkins*, 271 A.D. 234 (1st Dep't 1946), *aff'd*, 297 N.Y. 477 (1947). This is true even if the plaintiff may have been unaware of the conversion. *Solomon R. Guggenheim Foundation v. Lubell*, 77 N.Y.2d 311

(1991). In other words, the statute of limitations runs from the date the conversion takes place, not from the discovery of the conversion or when in the exercise of diligence it should have been discovered. *Vigilant Ins. Co. of America v. Housing Authority of City of El Paso, Tex.*, 87 N.Y.2d 36 (1995).

Here, viewing the facts alleged in the light most favorable to the defendant, the conversion of the Photographs occurred in the early 1970's, when Nabokov made several inquiries about the Photographs and asked for their return, and Avedon told him he could not give them back because he had lost them. Avedon's alleged interference with Nabokov's asserted ownership rights constitutes conversion. Whether Avedon intended to return the Photographs once he had found them is not material here. *See* Restatement (Second) of Torts, § 222 A (1965) (a conversion claim lies where a man leaves a restaurant with the wrong hat and "a sudden gust of wind blows it from his head, and it goes down an open manhole and is lost"). What matters is the degree of dominion exercised over the Photographs, which were in Avedon's possession for over 30 years notwithstanding Nabokov's several attempts to have them returned.

Defendant relies on *Solomon R. Guggenheim Foundation v. Lubell*, 77 N.Y.2d 311 (1991), to support the argument that her cause of action accrued in September 2006, when she demanded restitution of the Photographs and the Foundation refused return them. In *Lubell*, *supra*, the Court of Appeals held that "a cause of action for replevin [recovery of chattel] against [a] good-faith purchaser of a stolen chattel accrues when the true owner makes demand for the return of the chattel and the person in possession of the chattel refuses to return it." However, the Court further held that a different rule applies "when the stolen object is in the possession of the thief. In that situation, the Statute of Limitations runs from the time of the theft even if the

property owner was unaware of the theft at the time that it occurred.” *Solomon R. Guggenheim Foundation v. Lubell*, 77 N.Y.2d 311 (1991) (internal citations omitted). In this case, Avedon was not a good-faith purchaser because he knew that Nabokov claimed ownership to the Photographs since the early 1970's. Thus, defendant's cause of action for recovery of the Photographs accrued sometime in the mid-1970's when the Photographs were converted and is now time-barred.

In any event, defendant has failed to raise a triable issue of fact as to her ownership rights because her allegations are not substantiated by admissible evidence. Indeed, defendant's testimony as to the transactions concerning the Photographs is barred by the Dead Man's Statute, which states in relevant part that:

a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest against the executor, administrator or survivor of a deceased person . . . or a person deriving his title or interest from, through or under a deceased person . . . by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person[.]

CPLR § 4519. Thus, the statute precludes Dominique Nabokov's testimony concerning Avedon's intent because she is an interested person who would be testifying against the Foundation about a personal transaction or communication with Avedon, who is deceased.

Moreover, the testimony contained in the affidavit of Helen Wright, a representative of Cartier-Bresson, is also inadmissible. Ms. Wright testifies that during the 1970's she had heard that Avedon intended to return the Photographs to Nabokov. However, Ms. Wright does not

state whom she heard this from. Even if she had heard this information from Cartier-Bresson or Nabocov, these individuals are dead now, and the testimony would be inadmissible hearsay.

In view of the above analysis, it is unnecessary to address the issue of laches.

For the foregoing reasons, plaintiff's motion for summary judgment seeking a declaratory judgment that the Foundation is the rightful owner of the Photographs and dismissing defendant's counterclaim is granted.

Accordingly, it is

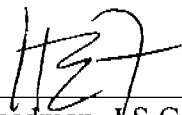
ORDERED that plaintiff's motion for summary judgment dismissing defendant's counterclaim for recovery of the four Cartier-Bresson Photographs is granted, and it is

DECLARED AND ADJUDGED that plaintiff is the rightful owner of the four Cartier-Bresson Photographs, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 31, 2007

Enter:



Helen E. Freedman, J.S.C.

UNFILED JUDGMENT

nis judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 11B)

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

HERMAN CAHN

PRESENT: _____

Justice

PART 49

Index Number : 114306/2005

EL MUNDO CO. LTD.

vs

CCS INTERNATIONAL, LTD.

Sequence Number : 002

STRIKE ANSWER

INDEX NO. _____

MOTION DATE _____

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

**THE MOTION IS (DENIED) (DENIED)
TO THE EXTENT SET FORTH IN A
DECISION DICTATED ON THE RECORD**

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

FILED

NOV 05 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: _____

NOV 01 2007

Herman Cahn

J.S.C.

Check one:

FINAL DISPOSITION

NON-FINAL DISPOSITION