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

PRESENT: HON. ROLANDO T. ACOSTA Justice

PART 61

Index Number : 120072/2000
LONG, CARLTON
VS
SOWANDE, BEVERLY
Sequence Number : 015
DISMISS

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	see attached
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

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 141B)

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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

Dated: 11/19/07

SO ORDERED

ROLANDO T. ACOSTA 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: PART 61

Carlton Long,

Plaintiff,

– against –

Beverly Folsade Sowande, Sowande & Associates, P.C., U-Haul Company of New York and Vermont, Inc., Leroy Elfrank & Associates Auctioneers, Ian Gottlieb and American Liquidators New York, Inc.,

Defendants.

DECISION/ORDER

Index No. 120072/00

Seq. Nos. 15 & 16

Present:

Rolando T. Acosta
Supreme Court Justice

Motion Sequence Numbers 15 and 16 have been consolidated for disposition. The following documents were considered in reviewing defendants Ian Gottlieb's and American Liquidators New York, Inc. ("Gottlieb" and/or "American")'s motion for an order pursuant to CPLR 3211 & 3212 dismissing all claims and cross-claims against them, defendant U-Haul Company of New York and Vermont, Inc.("U-Haul")'s motion for an order pursuant to CPLR 3212 dismissing the complaint and cross-claims, and defendants Beverly Folsade Sowande's and Sowande & Associates, P.C. ("Sowande")'s cross-motion for an order pursuant to CPLR 3212 dismissing plaintiff's claims and granting them summary judgment on their counter- claims and cross-claims, and a default judgement against defendant Leroy Elfrank & Associates Auctioneers:

Papers	**Numbered**
Gottlieb's Notice of Motion (Seq. No. 15), Affirmation & Memorandum of Law	**1-3 (Exhibits 1-24)**
Sowande Defendants Affidavit in Opposition	**4**
Reply Memorandum of Law	**5 (Exhibit 1)**
U-Haul's Notice of Motion (Seq. No. 16), Affirmation, Affidavit & Memorandum of Law	**1-2 (Exhibits A-L)**

Sowande's Affidavit in Opposition	**3**
Reply Affirmation and Memorandum of Law	**4-5 (Exhibits A-D)**
Sowande's Notice of Cross-Motion, Affidavit & Memorandum of Law	**6-7 (Exhibits A-WW)[1]**
U-Haul's Affirmation & Memorandum of Law in Opposition	**8-9**

Background

Carlton Long, an art collector and political science professor was terminated by Columbia University in early 1997. That summer, while in England, he was evicted from his Columbia University owned apartment and his possessions, which included 18 pieces of artwork and two containers with unframed prints, were put in storage. Both Long and defendant Beverly Folsade Sowande, Esq., agree that Long retained Sowande to retrieve his artwork and to assist him in his wrongful termination claim against Columbia University. Sowande's Exhibit S. Sowande was successful in the retrieval of the artwork and had it placed in her office.

On July 31, 1997, Sowande wrote to Long, who was still in England, that she had "offered to keep these paintings and other pieces of art for you in my office as an accommodation to you, because of the difficult circumstances you were facing at the time. I have also advised you that, if you wish to have someone come and collect these pieces for more appropriate storage, that will be fine. Just let me know who this person is and when he or she will arrive. You are welcome, however, to leave your art here until you return to New York on or about August 23rd." Sowande Exhibit D, Sub-Exhibit A.

Although the record is not clear as to when Long returned to New York, Long and Sowande's version of what happened next differs considerably. According to Long, he attempted to pick up his artwork on several occasions, but was unsuccessful. He still owed

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1. The Sowande defendant's cross-motion consisted of a 144 page affidavit (364 numbered paragraphs) and an 82 page memorandum of law. Although the Court considered these papers in deciding this motion, the Sowande Defendants are hereby put on notice that any further affidavits or memoranda of law submitted in this Part for whatever reason that exceed 40 pages will not be accepted by the Court and could lead to the imposition of sanctions.

Sowande money for her legal representation and she would not surrender the artwork until he had paid her in full. According to Sowande, Long, who was unemployed and homeless, simply did not pick up the artwork when he returned because he had no place to put it. She also stated that she terminated her representation of Long on August 26, 1997 when he returned from England because it became evident that he could not provide any documentation of his legal claims against Columbia. In fact, she later discovered that he had waived any claims against Columbia University. See Sowande Exhibit Z.

Sowande closed her practice some time in 1998 to care for her ailing mother. On November 29, 1998 she rented a 14 foot U-Haul truck from U-Haul's New York County, Chelsea neighborhood location to transport her office belongings and Long's art work to a storage unit at the Chelsea location. Her mother took a turn for the worst and she was unable to return the truck until April 14, 1999, approximately four and one half months later. Of course, in April when she attempted to start the truck, the battery was dead. U-Haul employees retrieved the truck, which was located at 80 Dupont Street in Brooklyn, where Sowande was living with her mother, and towed the truck with Sowande's belongings to U-Haul's Brooklyn location. According to Sowande, she telephoned a Lisa Roldan, who identified herself as the U-Haul manager, and gave Roldan her Brooklyn address and telephone number. Roldan told her that the truck would be parked at the Brooklyn facility until Sowande could make arrangements to get there.

Sowande eventually made it to the Brooklyn U-Haul facility on May 1, 1999. Donovan Robinson, the general manager, informed Sowande that she owed $5,165.53. Since Sowande was able to pay only $1,860.83 of the total bill, Robinson told her that her property would be placed in storage and could not be removed until she paid the balance. Accordingly, Sowande signed a storage room rental agreement for a monthly fee of $157.95, which included an $18.00 per month insurance fee for a $10,000 protection limit. Sowande could have opted to insure her belongings to a maximum of $15,000. See Agreement, Soawande Exhibit BB. She attempted to put her current Brooklyn address on the agreement, but the "young man" behind the counter told her that she had to list the address on her driver's licence. She was able to list her Brooklyn telephone number nonetheless. Several U-Haul employees then removed the property from the truck and put it in a storage unit. According to Sowande, Roldan was one of the employees who helped unload the truck.

On June 3, 1999, Sowande telephoned Roldan to tell her that she would be coming in to pay her storage bill for the month of June. She also asked Roldan whether she could take out a few items even though there was still an outstanding balance on the truck bill, and Roldan allegedly agreed. Roldan, however, disputes this account and testified that she did not recall speaking with Sowande or giving her permission to take out some property. Sowande also claimed that she was allowed to remove property sometime in July.

On June 10, 1999, Sowande alleged that she telephoned Roldan again, explained that she needed to undergo expensive medical testing, and requested an extension of time to make future payments. According to Sowande, Roldan agreed to an extension and told Sowande that all fees would have to be paid by the end of October 1999. Sowande also alleged that she telephoned Roldan on July 16, 1999, August 5, 1999, and twice on September 17, 1999, to confirm that the extension of fees was still in effect. She was assured that the contents of the storage room would remain secured so long as all outstanding fees were paid by the end of October. In fact, according to Sowande, she was allowed to remove several more items in July and August. Roldan denied all these allegations.

When Sowande traveled to U-Haul on October 11, 1999 to pay her outstanding bill, she was informed that her property had been sold in auction on September 14, 1999. She informed Long the following day. According to Sowande, U-Haul had her property auctioned in violation of U-Haul's internal policies as reflected in the internal U-Haul Manual (attached as Sowande's Exhibit II), which required that she be informed by telephone that the property was at risk of being auctioned. She had listed a working telephone number on the agreement and there was always a working answering machine associated with the telephone. Sowande also noted that Roldan never told her that the Sowande property was at risk when Sowande spoke with Roldan in July, August and September.

Sowande also alleged that also in violation of the Manual, she never received written notice, nor did U-Haul contact Sowande's listed emergency contact by either telephone or mail. Sowande asserts that she relied to her detriment upon U-Haul's good faith adherence to its internal Manual, which she claims she knew about because she had previously used U-Hauls's Chelsea location.

According to Anderson Ramsaroop, Marketing Company Storage Manager for U-Haul, Sowande paid her May 1999 rent when she executed the agreement. The June rent was paid three days late after having incurred a $15.00 late fee. No further payments were made by Sowande. Although Ramsaroop stated that U-Haul sent Sowande a letter when her July rent was late, a copy of which he states is attached as Exhibit C, the letter attached to Exhibit C is dated June 3, 1999. U-Haul assessed a second $15.00 late fee on July 15th, and then a a $50.00 lien processing fee after July 31st as authorized by the agreement. On August 7th, Sowande was sent a lien sale notice at the address listed on the agreement. See U-Haul Exhibit D. The notice advised Sowande that the property would be sold on September 14 to satisfy the lien unless she paid the amount of the lien. The letter was sent by certified mail, and markings on the envelope show that the post office attempted to deliver the letter on August 7 and August 19. The envelope was returned to U-Haul on August 27 as "unclaimed." Ramsaroop noted that the storage agreement provided that if the address provided had changed, Sowande was obligated to provide immediate written notification,

which they never received. According to Sowande, the envelope attached as Exhibit D is a fake. See Sowande Affidavit ¶¶ 227-231.

U-Haul also tried to alert Sowande of the imminent sale by placing advertisements in the New York Post on August 28, 1999 and September 4, 1999. The advertisements indicated the date of the auction. According to Ramsaroop, prior to conducting an auction, U-Haul opens the space to take a photograph and a visual inventory of the contents. They are both done while standing in the front door without moving any items. A photograph of Sowande's storage unit was attached as U-Haul's Exhibit G. According to Ramsaroop, there is no indication that the contents of the room belong to anyone other than Sowande. Notwithstanding Ramsaroop's assertions, it is impossible to see everything in the unit based on the photographs attached as Exhibit G.

Robinson gave Sowande the auctioneer (defendant Leroy Elfrank & Associates Auctioneers)'s telephone number on October 11. Sowande eventually learned the name of the person and entity who purchased the property, defendants Ian Gottlieb and American Liquidators New York, Inc. ("Gottlieb"and/or "American"). Sowande contacted Gottlieb, who agreed to sell most of the artwork back to Long for $7,500.

On October 26, 1999, plaintiff contacted Howard Thompson, a television reporter for WPIX ["Help me Howard" news program] and, according to Sowande, told him that Sowande and her firm, while acting as his attorney, defrauded him, stole his artwork, and unlawfully sold the art in collusion with another. He also stated that Sowande was holding the art as collateral for unpaid legal bills. An interview with Thompson and Long was broadcast on Channel 11 on October 26, 1999. In the broadcast, Long stated that Sowande stole his artwork, that although he owed her monies for unpaid legal bills, he never agreed that she could hold his artwork as collateral, and that Sowande refused to tell him the name of the storage company where she was storing the work. He went on to say that she called him one day, told him that the work had been sold (without his permission), and that she now represented a man named Ian who was willing to return some of the work that had not yet been resold for $8000. See Video Tape attached to Sowande's Cross-Motion. In the broadcast interview, Long never used the words "defrauded" or stated that Sowande sold the work "in collusion with another." Id.

The procedural history of this case is very long and tortuous. Rather than trace the over seven years of litigation, it suffices to say that the following claims remain. Long has three causes of action against Sowande for breach of contract, legal malpractice/negligence and fraud; six causes of action against U-Haul and Leroy Elfrank & Associates Auctioneers for negligence, conversion, fraud, intentional infliction of emotional harm and prima facie tort; and nine causes of action against Gottlieb for conversion, fraud, intentional infliction

of emotional harm, prima facie tort, preliminary and permanent injunction, and declaration of constructive trust, declaratory judgment, replevin, recovery and immediate turnover of artwork.

Sowande has counterclaims against Long for defamation and legal fees billed and owing. She also has two cross-claims against U-Haul for breach of contract and conversion; and, one cross-claim against Elfrank for conversion. In February 2005, Sowande amended her cross-claims to allege another emotional distress claim against U-Haul, Elfrank and Gottlieb. Elfrank did not answer the amended cross-claim. U-Haul has a cross-claim against Gottlieb for contribution.

Ian Gottlieb and American Liquidators New York, Inc.'s Motion for an Order Pursuant to CPLR 3211 & 3212 Dismissing all Claims and Cross-Claims Against Them[2]

Long's legal claims against Gottlieb and American (i.e., conversion, fraud, intentional infliction of emotional harm, prima facie tort) and Sowande's amended cross-claim for emotional distress are time barred. Long v. Sowande, 27 A.D.3d 247 (1st Dept. 2006). As for Long's equitable remedies against Gottlieb and American (preliminary and permanent injunction, and declaration of constructive trust, declaratory judgment, replevin, recovery and immediate turnover of artwork), they are dismissed as well inasmuch as Gottlieb and American sold the artwork years before Long obtained a temporary restraining order on November 10, 2003. Given that Gottlieb and American no longer owe the artwork, Long has an adequate remedy at law based on his claims against the other defendants.

Last, U-Haul's cross-claim against Gottlieb and American for contribution for Long's and Sowande's claims was abandoned.

Defendant U-Haul Company of New York and Vermont, Inc's Motion for an Order pursuant to CPLR 3212 dismissing the complaint and cross-claims

Long has six causes of action against U-Haul for negligence, conversion, fraud, intentional infliction of emotional harm, prima facie tort, and an injunction to prevent the sale of the artwork. Five of these causes of action against U-Haul are dismissed. First, with respect to negligence, U-Haul did not owe a duty to Long and therefore, there can be no liability for breach of a non-existing duty. Pulka v. Edleman, 40 N.Y.2d 781, 782 (1976).

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2. It should be noted that at a May 10, 2007 hearing, both Long and U-Haul acknowledged that they did not intend to oppose Gottlieb's and American's motion for summary judgment.

As for conversion ("an unauthorized exercise of dominion and control over property by someone other than the owner where such control interferes with and is in defiance of superior possessory right of owner or another person," Miller v. Marchuska, 31 A.D.3d 949 (3rd Dept. 2006)), although U-Haul had a valid lien on the property stored in its facility, Lien Law § 182(6)(lien attaches as of the date the personal property is brought to the self-service storage facility), there are issues of fact as to whether U-Haul properly enforced that lien. See Sowande's arguments regarding her cross-motion below. Ingram v. Machel & Jr. Auto Repairs, 148 A.D.2d 324 (1st Dept. 1989)(clear departure from strict requirements of Lien Law by possessory liener constitutes conversion). That U-Haul was unaware that Long owned the artwork is of no moment. Spraights v. Hawley, 39 N.Y. 441 (1868).

The fraud claim fails because plaintiff did not establish that U-Haul made a false representation to him of a material fact. Pope v. Saget, 29 A.D.3d 437 (1st Dept. 2006)(to establish fraud, plaintiff must demonstrate the representation of a material fact, the falsity of that representation, knowledge by the defendant that the representation was false when made, justifiable reliance by plaintiff, and resulting injury).

To establish a claim for intentional infliction of emotional harm, a plaintiff must establish that: the defendant engaged in extreme and outrageous conduct; the defendant intended to cause, or disregarded substantial probability of causing, severe emotional harm to the plaintiff, the extreme and outrageous conduct caused the plaintiff injury; and, the plaintiff suffered severe emotional harm. Howell v. New York Post Co., 81 N.Y.2d 115, 121 (1993). These requirements are "rigorous and difficult to satisfy. Id. at 122. Thus, there is liability only where the conduct has been "so outrageous in character, and so extreme in degree, [that it] go[es] beyond all possible bounds of decency, and [is] regarded as atrocious, and utterly intolerable in a civilized community." Id. Here, U-Haul's conduct in auctioning off Sowande's property falls far short of this standard. Indeed, there is no indication in the record that U-Haul even knew about plaintiff. Accordingly, this claim is also dismissed.

As for prima facie tort, a plaintiff must establish the intentional infliction of harm, causing special damages, without excuse or justification, by an act or series of acts that would otherwise be lawful. Curiano v. Suozzi, 63 N.Y.2d 113, 117 (1984). "[T]here is no recovery in prima facie tort unless malevolence is the sole motive for defendant's otherwise lawful act." Burns Jackson Miller Summit & Spitzer v. Lindner, 59 N.Y.2d 314, 333 (1983). Here, there is no evidence of malevolent conduct directed toward plaintiff. Indeed, as noted above, U-Haul did not even know of plaintiff's existence. U-Haul was merely trying to recover the monies due to it under the agreement.

Last, plaintiff's request for an injunction is denied as moot inasmuch as U-Haul no longer has possession of the artwork. Currier v. First Transcapital Corp., 190 A.D.2d 507

(1st Dept. 1993).

Sowande has several cross-claims against U-Haul; these include breach of contract, conversion, and mental stress that caused or contributed to her cancer, and indemnification. U-Haul argues that both the breach of contract and conversion claims fail because the sale of the property was proper pursuant to Lien Law § 182(7),[3] which states, inter alia, that

> An owner's lien may be enforced by public or private sale . . . after notice to all persons known to claim an interest in the goods. . . . The notice shall be personally delivered to the occupant, or sent by registered or certified mail, return receipt requested, to the occupant to the last address provided by the occupant, pursuant to the occupancy agreement. (emphasis added).

There are issues of fact, however, as to whether Sowande was prevented from giving her address in Brooklyn at the time of the signing of the agreement in May 1999. According to Sowande, she explained to the person working the counter that the address on her license was no longer current. The worker allegedly told her that she needed to put the address on the license. Thus, she never received the letter sent to her prior Central Park West address. She also notes that U-Haul has been unable to produce a copy of the original letter allegedly mailed to Sowande and which was returned as "Undeliverable."

There are also issues of fact as to whether U-Haul breached the implied covenant of good faith and fair dealing by auctioning the property in violation of its internal policies regarding pre-auction procedure, as outlined in the U-Haul Manual. Fourth Branch Associates Mechanicville v. Niagara Mohawk Power Corp., 302 A.D.2d 780 (3rd Dept. 2003)(whether or not defendant breached the implied covenant of good faith and fair dealing is often a factual question). It is well settled that within every contract is an implied covenant of good faith and fair dealing. 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144 (2002). A breach of the covenant is a breach of the contract itself. Boscorale Operating , LLC v. Nautica Apparel, Inc., 298 A.D.2d 330 (1st Dept. 2002). The covenant is breached when a party acts in a manner that deprives the other party of the right to receive benefits under the agreement. 511 West 232nd Owners Corp. v. Jennifer Realty Co., supra, 98 N.Y.2d at 153. The covenant encompasses any promises which a reasonable person in the position of the promisee would be justified in understanding were included. Id. Furthermore, where the contract contemplates the exercise of discretion, the implied

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3. Sowande's first cross-claim against U-Haul is for breach of contract and not breach of bailment. Long v. Sowande, 27 A.D.3d 247, 248 (1st Dept. 2006). Accordingly, Lien Law § 182 rather than the UCC procedure apply with respect to enforcing a lien.

covenant includes a promise not to act arbitrarily or irrationally in exercising that discretion. Dalton v. Educational Testing Service, 87 N.Y.2d 384 (1995).

According to Sowande, she knew about the Manual because she had used U-Hauls' facilities in the past and justifiably understood that its terms were included in the agreement. The manual required that Sowande be informed by telephone that he property was at risk of being auctioned, which was not done notwithstanding that she had listed a working telephone number. The Manual also required that U-Haul contact Sowande's listed emergency contact by either telephone or mail, which U-Haul also failed to do. There are issues of fact as to whether U-Haul's failure to follow its internal policies deprived Sowande of the right to receive notices in addition to those requires under Lien Law § 182. It should also be noted that the storage agreement states that "the property stored in the leased space *may* be sold to satisfy the lien" (emphasis added). Thus, by its express terms, the lease vested U-Haul with discretion as to whether to sell the property. The implied covenant, however, prevented U-Haul from exercising that discretion arbitrarily, and it is for a jury to decide whether U-Haul, in violating its internal manual, acted arbitrarily or irrationally.

There was also evidence that U-Haul orally agreed to extend Sowande's time to pay the arrears. Although generally an extension of time to make a payment is valid only if there is additional consideration for the extension, Wells Fargo Bank Minnesota, N.A. v. Nassau Broadcasting Partners, LP, 2003 WL 22339299 (S.D.N.Y. 2003), in this case, granting an oral extension was consistent with U-Haul's internal policy. Indeed, the manual specifically permits customers to make special arrangements so long as a firm payment date is promised, such as Sowande asserts was made here. Accordingly, the breach of contract claim survives U-Haul's summary judgment motion. U-Haul's potential liability however is limited to $15,000 inasmuch as she covenanted that the value of the goods would not exceed $15,000. Goldberg v. Manhattan Mini Storage Corp., 225 A.D.2d 408 (1st Dept. 1996); Ross v Tuck-It-Away, Inc., 180 A.D.2d 428 (1st Dept. 1992). Indeed, it should be noted that she insured the property for only $10,000. Under the circumstances of this case, however, the Court finds that the provision in the agreement which states that Sowande agrees to bear all the risk of loss and damage, including loss and damage caused by U-Haul's negligence, to be contrary to public policy.

That portion of the motion which seeks to dismiss Sowande's cross-claim (first asserted in her third amended cross-claims) that as a result of U-Haul's conduct, she experienced mental stress that caused or contributed to her cancer is hereby granted. First, the Appellate Division dismissed Sowande's extreme emotional disturbance claim. Second, under a breach of contract theory, damages related to aggravation of breast cancer are not the natural and probable consequences of an alleged breach of an agreement to rent self-storage space. Kenford Co v. County of Erie, 73 N.Y.2d 312, 319 (1989)(in order to impose on the

defaulting party a further liability than for damages which naturally and directly flow from the breach, such unusual or extraordinary damages must have been brought within the contemplation of the parties as a probable result of a breach at a time prior to contracting). Furthermore, under a negligence theory, Sowande's claim fails because the risk of Sowande's cancer was unforeseeable. DiPonzio v. Riordan, 89 N.Y.2d 578, 583-84 (1997).

Last, U-Haul seeks to dismiss Sowande's claim for indemnification from any liability the Sowande defendants owe to plaintiff from the sale of the artwork because the rental agreement specifically states that Sowande agrees not to store works of art. The problem with this argument is that Sowande was not given the option to remove the art work when she returned the truck. Rather, according to her, all her property was held as collateral until she paid the outstanding balance on the truck rental. Accordingly, this portion of the motion is denied.

Sowande Defendants Cross-Motion for an Order pursuant to CPLR 3212 Granting her Summary Judgement on her Counter-Claims and Cross-Claims

The Sowande defendants have two counterclaims against plaintiff, unpaid legal bills and slander per se. With respect to plaintiff's outstanding legal bills, Sowande has established her prima facie entitlement to summary judgment in the amount of $1,930.44, and plaintiff does not dispute that he owes Sowande the money. Accordingly, this portion of the motion is granted.

As for slander per se (perhaps better stated as "libel on its face" or "libel per se" because the alleged defamatory statement were made on television, Frank v. National Broadcasting Co., 119 A.D.2d 252 (1st Dept. 1986)), the Sowande defendants (private person and entity) alleging defamatory statements about a purely private concern, would have to show: 1. that Long's statements to Howard Thompson of Channel 11 were defamatory (i.e., that they tended to expose the Sowande defendants to hatred, contempt or aversion, or to induce an evil or unsavory opinion of the Sowande defendants in the minds of a substantial number of the community, Golub v. Enquirer/Star Group, Inc., 89 N.Y.2d 1074 (1997)); 2. that Long's statements imputed incompetence or dishonesty in the Sowande defendants' profession or trade or that the Sowande defendants committed a serious offense, Lieberam v Gelstein, 80 N.Y.2d 429 (1992); 3. that the statements referred to the Sowande defendants; and, 4. that the statements were published (i.e., that it was heard by persons other than the Sowande defendants), Fedrizzi v. Washingtonville Cent. Sch. Dist., 204 A.D.2d 267 (2nd Dept. 1994).

Here, the Sowande defendants have failed to establish their prima facie entitlement to summary judgment inasmuch as they can not "show that there is no defense to the cause

of action." CPLR 3212(b).[4] Specifically, viewing the facts in the light most favorable to Long, Fundamental Portfolio Advisors v. Tocqueville Asset Management, 7 N.Y.3d 96, 106 (2006), he has a valid defense, namely that he spoke the truth. According to Long, he attempted to retrieve his art work when he returned from England but Sowande would not return it because he still owed her money. Thus, under his version, she stole his art work. Moreover, even Sowande admits that she contacted Ian Gottlieb, who offered to sell beck some of the artwork to Long.

Sowande has also failed to establish her prima facie right to summary judgment on her cross-claims against U-Haul for breach of contract and conversion, and against Elfrank for conversion. As noted above, there are triable issues of fact with respect to these claims.

Sowande's request for a default judgment against Elfrank on the conversion claim is denied inasmuch as she failed to move within a year of the default. Accordingly, it is

ORDERED that Ian Gottlieb's and American Liquidators New York, Inc.'s motion (Seq. No. 15) for an order pursuant to CPLR 3211 & 3212 dismissing all claims and cross-claims against them is granted in its entirety; and it is further

ORDERED defendant U-Haul Company of New York and Vermont, Inc.'s motion (Seq. No. 16) for an order pursuant to CPLR 3212 dismissing the complaint and cross-claims is granted to the extent that all of Long's claims against U-Haul are dismissed except for his conversion claim, and all of the Sowande cross-claims, except for the breach of contract and conversion claims, are dismissed; and it is further

ADJUDGED that the Sowande's cross-motion is granted solely to the extent that the Sowande defendants are granted summary judgment on their claim against Long for unpaid legal fees in the amount of $1,930.44; and it is further

ORDERED that the matter proceed to trial on the surviving claims.

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4. The Sowande defendants do not have to establish falsity as part of their prima facie case at trial inasmuch as they are private figures and the speech relates to matter of purely private concern. See NY PJI 3:27, Comment at p. 298. Rather, falsity is a defense and the burden is on Long to establish by a fair preponderance of the evidence that the statements were true. See NYPJI 3:33. For purposes of summary judgment, however, CPLR3212(b) imposes the burden on the party moving for summary judgment to show that there are no defenses to the cause of action.

This constitutes the Decision and Order of the Court.

SO ORDERED

Dated: November 14, 2007

ROLANDO T. ACOSTA
J.S.C.

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 141B)

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