

Sobel v Historical Design, Inc.
2008 NY Slip Op 30877(U)
March 24, 2008
Supreme Court, New York County
Docket Number: 0601425/2007
Judge: Barbara Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **BARBARA R. KAPNICK**

PART 12

Index Number : 601425/2007

SOBEL, PETER

vs.

HISTORICAL DESIGN

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO.

601425/07

MOTION DATE

MOTION SEQ. NO.

001

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

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED

MAR 27 2008

NEW YORK
COUNTY CLERKS OFFICE

Dated:

3/24/08



BARBARA R. KAPNICK 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 12

-----X

PETER SOBEL,

Plaintiff,

- against -

HISTORICAL DESIGN, INC.,

Defendant.

-----X

BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 601425/07
Motion Seq. No. 001

FILED
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In this action, plaintiff Peter Sobel seeks a judgment mandatorily enjoining and directing defendant Historical Design, Inc., a Manhattan-based art gallery specializing in American and European Art, to immediately turn over and deliver to him a Fayence Plate ("the plate") and an Iris Garden Vase ("the vase") which plaintiff purchased from defendant on or about March 6, 2002 for the price of \$34,000.00 (first cause of action).

Plaintiff also seeks to recover money damages for breach of bailment (second cause of action) and conversion (third cause of action).

Defendant does not dispute that plaintiff purchased the two items in March 2002. Plaintiff allegedly advised defendant at the time of the purchase that he would be in contact shortly with instructions on where to deliver the artwork and asked that

defendant hold the items on his behalf pending receipt of such instructions.

There was no further contact between the parties until May 25, 2004 when plaintiff claims to have had a chance meeting with Daniel Morris, President and co-founder of the defendant, at Cipriani's Restaurant. However, the subject of the plate and vase were not raised at that time by either plaintiff or Mr. Morris.

Plaintiff also claims in his reply affidavit that he met with Mr. Morris in Mr. Morris' offices in January of 2007 to discuss the possibility of defendant selling the plate and vase on his behalf. Mr. Morris allegedly failed to disclose that the gallery had sold the items to other buyers,¹ a fact which plaintiff claims to have learned for the first time when he sought to recover the plate and vase on February 22, 2007.

Plaintiff now moves for summary judgment against the defendant in the sum of \$34,000.00, together with interest from March 6, 2002.

¹ According to Mr. Morris, the plate was sold at a private sale on December 21, 2005 for \$23,842.59, and the vase was sold at an auction on December 19, 2006 for \$10,000.00.

Defendant opposes the motion on the grounds that there are issues of fact as to whether plaintiff's claims are barred under the doctrine of abandonment.

Abandonment of property requires a confluence of intention and action by the owner. Accordingly, before possessory rights will be relinquished, the law demands proof both of an owner's intent to abandon the property and of some affirmative act or omission demonstrating that intention. This well-settled doctrine has long been incorporated in the law of New York:

The abandonment of property is the relinquishing of all title, possession, or claim to or of it - a virtual intentional throwing away of it. It is not presumed. Proof supporting it must be direct or affirmative or reasonably beget the exclusive inference of the throwing away.

United States v. Cowan, 396 F.2d 83, 87 (2d Cir. 1968) (quoting *Foulke v. New York Consol R.R. Co.*, 228 N.Y. 269, 273, 127 N.E. 237 (1920)).

Hoelzer v. City of Stamford, Conn., 933 F.2d 1131, 1138 (2nd Cir. 1991).

However, it is undisputed that defendant, as the bailee, failed to give him any notice that it no longer wished to possess and protect his property. Moreover, defendant has failed to establish that plaintiff took any action demonstrating an intention to abandon the property. Accordingly, plaintiff's claims are not barred under the doctrine of abandonment.

Alternatively, defendant argues that it is entitled to an offset for the expenses it incurred in storing the items for five years,² for \$2,805.00 in New York State taxes it paid on the plate and vase on behalf of plaintiff, for \$3,524.00 in taxes for two earlier purchases by plaintiff for which state and local taxes had not been paid, and 'penalties' of \$6,319.63 associated with these sales.

However, it is undisputed that such charges were never discussed or agreed to between the parties. Accordingly, this Court finds that defendant is not entitled to any offset for storage charges.

In addition, defendant has failed to submit any evidentiary proof showing that it paid taxes on plaintiff's behalf.³

Accordingly, based on the papers submitted and the oral argument held on the record on the record on January 23, 2008, plaintiff's motion for summary judgment is granted. The Clerk may enter judgment in favor of plaintiff Peter Sobel and against

² Defendant indicates that it typically charges between \$150 to \$400 per month to store such items.

³ Plaintiff, on the other hand, has annexed a cancelled check dated November 26, 2006 which purports to show that he already paid sales taxes on the items directly to New York State.

defendant Historical Design, Inc. in the sum of \$34,000.00, together with interest to be calculated by the Clerk from February 22, 2007 (the date plaintiff demanded the return of the items) and costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the decision and order of this Court.

Dated: March 24, 2008


BARBARA R. KAPNICK
J.S.C.

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