

Fischer v Commission For Art Recovery Inc.

2008 NY Slip Op 33168(U)

May 8, 2008

Supreme Court, New York County

Docket Number: 103571/08

Judge: Marcy S. Friedman

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

PRESENT: **MARCY G. FRIEDMAN**

PART 57

Justice

Alice Buger Fischer

INDEX NO.

103571/08

MOTION DATE

Commission for Art Recovery Inc
et al

MOTION SEQ. NO.

001

MOTION CAL. NO.

OSC

The following papers, numbered 1 to _____ were read on this motion to/for pre-action discovery

PAGES NUMBERED

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

1

Answering Affidavits — Exhibits

2

Replying Affidavits Pet. Atty letter dated 3-24-08

3

Bank Austria memo of Law M-1. Court Excl-Val hearing held 3-25-08

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

The court declines to sign this order to show cause pursuant to decision/order dated 5-8-08.

FILED
NOV 25 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5-8-08

M G
MARCY S. FRIEDMAN 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 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x

ALICE BURGER FISCHER,

Petitioner,

- against -

COMMISSION FOR ART RECOVERY INC.;
UNICREDIT GROUP; CREDITANSTALT
BANKVEREIN-BANK AUSTRIA; STROOCK,
STROOCK & LAVAN,

Respondents.

_____ x

Index No.: 103571/08

DECISION/ORDER

FILED
NOV 25 2008
COUNTY CLERK'S OFFICE
NEW YORK

Petitioner, Alice Burger Fischer, seeks to commence a proceeding by order to show cause for pre-action discovery, pursuant to CPLR 3102(c), against respondents Commission for Art Recovery Inc. ("CAR"), UniCredit Group; Creditanstalt Bankverein-Bank Austria ("Bank Austria"), and Stroock, Stroock & Lavan ("Stroock").

Petitioner, a Holocaust survivor, claims that respondents have information that petitioner needs to frame a complaint and to obtain the identity of prospective defendants for an action to recover artwork – in particular, a Rembrandt self-portrait – stolen from her family during the Holocaust. Respondent CAR is an organization established in 1997 and affiliated with the World Jewish Congress and World Jewish Restitution Organization, to lobby European governments for the identification and restitution of Holocaust-era looted art. (See Pet., Ex. 1.) The petition alleges that CAR is in possession of a document, the "de la Croix memo," which may contain useful information about an alleged meeting between a representative of the German government

and Hungarian and Austrian officials during the 1960s or 1970s to conceal artwork looted from Hungarian Holocaust victims such as petitioner. (Pet. ¶¶ 35-42.) The petition also alleges that respondent Bank Austria may have been in possession of a Rembrandt self-portrait owned by petitioner's father (Pet., ¶ 50), and that Bank Austria's counsel, Stroock, may have knowledge about Bank Austria's possession of this painting.

The petition discloses that petitioner was a named plaintiff in many of the Holocaust Era restitution cases, and has been included in settlements of those cases, and that she was also a plaintiff in at least five additional cases for restitution of artwork brought in 2004 in federal court and since dismissed. (See Pet., ¶¶ 20, 21.) In view of the issues raised on the face of the petition as to whether this action is barred by the federal litigation, the court scheduled a hearing, on notice to the respondents, as to whether the order to show cause should be granted.

The standards for pre-action disclosure are well settled. CPLR 3102(c) authorizes disclosure before an action is commenced "to aid in bringing an action * * * but only by court order." Such disclosure may be appropriate to identify potential defendants. (Holzman v Manhattan Bronx Surface Tr. Operating Auth., 271 AD2d 346, 347 [1st Dept 2000].) However, such disclosure "cannot be used by a prospective plaintiff to determine whether he has a cause of action." (Matter of Stump v 209 E. 56th St. Corp., 212 AD2d 410 [1st Dept 1995].) Thus, "disclosure in advance of service of a summons and complaint is available only where there is a demonstration that the party bringing such a petition has a meritorious cause of action and that the information being sought is material and necessary to the actionable wrong." (Liberty Imports, Inc. v Bourguet, 146 AD2d 535, 536 [1st Dept 1989]; Matter of Stewart v New York City Tr. Auth., 112 AD2d 939 [1st Dept 1985].)

Applying these standards, the court holds that the petition wholly fails on its face to satisfy the standards for pre-action discovery against any of the named respondents. Even assuming arguendo that petitioner's general description of her family's Rembrandt self-portrait would be sufficient to permit the painting to be identified if located, a matter as to which substantial doubt exists, the petition does not set forth a potentially viable cause of action.

As to Bank Austria, the petition takes pains to disclose that the federal court (Kram, J.) dismissed damage claims against and an attempt to re-open a prior settlement with Bank Austria, and that petitioner's counsel was severely sanctioned for bringing the action. (Pet., ¶ 21, n1.) The petition also asserts that it "should not be construed as an effort to gain discovery related to damage claims against Defendants" in any of the prior federal cases, and that any damage claims against such defendants "would ultimately be brought before the Judge who previously had the cases." (Pet., ¶ 28.) Petitioner thus appears to concede that she does not have any damage claim relating to the artwork that could be maintained without leave of the federal court. Petitioner also does not dispute that a settlement of a class action with Bank Austria over looted assets defined such assets to include art masterpieces. (See Matter of Austrian & German Bank Holocaust Litigation, 98 Civ 3938 [US Dist Ct SD NY], Complaint, ¶¶ 17, 97 [Ex. B to Aff. In Opp.]; Settlement Agreement, dated Mar. 15, 1999 [Ex. C to Aff. In Opp.]) Significantly, moreover, petitioner's counsel was sanctioned \$5000 and ordered to pay Bank Austria's legal fees, which were subsequently determined to amount to over \$345,000, for Bank Austria's defense of the subsequent action to recover looted artwork. In awarding sanctions, the court found that petitioner's counsel had committed several wrongful acts, including commencement of the subsequent action in "circumvention of the Bank Austria settlement." (Association of

Holocaust Victims for Restitution of Artwork & Masterpieces, a/k/a "AHYRAM" v Bank Austria Creditanstalt AG., et al. [US Dist Ct, SD NY, 04 Civ 3600, Aug. 19, 2005, Kram, J., at 15 [Ex. E to Aff. In Opp.].) It thus appears unlikely that leave to commence a further action at least against Bank Austria would be granted. In any event, that issue is for the federal court to decide. This state court proceeding may not be commenced as an end-run around the concluded federal actions.

The court further finds that the petition fails to set forth a colorable claim against the other named respondents or against any party as to whom the other named respondents allegedly have information. Petitioner's counsel's conclusory assertions that Stroock is in effect part of a conspiracy to conceal information about looted artwork, or that it made an oral agreement to provide information from its client, Bank Austria, about possession of the Rembrandt, are patently insufficient to warrant the requested pre-action discovery. Petitioner also fails to show any basis on which CAR is obligated to make available to petitioner in particular the results of its own investigations on behalf of numerous Holocaust survivors, or that such disclosure would not prejudice those investigations.

After an extensive hearing, and for the foregoing reasons, petitioner's order to show cause should be declined. While mindful of petitioner's tragic circumstances, the court finds that her remedy, if any, must be sought before the federal court in the prior action or actions that may be a bar to further litigation.

It is noted that after hearing of the initial order to show cause, petitioner submitted a "Supplemental Order to Show Cause" seeking discovery from an additional party, Roman Pipko, and purporting to attach two confidential declarations for in camera inspection (Exs. 3 and 4 to


the Supplemental Order to Show Cause.) As characterized by petitioner's counsel, these declarations contain conclusory assertions as to the on-going concealment of artwork looted during the Holocaust by a secret society dedicated to Nazi ideals. (See Fagan Letter to Court dated Mar. 24, 2008.) While the assertions in the confidential declarations appear to be similar to those previously disclosed to respondents, the declarations will be sealed in the absence of any objection by respondents.

It is accordingly hereby ORDERED that the court declines to sign petitioner's orders to show cause for leave to commence a proceeding for pre-action discovery against Commission for Art Recovery Inc.; UniCredit Group; Creditanstalt Bankverein-Bank Austria; Stroock, Stroock & Lavan; and Roman Pipko; and it is further

ORDERED that the declarations filed as Exhibits 3 and 4 to petitioner's Supplemental Order to Show Cause dated April 18, 2008 shall be filed under seal.

This constitutes the decision and order of the court.

Dated: New York, New York
May 8, 2008



MARCY FRIEDMAN, J.S.C.

FILED
NOV 25 2008
COUNTY CLERK'S OFFICE
NEW YORK