

**Khoury v Khoury**

2008 NY Slip Op 33203(U)

November 18, 2008

Supreme Court, Nassau County

Docket Number: 7596/08

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 22 NASSAU COUNTY**

**PRESENT:**

**Honorable Karen V. Murphy  
Justice of the Supreme Court**

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**CHARLES KHOURY,**

**Plaintiff(s),**

**-against-**

**AGNES M. KHOURY, TRUSTEE OF THE AGNES  
M. KHOURY LIVING TRUST AND DANIEL  
KHOURY AND AGNES KHOURY,  
INDIVIDUALLY,**

**Defendant(s).**

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Index No. 7596/08

Motion Submitted: 10/24/08

Motion Sequence: 001, 002

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....	XX
Answering Papers.....	X
Reply.....	
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Motion by plaintiff, Charles Khoury, by Order to Show Cause, for an Order pursuant to CPLR §§ 7107, 7112, 7109(a), 6301 and 6311, *inter alia*, granting plaintiff an immediate trial to determine his right to possession of certain "unique chattel" in the possession of and under the control of the defendants and enjoining and restraining the defendants from removing, transferring, selling, destroying or otherwise disposing of the "unique chattel" belonging to the plaintiff but in the possession of the defendants, is denied.

Cross motion by the defendants, Agnes M. Khoury, Trustee of the Agnes M. Khoury Living Trust and Daniel Khoury and Agnes Khoury individually, pursuant to CPLR § 3211(a)(7), of an Order of this Court, dismissing plaintiff's complaint is granted.

The defendant, Agnes M. Khoury Living Trust ("Trust") is the owner of a two family rental property located at 23 6<sup>th</sup> Street, Bayville, New York (the "Property"). Agnes M. Khoury is the Trustee of the Trust. She is also the mother of plaintiff, Charles Khoury, and of defendant, Daniel Khoury. Defendant, Daniel, manages the Property. In 2003, Charles was a tenant at one of the two apartments at the Property. While he was a tenant, he apparently stored his belongings in a closet in the hall, a common area of the Property. Plaintiff alleges that his property constitutes "unique chattel." Plaintiff claims that his belongings "includ[ed] but not limited to clothing and personal effects, as well as unique business records including tax returns and other business records of various businesses for which [he is] the sole owner and sole shareholder, including but not limited to American Millennium Management Co., Subway of Ridgewood, Inc., and Carib Amerique, Inc." (Plaintiff Aff., ¶9). In May 2003, plaintiff vacated the Property and moved to Antigua. Defendants have since rented the two apartments to third parties. Plaintiff admits that when he vacated the Property, he left his belongings and business records in the hallway closet "because the property was owned by my mother" (*Id.*, ¶11). In April 2008, five years after he moved out, plaintiff attempted to retrieve his belongings but was allegedly denied access to the Property. Plaintiff admittedly possesses the key to said closet.

Defendants, Agnes Khoury and Daniel Khoury, live in Sunrise, Florida. Other than for a brief period prior to 1996, Agnes never permanently lived in the building. While plaintiff alleges that due to a personal family falling out, his brother and mother have refused him access to the Property, in support of their cross motion to dismiss plaintiff's complaint, defendants, without admitting the truth of the allegations set forth in plaintiff's affidavit or in his complaint, agree to give the plaintiff access to the Property to obtain his personal property, on the condition that plaintiff deliver a general release and execute a stipulation of discontinuance of the action. Plaintiff has admittedly refused to do so based upon the belief that in the five years that he stored his personal property, the individual defendants have gained access to the closet and have removed some or all of his property in the closet. For this reason, he claims he needs to continue his lawsuit against the defendants to recover the property or to seek monetary damages.

Upon the instant motion by Order to Show Cause, plaintiff seeks relief under the provisions of CPLR Article 71 ("Recovery of Chattel"). Defendants, in turn, cross move to dismiss plaintiff's complaint. Generally, on an application for a seizure order, plaintiff is required to submit an affidavit, wherein he is required to "clearly identify" the chattel, set forth the chattel's value, show that he is entitled to it and that the defendant is wrongfully

withholding it ( *CPLR 7102(c)*). Plaintiff must also state whether an action has yet been commenced and, if so, its status. Essentially, all of the substantive elements of the replevin claim should be set forth in the affidavit. Here, plaintiff has failed to state the necessary requirements in his affidavit.

Plaintiff alleges in paragraph 9 of his affidavit, that in the stated closet at the Property, he stored various personal properties "including but not limited to clothing and personal effects, as well as unique business records including tax returns and other business records of various businesses" for which he is the sole owner and sole shareholder, including but not limited to American Millennium Management Co., Subway of Ridgewood, Inc., and Carib Amerique, Inc. Yet, other than identifying the three corporations, he has failed to specifically identify and describe all of his remaining personal property except by conclusory statements. The purpose of specific identification of the chattels in the affidavit is to afford the sheriff sufficient identification so as to enable him or her to locate the chattel described (*McCarthy v. Ockerman*, 154 N.Y. 565, 49 N.E. 153 [1898]). Further, as to the three corporations, plaintiff has failed to identify the records he is attempting to seize. An affidavit directing the sheriff to replevy "unique business records including tax returns and other business records of various businesses" without more particular description is defective (*Croker Fire Preventiion Corp. v. Jacobs*, 235 A.D. 216, 256 N.Y.S. 775 [1<sup>st</sup> Dept., 1932]). This Court finds that plaintiff's affidavit is not sufficiently clear so that the sheriff would be able to determine from it, with some degree of accuracy, what he or she was required to replevy (cf. *Hipsley v. Hipsley*, 186 Misc. 458, 60 N.Y.S.2d 10 [1<sup>st</sup> Dept., 1946]).

In addition, while plaintiff advances certain allegations in his affidavit that the individual defendants have refused him access to the property, in light of defendants' statements in their cross-motion permitting him access to the property to retrieve his personal belongings in exchange for a general release and stipulation of discontinuance, this Court finds that the plaintiff fails to submit to the Court any proof that the defendants are wrongfully withholding his property. For these reasons, plaintiff's request for an Order of Seizure of Chattel pursuant to CPLR § 7102 is denied and his second cause of action is dismissed.

Similarly, plaintiff's request for a preliminary injunction, pursuant to CPLR §§ 7109(a), 6301 and 6311, enjoining and restraining the defendants from removing, moving, selling, destroying or otherwise disposing of the "unique chattel" is also denied. To qualify for relief under CPLR § 7109(a), the plaintiff must establish the uniqueness of the chattel and must satisfy the usual requirements for a preliminary injunction: clear right to relief, balancing of the equities in plaintiff's favor, and irreparable harm in the absence of an injunction (*Danae Art International, Inc. v. Stallone*, 163 A.D.2d 81, 557 N.Y.S.2d 338 [1<sup>st</sup>

Dept., 1990]). Generally, "unique items" that will justify a temporary restraining order prohibiting sale may be heirlooms, works of art, patents and inventions, and particular shares of stock with peculiar investment features (*Morose v. Penzimer*, 58 Misc.2d 156, 295 N.Y.S.2d 125 [Sup. Ct. Oneida, 1968]). In this case, plaintiff has failed to show that the tax returns and "other business records" of his three corporations are in fact "unique chattels." Plaintiff fails to submit an affidavit from an attorney or accountant demonstrating that these sought after records are in fact unique and cannot be replaced. He also fails to state in his affidavit that he made an attempt to replace his alleged missing records. Tax returns can be replaced by requesting copies from the Department of Taxation and Finance or from the plaintiff's accountant. In light of the foregoing, this Court herewith denies plaintiff's request for a preliminary injunction pursuant to CPLR §§ 7109(a), 6301 and 6311 and his first cause of action is also dismissed.

Under these circumstances, plaintiff's third cause of action seeking an Order granting him an immediate trial pursuant to CPLR § 7107 to determine his right to possession of certain chattel is also denied. Similarly, under these circumstances, plaintiff's request for a declaratory judgment, pursuant to CPLR § 7109, that his personal property is "unique" is also denied. A cause of action for declaratory judgment must show a real actual bona fide controversy between the parties as to their jural relationship (*Red Robin Stores Inc. v. Rose*, 274 A.D. 462, 84 N.Y.S.2d 685 [1<sup>st</sup> Dept., 1948]). Having found that plaintiff's first and second causes of action are herewith dismissed, a controversy no longer exists between the parties that could sustain this fourth cause of action for a declaratory judgment.

Finally, plaintiff's fifth cause of action for monetary damages is also dismissed. The plaintiff alleges as his fifth cause of action that if the property he seeks has been destroyed, his monetary damages are not less than \$500,000. Yet, plaintiff fails to allege why he is entitled to monetary damages in the first place. Moreover, plaintiff fails to allege the identity and value of the "unique" chattels as required by CPLR § 7102[c][4] and therefore his fifth cause of action is dismissed.

The foregoing constitutes the Order of this Court.

Dated: November 18, 2008  
Mineola, N.Y.

*Karen V. Murphy*  
**ENTERED** J.C.C.  
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