

**Barber Bros. Jewelry Mfg., Inc. v Sotheby's Inc.**

2009 NY Slip Op 30484(U)

March 4, 2009

Supreme Court, New York County

Docket Number: 600190/08

Judge: Walter B. Tolub

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

PRESENT: WALTER B. TOLUB  
*Justice*

PART 15

BARBER BROS. JEWELRY MFG. INC.

INDEX NO. 600190/2008

Plaintiff,

- v -

MOTION DATE 9/19/08

SOTHEBY'S, INC.,

MOTION SEQ. NO. 001

Defendants.

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 this motion is decided in accordance with the accompanying memorandum decision.

**FILED**

MAR 05 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 3/4/06

WALTER B. TOLUB, 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: IAS PART 15

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BARBER BROS. JEWELRY MFG., INC.,

Plaintiff,

-against-

SOTHEBY'S, INC.

Defendant.

-----x

Index No. 600190/08

Mtn. Sec. 001

**FILED**

MAY 05 2009

COURT OFFICE  
NEW YORK

**WALTER B. TOLUB, J.:**

This action arises in connection with a 1993 involuntary bankruptcy proceeding against Mary Theresa Ramirez Rodriguez ("Ms. Rodriguez") of Houston, Texas and her dealings with plaintiff Barber Bros. Jewelry Mfg., Inc. ("Barber Bros." or "plaintiff"), a wholesale/retail jeweler.

Background

Plaintiff claims that in 1992 and 1993, it consigned numerous pieces of jewelry ("the jewelry") to Ms. Rodriguez. Plaintiff never filed any UCC statements or other documents reflecting that it held a continued security interest in any of the consigned jewelry, and when Ms. Rodriguez was forced into involuntary bankruptcy in 1993 (see, In re: Mary Teresa Ramirez Rodriguez, et al., Case No 93-43722-H-5-7) [US Bankruptcy Ct. So. Dist. Texas, [Houston, Tx]], the jewelry consigned to Ms. Rodriguez was deemed, by the bankruptcy court, to be part of the bankruptcy Estate ("the Estate").

The Estate, which plaintiff claims now contained its' consigned jewelry, was turned over to the bankruptcy Trustee, Ben B. Floyd, Esq. ("the Trustee") (see, Adelman Affirmation, Exhibit A). In early 2004, at the direction of the Bankruptcy Court, the Trustee entered into an agreement with defendant Sotheby's ("Sotheby's") wherein Sotheby's would conduct two auctions of the Estate property (Adelman Affirmation, Exhibits A, B, C). Pursuant to the agreement, any items remaining unsold would be returned to the Trustee, as consignor on behalf of the Estate (Adelman Affirmation, Exhibit C).

Sotheby's conducted two auctions where it offered plaintiff's consigned jewelry for sale: Auction No. 1466, held on April 11-12, 1994, and Auction No. 1468, held on June 8, 1994 (id.). Many of the Estate items were sold at these auctions, and the proceeds, less Sotheby's commissions, were transferred to the Trustee in accordance with the agreement between the Trustee and Sotheby's, and the order of the Bankruptcy Court.

In accordance with the terms of the agreement, Sotheby's continued to hold the remaining unsold Estate lots. On August 5, 1994, Sotheby's received a letter from the Trustee authorizing the release of 34 of the lots ("the 34 lots") retained by Sotheby's to Barber Bros. pursuant to a "Compromise Settlement Agreement" between the Trustee and Barber Bros. (Adelman Affirmation, Exhibit F). However, before Sotheby's released the

34 lots as requested, Sotheby's was served with a Notice of Levy (the "Notice of Levy") from the Internal Revenue Service ("the IRS"). The October 20, 1994 Notice of Levy requested that Sotheby's either retain the Jewelry, or turn it over to the IRS as part of the satisfaction of \$737,431.03 in back taxes owed by plaintiff Barber Bros. (Adelman Affirmation, Exhibit G).<sup>1</sup>

Sotheby's retained the jewelry for nearly two years following the IRS Notice of Levy. In April of 1997, Sotheby's claims that it released 53 lots of Estate property, including all of the jewelry, to the bankruptcy Trustee (Adelman Affirmation, Exhibits H, I). In May of 2005, the IRS Notice of Levy expired. In June of 2007, some two years later, plaintiff contacted Sotheby's seeking return of the jewelry.

When plaintiff discovered that Sotheby's was unable to return the jewelry, this action was commenced. Initially comprised of four causes of action, plaintiff sought relief under theories of negligence (first and second causes of action), conversion (third cause of action), and failure to return property (fourth cause of action). In July of 2008, plaintiff amended its complaint so as to assert three causes of action claiming negligence, conversion, and breach of contract. By this

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<sup>1</sup> Plaintiff, it appears, had protested the IRS tax assessment in January of 1994. However, by October of 1994, the IRS had deemed plaintiff to be insolvent and with collection of back taxes endangered, issued the Notice of Levy (Adelman Affirmation, Exhibit G).

motion, defendant Sotheby's moves to dismiss plaintiff's complaint<sup>2</sup> pursuant to CPLR 3211.

Discussion

As with any motion to dismiss, the only inquiry to be made by the court at this juncture is whether plaintiffs' facts, as alleged, "fit within any cognizable legal theory" upon which plaintiff may succeed (Leon v. Martinez, 84 NY2d 83, 87-88 [1994]; Campaign For Fiscal Equity, Inc. v. State of New York, 86 NY2d 307, 318 [1995]. See generally, Barr, Altman, Lipshie, and Gerstman; New York Civil Practice Before Trial [James Publishing 2008] §36.01 et seq.).

The gravamen of plaintiff's complaint focuses upon the contention that defendant Sotheby's somehow owed plaintiff a duty to protect its property. In fact, plaintiff's entire opposition is predicated upon the contention that the relationship as between plaintiff and Sotheby's is that of a bailor-bailee. This is not a correct characterization of their relationship.

A bailment, in simplest form, refers to the delivery of one person's property to another for a particular purpose with the understanding that once the purpose is fulfilled, the property is to be redelivered to the person who delivered it in the first

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<sup>2</sup> Noting that the amended complaint was served after the instant motion was made, but prior to its full submission, defendant's motion for dismissal is deemed to include both plaintiff's original and amended complaint.

instance. Although most commonly created by contractual agreement, a contractual relationship between parties is not required to create a bailment (Foulke v. New York Consolidated Railroad Co. 228 NY 269; Pivar v. Graduate School of Figurative Art of the New York Academy of Art, 290 AD2d 212 [1<sup>st</sup> Dept 2002]). What is required, is lawful possession of the property belonging to another coupled with a duty to account for that property.

The problem in this case however, is that plaintiff, despite strenuous assertions to the contrary, is not, and never was, a bailee. All of the jewelry consigned by plaintiff to Ms. Rodriguez in 1992 and 1993 was deemed by order of the United States Bankruptcy Court in 1994 as part of the bankruptcy Estate. That Estate was administered not by plaintiff, but by a bankruptcy Trustee, who, pursuant to the directive of the Bankruptcy Court, entered into a contractual agreement with defendant Sotheby's, ultimately allowing for the auction of a significant portion of the Estate. Stated differently, while there indeed exists a bailor-bailee relationship in this case, that relationship lies solely as between the bankruptcy Trustee and defendant Sotheby's. Plaintiff's claim that three documents: a 1994 letter from plaintiff's Houston, Texas attorney to Sotheby's "not objecting to the sale of certain jewelry" (Barber Affidavit, Exhibit A); the August 5, 1994 letter from the

bankruptcy Trustee to Sotheby's directing the release of the 34 lots of jewelry to Barber Brothers (Adelman Affidavit, Exhibit F); and the October 1994 Notice of Levy from the IRS (Adelman Affidavit, Exhibit D, Barber affidavit, Exhibit C), act to somehow change their status is unavailing. The above-mentioned documents are neither made on behalf of, or signed by Sotheby's, and as such, do not modify the consignment agreement entered into as between the bankruptcy Trustee and defendant Sotheby's (see, General Obligations Law 15-301). Since there was no contractual obligation as between Barber Bros. and Sotheby's, plaintiff's claims for breach of contract fail and must be dismissed.

Likewise, absent a filed security interest for the jewelry, plaintiff's claims for negligence and conversion as against Sotheby's also fail. As discussed *supra*, the consignment contract involved in this case was entered into only as between the bankruptcy Trustee and Sotheby's. As such, the only party capable of advancing a claim of negligence and/or conversion is the bankruptcy Trustee.<sup>3</sup>

This court does not doubt that plaintiff may indeed have suffered damages as a result of the underlying bankruptcy

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<sup>3</sup> The court further notes that even if plaintiff could properly advance a claim for conversion, the claim, governed by a three year statute of limitations, would have expired in 2001, three years after the jewelry was returned to the Trustee. (see, CPLR 214(3); Feld v. Feld, 279 AD2d 393 [1<sup>st</sup> Dept 2001] *lv to app. den.*, 96 NY2d 717 [2001]).

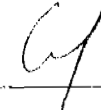
proceedings from which this case arises. However, inasmuch as plaintiff has failed to demonstrate a cognizable legal theory upon which they may be able to succeed (see, Leon v. Martinez, 84 NY2d 83 [1994]; Campaign For Fiscal Equity, Inc. v. State of New York, 86 NY2d 307 [1995]) the claims advanced against defendant Sotheby's are dismissed. Accordingly, it is

ORDERED that defendant's motion to dismiss both plaintiff's amended and original complaint is granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 3/4/09

  
\_\_\_\_\_  
HON. WALTER B. TOLUB, J.S.C.

**FILED**  
MAR 05 2009  
CLERK OF THE COURT  
NEW YORK

(COMM) E 4 3000

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

PRESENT: \_\_\_\_\_

PART \_\_\_\_\_

Index Number : 600190/2008

BARBER BROS. JEWELRY MFG.,

vs

SOTHEBY'S, INC.

Sequence Number : 001

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

NON-COMMERCIAL PART.

RICHARD B. LOWE III

Dated: \_\_\_\_\_

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):