

Galeria Rienzo, Ltd. v Lobacz

2009 NY Slip Op 31252(U)

June 4, 2009

Supreme Court, New York County

Docket Number: 111701-06

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: _____

PART 10

Justice

Julia Rienzo Ltd

INDEX NO.

111701/06

MOTION DATE

- v -

MOTION SEQ. NO.

002

MOTION CAL. NO.

Frank Lobacz MD

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

Summary JM

§3212

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 THE ACCOMPANYING MEMORANDUM DECISION.

FILED

JUN 11 2009

COUNTY CLERK'S OFFICE
NEW YORK

JUN 04 2009

Dated: June 4, 2009

JJG
HON. JUDITH J. GISCHE 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 10**

-----X
GALERIA RIENZO, LTD.,

Plaintiff (s),
-against-

FRANK LOBACZ, M.D.,
Defendant (s).

DECISION/ ORDER
Index No.: 111701-06
Seq. No.: 002

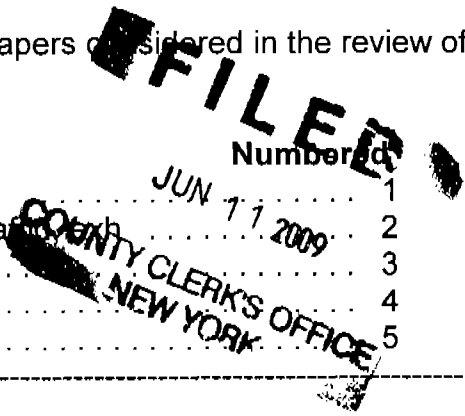
PRESENT:
Hon. Judith J. Gische
J.S.C.

-----X

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers

- Pltf n/m (§3212) w/AW affirm, RR affid, exhs 1
- Amended n/m (sep back), w/AW affirm, RR affid, exhs 2
- Def opp w/FML affid in opp, exhs 3
- Pltf reply w/AW affirm, exh 4
- Pltf's exhs (sep bound vol) 5



Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by plaintiff to recover paintings it claims were converted or otherwise wrongfully retained by defendant. Defendant has answered and asserted a counterclaim. He seeks the recovery of valuable gold coins he contends he delivered to plaintiff as collateral for one of the paintings that is the subject of the parties' dispute. Plaintiff filed the note of issue on April 23, 2009. This motion was brought before the note of issue was filed, but after issue was joined. The motion is opposed by defendant who argues there are triable issues of fact.

Since the motion is timely, it will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). The court's decision is as follows:

Arguments

Plaintiff Galeria Rienzo Ltd. is an art gallery ("gallery"). Robert Rienzo is plaintiff's principal ("Rienzo"). Defendant, Frank Lobacz, M.D. ("Lobacz") is a collector of works by the artist Bernard Buffet. Plaintiff contends the gallery and Lobacz entered into a consignment for two oil paintings, hereinafter called the "rose" and the "sailboat," both by Buffet. The consignment agreement for the rose is dated December 18, 2001 and is the amount of \$80,000. The consignment agreement for the boat is dated December 11, 2002 and in the amount of \$100,000.

The parties disagree whether Lobacz has fully paid for the rose painting. According to Rienzo, Lobacz paid \$40,000, but still owes the balance (\$40,000) painting. The parties also disagree whether Lobacz made any payments at all for the boat painting. According to Rienzo, the full amount is owed and unpaid for that painting. The gallery contends that since Lobacz breached his agreement with the gallery, ownership of the paintings did not pass from plaintiff to defendant, and therefore, the gallery is the rightful owner of both of them. The gallery seeks the return of the paintings, based upon claims of conversion and breach of contract. Lobacz has asserted a counterclaim for the return of certain coins, more fully discussed later in this decision.

The parties were deposed. Lobacz testified at his ("EBT") that he had a longstanding business relationship with Rienzo and it was Rienzo's practice to deliver paintings to him on consignment. As Lobacz made payments on the consigned works of art, Rienzo usually noted the payments on the face of the consignment agreement, if the payment was by check. Rienzo did not always give him a receipt for payments,

however, and according to Lobacz, he sometimes made payments by cash or valuable gold coins. According to Lobacz, he paid \$40,000 for the rose by checks, which Rienzo noted on the face of the agreement. Lobacz also has copies of the cancelled checks. However, Lobacz then paid the remaining balance by gold coins which Rienzo did not provide him a receipt for. Lobacz has provided a copy of an appraisal dated November 14, 2001, showing he purchased 100 St. Gardens \$20 gold coins from a non-party, and that those gold coins had an appraised value of \$50,000.

As for the boat painting, Lobacz contends he paid \$10,000 by cash and then delivered 250 St. Gardens \$20 coins valued at \$125,000. The coins were delivered as collateral. Lobacz has provided a copy of the appraisal for these coins as well.

Lobacz's office manager ("Buckley") was deposed. She testified that Lobacz maintained a cashbox where payments by patients were kept. According to Buckley, Rienzo came to their office a few times to collect payments. Some of these visits were during 2001, 2002 an/or 2003. She was instructed by Lobacz to give Rienzo cash and each time she gave Rienzo at least \$10,000.

Since the gallery denies that Lobacz paid for either painting in full, the gallery contends ownership never passed from plaintiff to the defendant, and therefore defendant has wrongfully retained both paintings. The gallery relies upon the terms of the consignment agreements. In relevant terms are as follows:

"2. Title to all merchandise will pass only after it has been paid in full. A check will constitute payment only after it has cleared through normal banking channels."

Both sides acknowledge that there is yet another document dated December 15, 2002. The document bears the legend "received for consignment." The artwork

identified is the boat and the amount listed is \$100,000. The document contains the following statement:

"The above painting is not for sale and only on loan to Galerie Rienzo for the Paris exhibition on the flowers of the 1990's. The painting will be returned by February 12, 2003 and all charges are covered by Galerie Rienzo. The above painting is fully insured for the full amount of \$100,000 from time of receipt [up until] the time of return to the above address. Insurance is covered by [Lloyds] of London though Frank Crystal & Co., 40 Broad Street, N.Y.

x____/s/____ 12/15/02
received by date
Robert Rienzo

x____/s/____ 12/15/02
released by date
Frank Lobacz

Plaintiff contends this document has no particular significance in terms of proof of ownership of the rose. Defendant, however, contends this document is meaningful, in that it proves he owns the rose, but agreed to lend or consign it back to the gallery for a limited purpose. Furthermore, defendant argues that it is illogical for the gallery to have returned the painting to him, unless he owned it.

Plaintiff also asks that if the court denies its motion for summary judgment, that defendant be required to place both paintings in a recognized bonded warehouse because of concerns over how it is being kept. Plaintiff is also concerned that the paintings are under insured. Consequently, the gallery asks that defendant be required to obtain insurance in an increased amount.

Finally, plaintiff argues that even if it is not entitled to the return of either painting, the gallery is entitled to payment of \$40,000 for the rose and \$100,000 for the boat, with interest from December 21, 2002.

Discussion

The gallery's primary argument is that Lobacz, not plaintiff, has the burden of proving he paid for the consigned paintings and since he does not have any tangible proof of payment, like a receipt or notation on the consignment agreement, Lobacz cannot prove that he is the rightful owner of either painting. On a motion for summary judgment, however, the proponent has the initial burden of making a prima facie showing of entitlement to judgment, as a matter of law, by tendering sufficient evidence to eliminate any material issues of fact from the case. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Only if this burden is met by the proponent, does it then shift to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). The gallery has not proved it is the rightful owner of either painting, i.e. that title did not pass to Lobacz and for the reasons that follow, plaintiff's motion must be denied in its totality.

Although a receipt is proof of payment, and may be the easiest and best way to prove payment was made and received, payment (and acceptance) can also be proved in other ways.

The consignment agreement does not require that the gallery give the purchaser/consignee a receipt every time the consignee makes a payment. Nor does the consignment agreement require that consignee present receipts in order to effectuate the transfer of title to paintings to him or her.

Even assuming Rienzo had an established custom and practice of giving consignees receipts and making notations on the consignment agreement once the

balance was paid in full, there is no evidence preferred by plaintiff that this is the only way title would be transferred to a consignee. In any event, Lobacz has come forward with a number of instances where Rienzo received payment from him - cash or coins- but he (Lobacz) did not receive any proof of payment, like a receipt.

Although plaintiff engages in lengthy arguments about defendant's involvement in a tax avoidance scheme, this is not evidence in admissible form that the gallery, not Lobacz is the rightful owner of either painting. There are many triable issues of fact and credibility. The court cannot resolve issues of credibility on a flat record; it is for the jury to weigh the evidence and draw legitimate inferences therefrom. S.J. Capelin Assocs. v Globe Mfg. Corp., 34 NY2d 338 (1974).

The court denies the motion for increased insurance coverage or to place the artwork in a bonded storage facility. Defendant argues that plaintiff examined the artwork before this motion was brought and raised no objections about how they are being maintained. Rienzo raises no claims now that the paintings are in a deteriorating condition or not being properly cared for. Other arguments that the insurance Lobacz has is "totally inadequate" rest on convoluted mathematical analysis of Lobacz's net worth and ominous claims that his net worth has "deteriorated due to recent litigation." None of these arguments persuade the court that it must intervene in the manner proposed. Lobacz has indicated his willingness to separately insure the paintings from his other personal property. Should he do so, he is to notify plaintiff within Ten (10) Days of having secured such policy.

Conclusion

Plaintiff's motion for summary judgment and other relief is denied in its entirety.

This case is ready for trial. Plaintiff shall serve a copy of this decision and order on the Office of Trial Support so it can be scheduled.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
June 4, 2009

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED
JUN 11 2009
COUNTY CLERK'S OFFICE
NEW YORK