Nussberg v Tatintsian
2010 NY Slip Op 33876(U)
March 12, 2010
Supreme Court, New York County
Docket Number: 650741/09
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ~~Jon Gammerman~~ Kornreich ~~JSC~~ Justice **PART** ~~27~~ 54

Lew Nussberg a/k/a Lev Nussberg

-v-

Gary Tatintsian a/k/a Garri Tatintsian, Gary Tatintsian Gallery, Inc., and Viktoria Pukemova

INDEX NO. 650741/09

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits _____	3,4
Replying Affidavits _____	5,6

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision; and it is further ORDered that the parties are to appear in Pt 54 for a preliminary conf. on April 20, 2010 at 11 a.m.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/12/10

JUSTICE SHIRLEY WERNER KORNREICH

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

---------- X

LEW NUSSBERG, a/k/a, LEV NUSSBERG,

Plaintiffs,

Index No.: 105792/07
Decision & Order

-against-

GARY TATINTSIAN, a/k/a, GARRI TATINTSIAN, GARY TATINTSIAN GALLERY, INC. & VIKTORIA PUKEMOVA,

Defendants.

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KORNREICH, SHIRLEY WERNER,

This action arises from the sale and consignment of artwork by plaintiff to defendants. Plaintiff now seeks an injunction for the return of 108 works of art, the subjects of his Third and Sixth causes of action alleging conversion, or to enjoin defendants from selling or transferring the art. Alternatively, plaintiff asks for an attachment of an apartment and artwork owned by defendant Tatintsian and/or artwork in the possession of Garri Tatintsian Gallery, Inc. (the Gallery).

Facts

Mr. Tatintsian is a gallery owner, who is the proprietor of the Gallery, a New York Corporation located at 119 West 22nd St., New York City, and a second art gallery in Russia. Mr. Tatintsian, a resident alien, lives and works at that address, as does defendant Pekemova, the Gallery's director.

Plaintiff avers the following. He is an art historian and collector, specializing in the art of three Russian Suprematists – Malevich, Suetin and Chashnik. Three separate transactions took

place between plaintiff and defendants. The first involved an April 2006 sale of a number of works of art. This transaction is not the subject of the instant application. The second transaction involved 2007 consignment agreements for 11Malevich drawings, totaling $752,000. Each agreement was signed by plaintiff and Mr. Tatintsian and expired in April 2009. The drawings neither were returned nor paid for, and plaintiff demanded their return. They were not returned.

The third transaction occurred in May 2009, and according to plaintiff, involved a coerced contract to sell 97 [1] pieces of art for $2,600,000, a price substantially below their market value.[2] Mr. Tatintsian altered the sales agreement to a consignment agreement and changed the payment terms after it was signed by plaintiff. Plaintiff further avers that, in a July 14, 2009 email, Ms. Pukemova objected to the quality of the works and demanded additional art work. She also stated that the 97 works of art were in Switzerland. Plaintiff avers that he did not authorize the removal of these pieces from New York. He argues that the third agreement is void due to, *inter alia*, coercion and both Mr. Tatintsian's alteration of the contract and defendants' rejection letters. Copies of the 12 agreements and the email, in Russian and in English translation, are annexed.

Mr. Tatintsian opposes the motion. He admits that he is the owner and chief executive officer of the Gallery, a Russian citizen and a legal permanent resident of New York. He claims that he overpaid plaintiff by $97,000 for the first transaction and that portions of the payments

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[1] It is unclear from the papers of the parties whether 97 or 98 works of art were involved.

[2] Plaintiff's counsel avers these works are valued at $5,600,000.

were made in goods and cash to plaintiff, his wife and children, at plaintiff's request. These allegations, allegedly, are the subject of a counterclaim.

Mr. Tatintsian further avers that the 11 Malevich drawings were part of the group of 97 art works, that 27 of the 97 art works were not of the quality the Gallery wanted and that, as a result, plaintiff agreed to a consignment rather than a sales agreement and to later deliver 8 promised previously selected works as well as 9 additional works of art. Mr. Tatintsian alleges that only 6 of the 8 works were delivered and Mr. Tatintsian, therefore, altered the May 2009 agreement. Letters from Mr. Tatintsian's attorney and from Ms. Pukemova demanding delivery of the missing art works, were sent to plaintiff. These letters are annexed to plaintiff's motion papers. Plaintiff never delivered these demanded works of art. Mr. Tatintsian avers that the Gallery delivered the pieces in its possession to its customer, who "wants to substantially reduce the price due to this failure." This, allegedly, is the basis for defendants' breach of contract counterclaim. Finally, Mr. Tatintsian avers that "defendants are unable to return the works Nussberg is demanding because they all are in the hands of the customer in Russia." Tatintsian aff., para. 30. *Conclusion of Law*

Preliminary Injunction

A preliminary injunction should be granted where a movant demonstrates: a likelihood of ultimate success on the merits; that irreparable injury would result in the absence of preliminary injunctive relief; and that a balancing of the equities to effect substantial justice and to preserve the status quo warrants the grant of this extraordinary relief. *Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 (1990); *Pilgreen v 91 Fifth Ave. Corp.*, 91 AD2d 565, 567 (1st Dept 1982), *appeal dismissed*, 58 NY2d 1113 (1983). Plaintiff has met this burden.

To begin, conversion requires a showing of legal ownership or superior right of possession to identifiable property and defendant's unauthorized dominion over the property, to the exclusion of the plaintiff's rights. *NY Medscan, LLC v JC-Duggan*, 40 AD3d 536 (1st Dept 2007); *AMF Inc. v Algo Distributors, Ltd.*, 48 AD2d 352, 356-7(2d Dept 1975). The agreements and affidavits presented to the court make clear that the 11 Malevich drawings were the subject of consignment contracts. Defendants contend that the third transaction also was a consignment agreement. Consequently, all parties agree that title to these art works never passed to defendants. The art works belonged to plaintiff. Moreover, defendants admit that they neither returned the art works nor paid for them despite plaintiff's demands. Plaintiff has demonstrated a *prima facie* case of conversion and a likelihood of success on his conversion claims.

Additionally, the property at issue here is valuable works of art created by deceased artists. The art is irreplaceable. Moreover, the art was transported out of New York by defendants, to Russia. Mr. Tatintsian is a Russian citizen, who owns an art gallery in Russia and who travels to and does business there. Irreparable injury may well ensue if Mr. Tatintsian is not ordered to return the art to New York and, thereafter, not to transfer sell or alienate it. A balancing of the equities favors this relief.

Attachment

> "'Attachment is a provisional remedy having as its object securing a debt by preliminary levy upon property of the debtor to conserve it for eventual execution. It is strictly a creature of statute and, therefore, because of its harsh nature and, it being in derogation of the common law, the courts have strictly construed the statute creating it in favor of those against whom it may be employed.'". [citations omitted]

Elton Leather Corp. v First General Resources Co., 138 AD2d 132, 135 (1st Dep't 1988). CPLR 6201(1) provides for an order of attachment where a plaintiff would be entitled to, "in whole or

in part," a money judgment against one or more of the defendants, when "the defendant is a nondomiciliary residing without the state, or is a foreign corporation not authorized to do business within the state."

Plaintiff, in part, seeks money damages here. However, the Gallery is a domestic corporation doing business within the state. Mr. Tatintsian is a nondomiciliary residing within the state. *See Laufer v Hauge*, 140 AD2d 671, 672 (2d Dept), *appeal dismissed* 72 NY2d 1041 (1988)(domicile is place which one intends as his permanent home); *Strater v Strater*, 20 AD2d 889, 890 (1st Dept), *appeal dismissed*, 14 NY2d 874 (1964)(for attachment purposes, residence "'means the actual abode of the defendant when the warrant is granted.'"). Hence, CPLR 6301 does not sanction attachment of defendants' property. Accordingly, it is

ORDERED that plaintiff's motion for a preliminary injunction is granted and Mr. Tatintsian and Gary Tatintsian Gallery, Inc. are directed to return the art works which are the subject of this action to New York within 30 days of service of this order with notice of entry and not to sell, transfer or alienate them during the pendency of this action; and it is further

ORDERED that plaintiff's motion for an order of attachment is denied.

Dated: March 12, 2010

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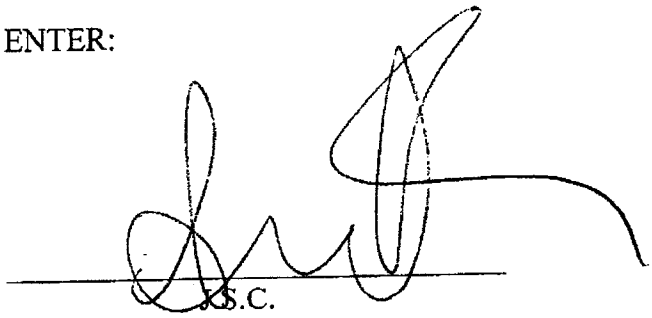

J.S.C.