

**Lyon-Wall v Cooper**

2011 NY Slip Op 30162(U)

January 19, 2011

Supreme Court, New York County

Docket Number: 103061/10

Judge: Eileen A. Rakower

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

HON. EILEEN A. RAKOWER

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

PART 15

Index Number : 103061/2010

LYONWALL, SCOTT

vs

COOPER, JAMES

Sequence Number : 003

STRIKE A PLEADING

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

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

MOTION SEQ. NO. 1

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

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

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

Answering Affidavits -- Exhibits \_\_\_\_\_

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

PAPERS NUMBERED
<u>1</u>
<u>2, 3</u>
<u>4, 5</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 1/20/11

  
HON. EILEEN A. RAKOWER

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 15

-----X  
SCOTT LYON-WALL and ARIADNE CORPORATION  
d/b/a LYON-WALL EDITIONS,

Index No.  
103061/10

Plaintiffs,

**DECISION  
AND ORDER**

- against -

JAMES COOPER,

Mot. Seq.  
003

Defendant.

-----X  
HON. EILEEN A. RAKOWER

According to the complaint Scott Lyon-Wall is an independent art publisher, exhibitor and investor, and Ariadne Corporation is Lyon-Wall's sole licensee of the rights to utilize works of art owned by him. Lyon-Wall and Ariadne (collectively "Plaintiff") bring this action asserting several causes of action against James Cooper ("Defendant") pertaining to the latter's alleged mishandling and wrongful withholding of three fragile and valuable pieces of fine art by an artist named Guillermo Kuitca ("the Artwork"). Plaintiff states that he contracted with Defendant in or around July of 2009 to build nineteen crates to store and transport the Artwork at a cost of \$33,000. Plaintiff states that he subsequently discovered that the crates thus far produced by Defendant (through subcontractor Trimaxion Fine Arts, LLC) were defective. Plaintiff thereafter requested that Defendant repair all nineteen of the crates to remedy the defect. Defendant agreed to this request; however he failed to make the needed repairs.

Plaintiff alleges that, in light of Defendant's failure to make the necessary repairs as agreed, he demanded that Trimaxion, Defendant's subcontractor, return the Artwork to Plaintiff in November of 2009. However, Plaintiff alleges that Defendant caused Trimaxion to withhold the Artwork under the "false pretexts" that Plaintiff did not have title to the work; and that Plaintiff has failed to pay Defendant for his work. Plaintiff commenced this action in March 2009.

**UNFILED JUDGMENT**  
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Presently before the court is a motion by Plaintiff for an order striking Defendant's answer or precluding him from offering evidence pursuant to CPLR §3126 based upon Defendant's alleged failure to comply with discovery. Alternatively, Plaintiff seeks an order compelling production of the sought-after discovery pursuant to CPLR §3124 and sanctioning Defendant. Plaintiff provides an attorney's affirmation. Plaintiff states that he served his notice for discovery and inspection, first set of interrogatories, and notice to take Defendant's deposition on June 1, 2010. Plaintiff annexes copies of said demands as exhibits to his motion. Plaintiff states that Defendant and his counsel have "repeatedly refused to respond" to the demands.

Defendant opposes the motion and cross-moves for an order (1) granting summary judgment on his first and second counterclaims (breach of contract and account stated, respectively); (2) striking the complaint; (3) granting sanctions; and (4) directing Plaintiff to post a bond. Defendant provides an affidavit, an attorney's affirmation, and a memorandum of law in support of its cross-motion. In his affidavit, Defendant states that he was contacted by Plaintiff by telephone to discuss the construction of a secure and archival wooden storage and shipping crate to hold a large and delicate image on silk. Defendant annexes copies of e-mail correspondence between him and Plaintiff. He also annexes copies of eight separate invoices. Defendant states that the first five invoices were accepted by Plaintiff without objection, while the final three "were prepared after the business relationship between the parties became adversarial."

Defendant states that, in June 2009, he and Plaintiff discussed a general approach to the project, Defendant "proposed a conceptual solution," set forth his design fee of \$60/hour, and Plaintiff budgeted \$3,000 for research and development. On July 1, 2009, Defendant's first invoice in the amount of \$4,000.00 was sent to Plaintiff, and was paid by Plaintiff on July 14, 2009. Two additional invoices were sent to Plaintiff on August 1, 2009 and August 5, 2009, and said invoices were paid by Plaintiff on August 10, 2009. Defendant states that during this period, Plaintiff expressed his satisfaction with Defendant's work, as evidenced by e-mails between the two, including, for example, a September 17, 2009 e-mail wherein Plaintiff tells Defendant, "The crate design is perfect! I am very pleased."

Defendant states that his fourth invoice (dated September 22, 2009), seeking payment of \$22,631.00, was only partially paid by Plaintiff (in the amount of

\$8,774) on September 30, 2009. Plaintiff did not voice any objection to the contents of the invoice or state when the balance would be paid. Defendant sent Plaintiff another invoice dated September 30, 2009, which simply restated the remaining balance from the prior invoice (\$13,857.00). Defendant followed with an e-mail on October 2, 2009 inquiring as to payment of the invoice. Plaintiff replied on the same day that he would "receive the balance \$13,857 immediately upon completion of the project."

On October 6, 2009, Plaintiff e-mailed Defendant claiming that there was a problem with the strength of the crate. The following day, Plaintiff sent Defendant an e-mail instructing him to "cease all work ... immediately."

On October 15, 2009, Defendant advised Plaintiff that the fifteen remaining crates were completed and ready for pickup, along with three previously fully loaded crates. Defendant further stated that Plaintiff would be required to pay the prior invoice plus \$1,080 in packing and release charges. Plaintiff did not reply.

From mid-October to mid-November of 2009, Plaintiff (through legal counsel) and Defendant discussed options for going forward on the project. Defendant states that he agreed to replace the hinges on his crates with bolts (Plaintiff asserted that the use of bolts is industry standard and better protects the crate from the kind of pressure typically exerted upon crates while in transit). In exchange, Plaintiff would pay the balance due (\$14,937), and the parties would exchange general releases.

Defendant states that he made the agreed-upon changes and sent Plaintiff an invoice on November 20, 2009 for \$14,937. Defendant states that he never received any reply from Plaintiff. Defendant prepared a seventh invoice on January 4, 2010 in the amount of \$17,277, reflecting charges for changing the crates' hinges to bolts in November 2009, plus the balance from the prior invoice.

On January 7, 2010, Defendant states that he arranged that the Artwork be stored in an art storage facility in New Jersey. Defendant asserts that he rightfully retains possession of the artwork pursuant to an artisan's lien under New York Lien Law §180.

The parties appeared before this court on July 29, 2010 on a motion by Defendant for a protective order in response to Plaintiff's demand to conduct a

physical inspection of the Artwork. There, it was agreed by the parties that an inspection would take place at a mutually agreeable time and location. The parties appeared before the court a week later to confirm that the inspection had taken place as agreed, and the motion was deemed moot.

Defendant alleges that, On August 5, 2010, the facility which was storing the artwork for the inspection refused to release the Artwork to the trucking company that Defendant had hired to pick it up to return it to his place of storage. The facility stated that it was acting under the orders of the Plaintiff. Defendant argues that this "seizure" of the Artwork, which is lawfully in his custody pursuant to the Lien Law is improper and amounts to unethical conduct on the part of Plaintiff's counsel. Defendant further contends that as a result of the foregoing, Plaintiff should be ordered to post a bond of twice the judgment Defendant seeks.

As for outstanding discovery, Defendant states that Plaintiff has failed to respond to his prior demand for verified bill of particulars, document request, and notice to take Plaintiff's deposition - all dated May 18, 2010.

In further support of its own motion and in opposition to the cross-motion, Plaintiff submits an attorney's affirmation and an affidavit from Scott Lyon-Wall. Regarding the alleged failure to return the Artwork to Defendant after the agreed-upon inspection, Plaintiff states that it is merely his intention to ensure that the Artwork is stored in a climate-controlled art storage facility. Plaintiff annexes an e-mail dated August 10, 2010 wherein he states that

[Plaintiff] has no intention of withholding his artwork. Rather, he is concerned about the manner in which the artwork is being kept. He has simply asked that, rather than sending it back to a warehouse in New Jersey, [Defendant] should store it at a CLIMATE CONTROLLED ART STORAGE ACCREDITED FACILITY due to the sensitive nature of the material of the artwork, namely silk .... [Plaintiff] is therefore requesting that [Defendant] store it at Christie's Fine Art Services (CFAS) in Brooklyn, NY ....

Plaintiff claims that Defendant's request for sanctions and threat to file a disciplinary grievance are frivolous, and that it is Defendant who has engaged in

sanctionable conduct. As for Defendant's discovery requests, Plaintiff states that "we never received any such documents from defendant's counsel in order to respond to them."

Plaintiff argues, in response to Defendant's motion for summary judgment, that issues of fact preclude any such award. In the Lyon-Wall affidavit, Plaintiff states that he agreed to resolve the matter by paying Cooper's outstanding invoice on the condition that the hinges on the crates be changed to bolts and that Trimaxion bear the costs of shipping the crates to the museum where they were to be displayed. Plaintiff states that, although Defendant replaced the hinges with bolts, Trimaxion refused to bear the costs of shipping and thus "the terms of the settlement were never finalized." Plaintiff also argues that "[t]here is a serious issue as to whether [Defendant's] work was conform to industry standard [sic]," and thus summary judgment is improper.

Pursuant to CPLR §3126, a court may impose sanctions when a party willfully fails to disclose information which the court finds ought to have been disclosed.

Lien Law §180 provides:

A person who makes, alters, repairs or performs work or services of any nature and description upon, or in any way enhances the value of an article of personal property, at the request or with the consent of the owner, has a lien on such article, while lawfully in possession thereof, for his reasonable charges for the work done and materials furnished, and may retain possession thereof until such charges are paid.

Plaintiff sought inspection of the artwork in the course of discovery for the stated purpose of ensuring the continued integrity of the artwork. Defendant agreed to Plaintiff's request that such inspection take place in a neutral venue, and the artwork was moved accordingly. Defendant did not waive his lien. The inspection took place; however, Defendant was unable to regain possession of the artwork. Instead, the "neutral" venue refused to release it upon orders from Plaintiff. It is undisputed that Plaintiff presently enjoys authority and control over the artwork. The Court cannot condone Plaintiff's resort to self help which, in effect, subverted Defendant's lien on the artwork. Accordingly, Plaintiff's willful

retention of the artwork and failure to comply with discovery demands justifies the extreme sanction of striking Plaintiff's pleading and Plaintiff's answer to Defendant's counterclaims.

Wherefore it is hereby

ORDERED that Plaintiff's motion is denied; and it is further

ORDERED that Plaintiff's pleading is hereby stricken; and it is further

ORDERED that Plaintiff's answer to Defendant's counterclaims is hereby stricken; and it is further

ORDERED that Defendant's cross-motion is granted to the extent that the Clerk is directed to enter judgment in favor of James Cooper and against Scott Lyon-Wall on the First and Second Counterclaims in the amount of \$14,937.00 with interest at a rate of 9% from November 20, 2009 until the date of this decision and order, and thereafter at the statutory rate until entry of judgment, as calculated by the Clerk, together with costs and disbursements, as taxed by the Clerk; and it is further

ORDERED and ADJUDGED that, upon satisfaction of the money judgment herein, Scott Lyon-Wall is declared the lawful owner of the Kuitica artwork.

This constitutes the decision, order and judgment of the court. All other relief requested is denied.

DATED: January 19 2011



EILEEN A. RAKOWER, J.S.C.

**UNFILED JUDGMENT**  
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