

Universe Antiques, Inc. v Sills

2011 NY Slip Op 30336(U)

February 9, 2011

Sup Ct, New York County

Docket Number: 601008/2010

Judge: Jane S. Solomon

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

PRESENT: Jane S. Solomon
Justice

PART 55

Index Number : 601008/2010
UNIVERSE ANTIQUES, INC.
VS.
SILLS, SUSAN
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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, it is ordered that this motion *is decided by the answer*
Memorandum + Decision

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

FILED
FEB 14 2011
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/9/11

JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
UNIVERSE ANTIQUES, INC. and
RAFAEL COLLECTIONS, LTD.,

Index No. 601008/2010

Plaintiffs,

DECISION AND ORDER

-against-

SUSAN SILLS, LONGINES REALTY, INC.,
and JOAN M. GRALLA,

Defendants.

-----X
JOAN M. GRALLA,

Third-Party Plaintiff

-against-

Norman Alexander and Thomas Doyle,

Third-Party Defendants

-----X

SOLOMON, J.:

Plaintiffs Universe Antiques, Inc. (Universe) and Rafael Collections, Ltd (Rafael) (together, Plaintiffs), sue Longines Realty, Inc (Longines Realty), Susan Sills (Sills), and Joan M. Gralla (Gralla), for fraud, unjust enrichment, indemnification and negligent supervision. Longines Realty moves to dismiss on the grounds that the complaint fails to state a cause of action against it and that the claims are barred by documentary evidence.

Gralla and Sills were friends. Gralls contacted Sills for help in selling a bronze sculpture of a dancer made by the famous French artist Edgar Degas (the Sculpture). At the time,

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[* 8]

Sills was a real estate sales agent working at the office of Longines Realty. Universe received a fax from Sills regarding the Sculpture, which fax was sent from Longines Realty's offices. On December 21, 2004, Jack Shaoul, the owner of Universe, viewed the Sculpture at Gralla's house. After that, and having received warranties regarding ownership of the Sculpture, Universe purchased it for \$225,000. Universe, and its partner Rafael, consigned it to Spanierman Gallery, LLC. for \$348,000. Spanierman sold the Sculpture to a non-party for \$450,000.

In the event, the Sculpture belonged to Norman Alexander (Alexander); and was stolen by the art thief Thomas A. Doyle III, Gralla's boyfriend. Alexander sued to recover the Sculpture (*Alexander v. Spanierman Gallery*, Index No. 105535/2007 [Sup. Ct., New York Co., 2007], *aff'd*, 64 AD3d 487, *leave to appeal denied*, 13 NY3d 709), and won. In that action, Plaintiffs were required to repay Spanierman for the full amount of its loss. Plaintiffs sue to recover their losses from the transaction.

Longines Realty moves to dismiss for three reasons. First, the Statute of Limitations has expired. This argument fails as the action was brought within six years from the date of the fraudulent sale of the Sculpture.

The second argument is that Plaintiffs have failed to allege in the complaint that Longines Realty participated in the

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fraud, and there cannot be any fraud because the complaint does not allege a false statement of fact by Longines Realty.

Plaintiffs counter that discovery will show that Longines Realty knew about Sills's activities, and that Sills's connection with Longines Realty gave Universe "confidence" in its dealings with Sills.

To set forth a fraud claim, a complaint must allege specific and detailed factual allegations that the defendant personally participated in, or had knowledge of any alleged fraud (CPLR 3016 [b]; *Handel v. Bruder*, 209 AD2d 282 [1st Dept., 1994]). The amended complaint alleges that Sills introduced Gralla to Universe and "[t]hat on or about December 20, 2004, Susan Sills, from her office at Longines Realty Realty and during the work day, sent a fax to Jack Shaoul . . . offering the Sculpture for sale" (Amended Complaint, ¶ 12). The amended complaint contains no other material reference to Longines Realty, nor are any other specific actions or activities alleged.

In support, Longines Realty supplies the affidavit of its owner, Bill Lam (Lam), who states that (1) Sills was a part-time independent sales representative working out of its office; (2) Longines Realty does not deal in the sale of artwork or antiques; and (3) he has no record of correspondence between his firm and Gralla or the Plaintiffs (Lam affidavit, ¶ 7-8).

Plaintiff responded with Shaoul's affidavit in which he states that Sills sent Universe "hundreds of faxes" from Longines

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Realty, not just the one regarding the Sculpture, and made "hundreds of phone calls" to Universe from there as well. Notwithstanding that these allegations are not found in the complaint, they do not tie Sills's actions to the real estate business of Longines Realty so as to hold it responsible for her conduct. Plaintiffs supply no other assertion or evidence that Longines Realty participated in the fraud, or had knowledge of it. The allegations that Sills used the equipment is insufficient to establish knowledge, or liability.

Finally, Longines Realty persuasively argues that it had no notice of Sills's conduct and cannot be held liable for negligent supervision of her acts, or for respondeat superior liability. If construed as a claim for vicarious liability, "[t]he doctrine of respondeat superior renders an employer vicariously liable for torts committed by an employee acting within the scope of the employment. . . . If, however, an employee for purposes of his own departs from the line of his duty so that for the time being his acts constitute an abandonment of his service, the master is not liable" (*RJC Realty Holding Corp. v. Republic Franklin Ins. Co.*, 2 NY3d 158, 164 [2004][citation and internal quotation marks omitted]). Longines Realty is a real estate broker, not an art dealer. Nothing in the complaint alleges otherwise.

Similarly, if the cause of action is construed as for negligent supervision, it must also fail. A necessary element of

* 6]

such a claim is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury (see, *N. X. v. Cabrini Medical Center*, 280 AD2d 34, 42 [1st Dept., 2001]). The assertions about Sills's communications from Longines Realty's office, even when read in the most favorable light, do not constitute this necessary element. Accordingly, the negligent supervision cause of action is dismissed.

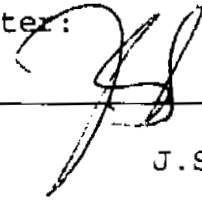
For the reasons described above, the indemnification cause of action also fails.

In light of the foregoing, it hereby is

ORDERED that the amended complaint is severed and dismissed as to defendant Longines Realty, Inc., and the Clerk of the Court is directed to enter judgment accordingly, with costs and disbursements as taxed.

Dated: February 9, 2011

Enter:



J.S.C.

JOSEPH E. SCORSONE

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