

<b>Universe Antiques, Inc. v Sills</b>
2011 NY Slip Op 30769(U)
April 1, 2011
Supreme Court, 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

PART 55

Index Number : 601008/2010

UNIVERSE ANTIQUES, INC.

vs  
SILLS, SUSAN

Sequence Number : 003

DISMISS

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

MOTION DATE 3/20/11

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

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

1-3

4-5

6

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is decided by*  
*the annexed memorandum decision and order.*

*NB PC 5/9/11*

**FILED**

APR 01 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 5/31/11

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.

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 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

**FILED**

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**SOLOMON, J.:**

Plaintiffs Universe Antiques, Inc. (Universe) and Rafael Collections, Ltd (Rafael) (together, Plaintiffs), sued Longines Realty, Inc (Longines Realty), Susan Sills (Sills), and Joan M. Gralla (Gralla), for fraud, unjust enrichment, indemnification and negligent supervision. The complaint has been dismissed as to Longines Realty. Sills now moves to dismiss on the following grounds: improper service; the complaint fails to state a cause of action against her; the complaint fails to allege fraud with specificity; and, the claims are barred by documentary evidence.

The facts of the case were described in the decision

concerning Longines Realty, dated February 9, 2011, as follows:

Gralla and Sills were friends. Gralla 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, 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.

Sills argument that service was improper because it was made on the doorman of her building is an inadequate challenge. The affidavit of service notes "DOORMAN . . . REFUSED TO ALLOW DEPONENT ACCESS TO SAID BUILDING" (Opposition, Ex. A). A doorman who bars a process server's access to a building is a person of suitable age and discretion (*F. I. duPont, Glore Forgan & Co. v Chen*, 41 NY2d 794, 797 [1977]; *Al Fayed v. Barak*, 39 AD3d 371, 372 [1st Dept., 2007]).

The second argument is that the complaint fails to state a cause of action. Rather than describe how the complaint is deficient, the motion papers attempt to recast the facts in

[\* 4]

Sills's favor. The resolution of conflicting proof is not a matter for a motion to dismiss; such conflicts are properly for determination at trial (*Mazariegos v. New York City Transit Authority*, 230 AD2d 608, 609-10 [1st Dept., 1996]).

The argument that the fraud claim was not pleaded with specificity also is lacking. To set forth a fraud claim, a complaint must allege specific and detailed factual allegations either that the defendant personally participated in the fraud, or that she had knowledge of it (*Handel v. Bruder*, 209 AD2d 282 [1<sup>st</sup> Dept., 1994]; see, CPLR 3016 [b]). The amended complaint alleges that Sills introduced Gralla to Universe and that Sills was the intermediary in the dealings between Gralla and Universe with respect to the stolen artwork (Amended complaint, attached to Opposition, Ex. B, ¶ 8-44). The complaint sufficiently alleges that Sills was a personal participant in the fraud. Sills's factual argument that she did not know that the artwork was stolen, and had no knowledge of the fraud, does not support a motion addressed to the pleading.

Finally, Sills's documentary evidence is insufficient to bar the claims against her. "To succeed on a motion to dismiss pursuant to CPLR 3211 (a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Teitler v. Max J. Pollack & Sons*, 288 AD2d 302 [1<sup>st</sup> Dept., 2001]).

Sills supplies Doyle's written sentencing allocution, which reads, as relevant:

Susan Sills, who brokered the sale to Universe Antiques and received a commission of \$12,500.00 had no intent to or knowledge of any loss and is not responsible for any loss incurred by Mr. Alexander

(Doyle Allocution, attached to Motion, Ex. D, p. 2).

Doyle's statement is not documentary evidence of the kind that defeats the complaint. It does not address the role of Sills vis-a-vis the plaintiffs here. It may be evidence of her lack of culpability, but is not grounds for dismissal.

While the co-plaintiff may have had no contact with Sills, this issue is raised only in reply. Arguments raised for the first time in the reply may not be considered (*Azzopardi v. American Blower Corp.*, 192 A.D.2d 453, 454 [1st Dept, 1993]).

Accordingly, it hereby is

ORDERED that the motion is denied; and it further is

ORDERED that Sills is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it further is

ORDERED that counsel shall appear for a preliminary conference in Part 55, 60 Centre Street, Room 432, New York, NY, on May 9, 2011, at 10:00 AM.

Dated: 3/31/11, 2011

Enter:

J.S.C.  
JANE S. SOLOVICK

**FILED**

APR 01 2011

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COUNTY CLERK'S OFFICE