

Universe Antiques, Inc. v Sills

2011 NY Slip Op 32194(U)

July 29, 2011

Sup Ct, NY 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 : 002

DISMISS

INDEX NO. _____

MOTION DATE 5/9/11

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

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is decided by the amended memorandum decision and order*

FILED

AUG 01 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 7/29/11


JANE S. SOLOMON 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: 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

FILED

AUG 01 2011

-against-

NORMAN ALEXANDER and THOMAS DOYLE,

NEW YORK
COUNTY CLERK'S OFFICE

Third-Party Defendants

-----X

SOLOMON, J.:

Plaintiffs Universe Antiques, Inc. (Universe) and Rafael Collections, Ltd. (together, Plaintiffs), sued Longines Realty, Inc (Longines), Susan Sills (Sills), and Joan M. Gralla (Gralla), to recover for a fraud perpetrated on them by non party Thomas Doyle. The complaint has been dismissed as to Longines.

The facts of the case were described in the decision concerning Longines, dated February 9, 2011. As relevant:

Gralla contacted Sills for help in selling a bronze sculpture of a dancer made by the famous French artist Edgar Degas (the Sculpture). . . . 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 (Doyle), Gralla's boyfriend.

This motion deals with Gralla's third-party action against Alexander and Doyle. She introduces many additional facts, none of which conform to the requirements of CPLR 1007, even if broadly read. That provision permits Gralla to proceed against Alexander as "a person who is or may be liable to [her] for all or part of the plaintiff's claim against [her.]"

Gralla's pleading explains that, based on Doyle's misrepresentations, Alexander gave the Sculpture to Doyle, who sold it to Universe upon misrepresentations about Gralla's ownership and his authority to act for her. The \$225,000 proceeds went directly to Gralla's bank account. The next month, Doyle told Alexander that the Sculpture had been severely damaged, and offered to make it up to Alexander. Alexander's attorney negotiated an agreement under which Doyle would pay Alexander \$600,000 for the Sculpture if he could not repair it. Pursuant to this agreement, on February 18, 2005, \$100,000 was wired to Alexander's attorney, with the notation: "AS DOWN PYMT" (email chain Ex. 37 and Citibank fund transfer, both attached to Cohen Reply Affirmation, Ex. 36). No further payments were made. The Sculpture was not returned.

When Alexander learned that Doyle sold the Sculpture he sued for breach of contract and the remaining \$500,000 (*Alexander v. Doyle*, Index No. 601228/2005 [Sup. Ct., NY County, 2005]).

[* 4]

Doyle defaulted. On February 7, 2006, judgment was entered in Alexander's favor for \$543,330.82 (Judgment, attached to Cohen Affirmation, Ex. 3).

Upon identifying Spanierman and its customer, Alexander sued to recover the Sculpture, and won (*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).

In somewhat greater detail, Gralla describes the disposition of the funds from Universe to establish her entitlement to them, and as support for her direct claims against Alexander that the \$100,000 she claims to have wired from her account directly to him should be repaid. Her allegations are largely incredible; there are internal contradictions in the text and between the original and amended versions of her third-party complaint and the second iteration patently was crafted to respond to the first of Alexander's motions. For instance, she asserts that on the very day she learned that Doyle stole the Sculpture, she initiated the transfer to Alexander. In fact, the funds were sent to Alexander's attorney as part of Doyle's agreement with him.

Gralla bases her recovery on the grounds of unjust enrichment and money had and received. Alexander moved to dismiss both the original and amended complaint on the grounds that there

was no factual or legal basis for Gralla's claims.¹

Unjust enrichment and money had and received are equitable claims. A plaintiff must allege that it would be against equity and good conscience to permit the defendant to retain what is sought (*Marini v. Lombardo*, 79 AD3d 932, 934 [2nd Dept., 2010][unjust enrichment elements]; *In re Witbeck*, 245 AD2d 848, 850 [3rd Dept., 1997][money had and received elements]).

Gralla argues that Alexander is not entitled to have both the Sculpture and the \$600,000 bargain with Doyle which was based on the alleged irreparable damage to the Sculpture. Her primary contention is that Alexander was made whole when he got the Sculpture back, so that it is inequitable for him to keep the \$100,000. However, in order for Gralla to have a claim for return of the funds, she must have a tangible, legal interest in them. Her sole claim to the funds is the allegation that she is the "owner," because Doyle owed her money and he gave it to her. Vis-a-vis Alexander, she is not credibly the "owner," and this allegation need not be afforded any consideration (*Matter of Sud v. Sud*, 211 AD2d 423 [1st Dept., 1995]). Had she asserted that the funds were from Universe, who now is suing her for their

¹Alexander moved to dismiss the original third-party complaint (Motion Sequence 002). In response, Gralla filed an amended third-party complaint, which Alexander separately moved to dismiss (Motion Sequence 004). Gralla requested that Alexander stipulate to a withdrawal of Motion Sequence 002, as moot. The request was denied. Alexander died in March, and his Estate has since been substituted for him.

[* 6]

equivalent, she might have a proper third party complaint, but she has not pleaded this claim. There is no other allegation that she is the proper party to receive an equitable return of the funds from Alexander.

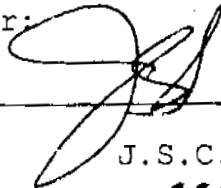
Finally, there is no alleged mistake of fact or law, nor is there any credible allegation that Alexander's conduct was tortious or fraudulent towards Gralla (*Paramount Film Distributing Corp. v. State*, 30 NY2d 415, 421 [1972] ["courts look to see if a benefit has been conferred on a defendant under mistake of fact or law . . . and whether the defendant's conduct was tortious or fraudulent"]). Accordingly, the amended third party complaint fails to state a cause of action for unjust enrichment or money had and received.

In accordance with the foregoing, it hereby is

ORDERED that Norman Alexander's motion to dismiss the third party complaint (motion sequence 002) is denied as moot; and it further is

ORDERED that Norman Alexander's motion to dismiss the amended third party complaint (motion sequence 004) is granted to the extent that the amended third-party complaint is severed and dismissed as against him, and the Clerk of the Court is directed to enter judgment accordingly, with costs and disbursements as taxed.

Dated: 7/29, 2011

Enter: 

J.S.C.
JANE S. SOLOMON

FILED

AUG 01 2011

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