

Roach v Mabry

2011 NY Slip Op 34187(U)

September 29, 2011

Supreme Court, New York County

Docket Number: 116193/06

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ

PART 13

MAXINE ROACH, Executrix for the estate
of MAX ROACH,

Plaintiff
- v -

FRANK MABRY,

Defendant.

INDEX NO. 116193/06

MOTION DATE 09-06-2011

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to 7 were read on this motion to punish for contempt and for a money judgment.

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

PAPERS NUMBERED

1-2, 3, 4

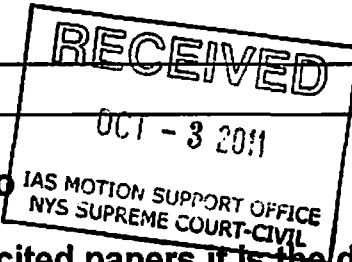
Answering Affidavits — Exhibits _____

5-6

Replying Affidavits _____

7

Cross-Motion: Yes No



Upon a reading of the foregoing cited papers it is the decision and order of this court that this motion pursuant to CPLR § 5225 for monetary award of the fair market value of the Estate Property that defendant has either lost or destroyed and pursuant to Judiciary Law § 753 to hold the defendant in contempt of court for failing to abide by Justice O. Peter Sherwood's order dated May 18, 2009 is granted to the extent of directing entry of judgment against the defendant Frank Mabry in the amount of \$98,790.93 dollars, The remainder of the motion is denied.

Plaintiff is the executrix of her father's estate and is seeking to recoup certain musical instruments that belonged to her father at the time of his death. The instruments which were being warehoused were removed by the defendant and taken to another location. When plaintiff learned that the instruments had been removed she requested that defendant return the instruments and when he failed to do so she commenced this action.

On May 4, 2009 Justice Sherwood held an inquest where he heard testimony from Plaintiff, her witnesses and from the defendant. The defendant stated that he had been in possession of the instruments but that some of them were destroyed in 2008 during a flood of his home; the remaining instruments were removed to Tennessee where they were being

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

10/4/11 ac

4

kept in a barn. Justice Sherwood rendered a decision ordering defendant to return all of the instruments belonging to the Estate in his possession.

Plaintiff and her attorney traveled to Tennessee to retrieve the instruments, incurring \$6,790.93 in expenses (see Plaintiff's 2 in evidence). Once there they proceeded to a barn located inside a farm property of Mr. Mabry. In the barn they found cases of instruments belonging to the Estate which they photographed and documented, comparing the pieces retrieved with an inventory list they possessed. (see Plaintiff's 1,3,4, 5 in evidence). The comparison revealed that only about one-third of the instruments were retrieved, the remainder, which contained some of the most valuable pieces were unaccounted for.

Missing were the following instruments for which plaintiff obtained an appraisal from "Steve Maxwell Vintage and Custom Drums, LLC":

- 1) Sonor Drum set, Ludwig Snare and Zildjian Cymbals - estimated value \$14,000.00 (see plaintiff's 6 in evidence);
- 2) Kenny Clarke Drum set- estimated value \$10,000 to \$18,000 (see plaintiff's 7 in evidence);
- 3) Hollywood brand Drum set - estimated value \$10,000 (see plaintiff's 8 in evidence);
- 4) Gretsch Drum set - Estimated Value \$50,000 (see plaintiff's 9 in evidence).

After returning to New York defendant informed Justice Sherwood that "Mr. Harvey Mars missed a few boxes in Tennessee. I would like him to obtain them as soon as possible." Justice Sherwood forwarded that correspondence to Plaintiff's attorney. (see Plaintiff's 11 in evidence). Plaintiff requested that the Sheriff inspect defendant's property in Tennessee in search of the missing items. The Sheriff inspected the premises but was unable to find any musical instruments or anything with the name of Max Roach. The belief that defendant is still in possession of property belonging to the Estate prompted the within motion.

The motion was adjourned final to September 6, 2011 for a hearing. Although defendant Mabry appeared at the hearing he chose not to participate and left the courtroom despite the court's warning that if he left the courtroom and failed to participate he did so at his own peril. At the hearing Plaintiff presented the testimony of Maxine Roach, Regina Davis and Dara Roach. Ms. Maxine Roach testified as previously stated. Ms. Regina Davis stated she had seen cases of instruments in the Tennessee barn as early as December 13, 2006 (see Plaintiff's 12 in evidence), thereby refuting defendant's allegation at the inquest that the instruments had been

destroyed in the 2008 flood of his home. Ms. Dara Roach testified about a conversation she had with Mr. Mabry in October of 2010 wherein he stated that " he was not going to let one pers) get everything", and talked about how things would get distributed.

At the conclusion Plaintiff requested that Mr. Mabry be found in contempt and ordered to return the instruments under penalty of incarceration or award a monetary judgment.

"A court cannot adjudge a defendant in contempt for not doing that which is impossible, or for not doing what is not in his power to do, unless he has voluntarily disabled himself to do the act in such a manner that the creation of the disability is in itself a contempt" (Meyers v. Trimble, 3 E.D. Smith 607 [Supreme Court N.Y. County, 1855]); " one is not in contempt for not doing what he cannot do. One cannot be punished for contempt for failure to comply with a judgment of a court, unless such failure be established with reasonable certainty." (Greenberg v. Polansky, 140 A.D. 326, 125 N.Y.S. 176 [1st. Dept. 1910]); "before one can be punished for contempt in not complying with a direction of the court, the particular or precise thing to be done by the party proceeded against must be clearly and definitely stated (Coffin v. Coffin, 161 A.D. 215, 146 N.Y.S. 565 [1st. Dept. 1914]).

Defendant cannot be punished for contempt if the property has been destroyed, as he previously stated at the inquest before Justice Sherwood. The photograph submitted in evidence at the contempt hearing as Plaintiff's 12 in evidence is a photograph of instrument cases. This photograph does not reveal what is inside the cases and does not completely refute defendant's testimony before Justice Sherwood that some of the property was destroyed during the flood of his home in 2008. Assuming the property was destroyed through no fault of his, as Mr. Mabry stated under Oath before Justice Sherwood, it would be impossible for him to return the property and it would be unjust for this court to subsequently find him in contempt.

However, Mr. Mabry is not relieved of all liability. He was responsible for safeguarding property of the Estate and is liable for the value of such property if the same has been lost or destroyed. "Conversion is an unauthorized exercise of dominion and control over property by someone other than the owner, where such control interferes with and is in defiance of a superior possessory right of the owner or another person (Miller v. Marchuska, 31 A.D.3d 949, 819 N.Y.S. 2d 591 [3rd. Dept. 2006]). Mr. Mabry converted Plaintiff's property and is liable to plaintiff for its value.

Through the testimony and exhibits in evidence plaintiff has established that the value of the lost property amounts to \$92,000. In addition, plaintiff is entitled to a judgment for the expenses to recover the property that was being stored in the Tennessee barn in the amount of \$6,790.93.

Accordingly, it is ORDERED and Adjudged that the motion seeking to hold defendant in contempt of court is denied, and it is further

ORDERED and ADJUDGED, that the motion for a monetary award for the value of Estate Property is granted, and it is further


ORDERED that the clerk of court is DIRECTED to enter judgment in favor of plaintiff MAXINE ROACH AS EXECUTRIX OF THE ESTATE OF MAX ROACH and against the defendant FRANK MABRY, in the amount of \$98,790.93 together with interest at the rate of 9% per annum from the date of May 18, 2009, until the date of entry of judgment, as calculated by the clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the clerk upon submission of an appropriate bill of costs.

This constitutes the decision, order and judgment of this court.

ENTER

Dated: September 29, 2011

MANUEL J. MENDEZ
J.S.C.


Manuel J. Mendez
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE