

Graff Diamonds (New York), Inc. v Desnick
2012 NY Slip Op 30038(U)
January 9, 2012
Supreme Court, New York County
Docket Number: 115429/2010
Judge: Doris Ling-Cohan
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 115429/2010
GRAFF DIAMONDS [NEW YORK]

INDEX NO. _____

vs
DESNICK, JAMES H.

MOTION DATE _____

Sequence Number : ~~100~~ 001

MOTION SEQ. NO. _____

OTHER RELIEFS

or Default judgment or cross-motion
(+ memo) to hold late answer
No(s) 1, 2

Answering Affidavits — Exhibits _____

No(s) _____

Replying Affidavits _____

No(s) 5

Upon the foregoing papers, it is ordered that this motion is—

Cross-motion (memo) 3, 4
interim order
+ supplemental memos 6, 7

by plaintiff for a default judgment and cross-motion to extend time to file an answer by defendant are decided in accordance with the attached memorandum decision.

This case is dismissed in accordance with the attached memorandum decision.

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: 10/12

_____, J.S.C.
JUDGE DORIS LING-COHAN

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

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice

GRAFF DIAMONDS (NEW YORK), INC. and
GRAFF DIAMONDS (CHICAGO), INC.,

Plaintiffs,

INDEX NO. 115429/10

-against-

MOTION SEQ. NO. 001

JAMES H. DESNICK,

UNFILED JUDGMENT

Defendant,

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).

LING-COHAN, J.:

This is an action for a declaratory judgment that defendant is not entitled to rescission or any other damages with regard to an emerald and diamond ring (the "Emerald Ring") that defendant purchased from plaintiffs on October 14, 2005. Approximately five years after the purchase, defendant made comments to plaintiff that the Emerald Ring had been improperly sized when he purchased it. After defendant allegedly threatened to initiate legal action, plaintiffs commenced this action seeking a declaratory judgment that defendant is not entitled to rescission or any other remedy with regard to the ring.

Plaintiffs moved for a default judgment against defendant, for defendant's failure to timely appear or answer, and, in response, defendant cross-moved to compel plaintiffs to accept service of defendant's notice of appearance and demand for complaint, pursuant to CPLR §3012(d).

By interim order of this court, the parties were directed to submit supplemental memorandum of law addressing the issue of whether this action should be dismissed on the grounds that it is not ripe and therefore not justiciable.¹

¹ Specifically, the parties were to brief the following issue:

"whether the within action should be dismissed as it fails to present an appropriate "justiciable controversy" [CPLR 3001], ripe for this court's

Upon review of the submissions by the parties, dismissal is warranted as this case fails to present an appropriate justiciable controversy within the scope of CPLR §3001.

The ability of a court to exercise subject matter jurisdiction is a matter which may be raised at any time, including *sua sponte*. See *Editorial Photocolor Archives, Inc. v Granger Collection*, 61 NY2d 517, 523 (1984); *Morrison v Budget Rent A Car Systems, Inc.*, 230 AD2d 253, 260 n 7 (2nd Dept 1997); *Police Benevolent Assn. of NY State Troopers, Inc. v New York State Div. of State Police*, 40 AD3d 1350, 1352 n 2 (2007), *appeal dismissed and lv denied* 9 NY3d 942 (2007); *333 Cherry LLC v Northern Resorts, Inc.*, 66 AD3d 1176, 1178 n 3 (3d Dept 2009). Ripeness and justiciability are questions of subject matter jurisdiction and, therefore, this court is able to consider whether a case raises a justiciable controversy without motion by the parties and at any time during the course of a lawsuit. *Id*; see also *Matter of Agoglia v Benepe* 84 AD3d 1072, 1076 (2d Dept 2011).

Under CPLR §3001 this court “may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed.” CPLR 3001. To be a justiciable, a controversy must “involve present, rather than hypothetical, contingent or remote, prejudice” to a party. *American Ins. Assn. v Chu*, 64 NY2d 379, 383, *cert denied* 474 US 803 (1985). This court is “not empowered to render advisory opinions, or determine abstract, moot, hypothetical, remote or academic questions.” *Matter of Ideal Mut. Ins. Co.*, 174 AD2d 420, 421 (1st Dept 1991) (citing 3 Weinstein-Korn-Miller, NY Civ Prac ¶ 3001.03). The First Department has specifically held that “[t]he hypothetical possibility that a lawsuit might be filed is not sufficiently immediate and real to constitute a justiciable controversy”. *Spitzer v Schussel*, 48

review, given that no claims have been asserted against plaintiff or action commenced for, *inter alia*, fraud or rescission with respect to the subject October 2005 jewelry purchase. See *Ithaca textiles, Inc. v Waverly Lingerie Sales Co.*, 24 AD2d 133, *aff'd* 18 NY2d 885 (1966); see also 22 NYCRR §130-1.1 (Costs/Sanctions for Frivolous Conduct)”

AD3d 233, 234 (1st Dept 2008)(citations omitted); *see also Park Ave. Clinical Hospital v Kramer*, 26 AD2d 613 (4th Dept 1966)(“[t]he controversy must be present, real, definite, and substantial, and must be sufficiently matured so as to be ripe for judicial decision and final determination” [citations omitted]).

Here, it is the plaintiffs who have initiated a lawsuit in response to defendant’s complaints regarding the size the Emerald Ring and his alleged threats of future litigation. Prior to the commencement of this declaratory judgment action, the interactions between plaintiffs and defendant were limited to mere phone conversations negotiating the discrepancy. To this date defendant has not filed a lawsuit, and his actions have been limited to discussions with plaintiffs expressing his belief that he was given an inadequate jewel. While plaintiffs argue that the dispute is not hypothetical, claiming that defendant has made verbal accusations of fraud to plaintiffs, demanded rescission of the sale of the Emerald Ring, filed insurance claims, and threatened to tarnish Plaintiffs’ reputation in the media, these are not actionable grounds upon which this declaratory judgment action seeking to prevent a lawsuit can be based. This declaratory judgment action does not seek damages for defendant’s actions, but essentially seeks to prevent a future lawsuit. Indeed, plaintiffs’ action seeks a “declaratory judgment that there is no basis for any challenge to the 2005 sale of the Emerald Ring,” and does not involve fraud, insurance claims, or the media, nor does it claim libel or slander. Plaintiff’s Memo in Support at 11. Plaintiffs’ suit implores the court to determine defendant’s ability to challenge the sale. However, in order to determine whether there is any basis for defendant to challenge the sale and the quality of the Emerald Ring, plaintiff must first in fact challenge the sale, by the initiation of a law suit. Since defendant has yet to commence a law suit with respect to the Emerald Ring, a declaratory judgment that plaintiffs would prevail in such a lawsuit is reliant on a hypothetical assumption and is therefore not ripe for adjudication. Any and all claims asserted in this declaratory judgment action may be raised as a defense in any action brought by defendant,

should he attempt to do so.² See e.g. *Skolnick v. Goldberg*, 297 AD2d 18 (1st Dept 2002). At this juncture, as articulated by the Appellate Division, First Department; a “hypothetical possibility that a lawsuit might be filed is not sufficiently immediate and real to constitute a justiciable controversy”³. *Spitzer*, 48 AD3d at 234. Thus, dismissal is warranted.

Accordingly, it is

ORDERED, ADJUDGED and DECLARED that plaintiff’s complaint is dismissed, *sua sponte*, for failure to raise a controversy that is ripe for this court’s review; and it is further

ORDERED that plaintiff’s motion for default judgment and defendant’s cross motion are deemed moot; and it is further

ORDERED that the Clerk of the Court shall enter judgment of dismissal, without costs to either party; and it is further

ORDERED that within 30 days of entry of this order, defendant shall serve a copy of this order, with a notice of entry, on plaintiffs.

Dated: _____




DORIS LING-COHAN, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check of Appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG. SETTLE ORDER/JUDG.

UNFILED JUDGMENT

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² The court notes that the transaction took place over six (6) years ago.

³ The court notes that our court would be even more burdened than it is now, if it permitted lawsuits to be commenced by a party, in defense of another party threatening potential future litigation.