

Walker v Foreman

2013 NY Slip Op 30467(U)

February 25, 2013

Supreme Court, New York County

Docket Number: 112387/10

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

ROCK J. WALKER,

Plaintiff,

-against-

SCOTT FOREMAN a/k/a SKOT FOREMAN,

Defendant.

SCOTT FOREMAN a/k/a SKOT FOREMAN

Third-Party Plaintiff,

-against-

XL SPECIALITY INSURANCE COMPANY,
ROCK J. WALKER, and
WALKER FINE ART LTD. a/k/a
WALKER FINE ART,

Third-Party Defendant.

INDEX NO. 112387/10

MOTION SEQ. NO. 003

FILED
MAR 08 2013
NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 4, were read on this motion by third-party defendant XL Speciality Insurance Company for dismissal pursuant CPLR 3211(a).

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2</u>
Answering Affidavits — Exhibits (Memo) _____	<u>3, 4</u>
Replying Affidavits (Reply Memo) _____	<u>5</u>

Cross-Motion: Yes No

This is an action for conversion and replevin. Rock J. Walker (plaintiff), seeks the recovery of artwork he allegedly left in a townhouse leased by defendant/third-party plaintiff Scott Foreman (Foreman). A previous related action brought by Walker against Foreman, entitled *Rock J. Walker v Scott Foreman a/k/a Skot Foreman*, NY County Index No. 113279/2007, was resolved in part, by a stipulation of settlement pursuant to which Foreman agreed to return certain items of artwork different from the ones enumerated in the present complaint. Plaintiff claims his previous complaint did not seek the return of the items

referenced in this action because he was not aware, at the time his previous action was filed, that those items were also missing or no longer in his possession. Plaintiff seeks the return of the missing artwork plus an injunction enjoining Foreman from selling, secreting, transferring or hypothecating any of the plaintiff's artwork.

Foreman commenced a third party action against XL Specialty Insurance Company (XL), the plaintiff Rock J. Walker and Walker Fine Art Ltd. a/k/a Walker Fine Art (WFA). The third-party complaint asserts four causes of action. The first two causes of action seek a declaratory judgment against XL to the effect that XL is prohibited from asserting and or maintaining a subrogation claim as subrogee of its insured WFA. The third and fourth causes of action against Walker and WFA respectively assert a claim for breach of contract relating to the sale of a painting of which Foreman claims that Walker falsely authenticated as an original work by Andy Warhol.

Now before the Court is a motion by XL for an order dismissing the third-party complaint as against it pursuant to CPLR 3211(a)(1). XL also seeks costs pursuant to CPLR 8303-a or 22 NYCRR 130-1.1 *et seq.* Plaintiff and Walker Fine Art cross-move to dismiss the third party complaint pursuant to CPLR 3211(a)(1) & (8) and CPLR 1010.

XL's motion to dismiss

As stated above, in the main action, plaintiff asserts causes of action for replevin and conversion against Foreman with respect to works of art that are allegedly missing. In the third-party action, Foreman requests declaratory relief, to the effect that XL may not sue him in subrogation for the value of the works of art. Foreman does not assert any monetary claims against XL. Foreman claims that XL, as the insurer of third-party defendant WFA, paid WFA for its insured loss and therefore possesses subrogation rights. Foreman argues that it is insufficient for the claim brought against him by plaintiff to be dismissed if XL were to retain the right to bring its own subrogation claim against him. By bringing this third-party action seeking

declaratory relief, Foreman is essentially seeking to have all of the claims related to the artwork adjudicated at the same time and in the same forum.

XL's motion to dismiss the third-party complaint, pursuant to CPLR 3211(a)(1), is based upon the ground that documentary evidence conclusively establishes a defense to the third-party complaint as a matter of law. The documents relied on by XL are a Sworn Statement in proof Of Loss submitted by WFA to XL (*see* Affirmation of Steven H. Kaplan Esq., Exhibit C) and a Settlement and General Release Agreement (the Settlement Agreement) between WFA and XL (*id.* at Exhibit D). Under paragraph 4(a) of the Settlement Agreement, XL became subrogated to the rights of WFA but, pursuant to paragraph 4(B) of the Settlement Agreement, XL reassigned its subrogation rights back to WFA. XL argues that since it reassigned its subrogation rights back to WFA, the request for declaratory relief against it is moot and the third-party complaint should be dismissed.

It is well-settled that although a party may move to dismiss under CPLR 3211(a)(1) "on the ground that . . . a defense is founded upon documentary evidence," a dismissal is warranted only if "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]). Here, Foreman argues that the submitted documents do not conclusively establish a defense to the claims for a declaratory judgment. The court agrees. In the first place, the plaintiff is seeking a declaration that XL is prohibited from ever asserting and or maintaining a subrogation claim as subrogee of its insured WFA. Such a declaration would not be rendered moot merely because XL currently has assigned its subrogation rights to someone else. There is nothing in the Settlement Agreement or anywhere else that would prevent XL from re-obtaining subrogation rights at a later point. Furthermore, XL is incorrect that a dismissal order in favor of XL would judicially estopp it from suing Foreman in subrogation, since there is nothing in the Settlement Agreement or elsewhere that would prevent XL from assuming subrogation rights in the future.

* 4]

The only way to forestall this would be to grant plaintiff the declaratory relief that it is in fact seeking. While XL may genuinely have no desire to ever assert a subrogation claim against Foreman, that does not make Foreman's request for a declaration establishing the legal rights of the parties moot. Indeed if XL wanted to make it clear that it was abandoning all subrogation rights against Foreman for all time, it could easily do so by conceding to the requested relief. Furthermore the reassignment of the subrogation rights in the Settlement Agreement is expressly subject to various conditions and limitations including an agreement by WFA that XL retains a interest in the recovery of any monies from Foreman up to \$90,000, the exact same amount that XL paid WFA to settle its claims. Thus the very language of the Settlement Agreement seems to indicate that XL has not divested itself of all of it's interest in subrogation rights and claims against Foreman. While XL characterizes this interest as a mere lien without subrogation rights, there is no language to that effect in the Settlement Agreement and no indication in the Settlement Agreement that XL could not assert a subrogation claim based on its shared interest with WFA in the recovery against Foreman. Nevertheless, XL has failed to meet its burden under CPLR 3211(a)(1), as the documents submitted do not conclusively establish a defense to the claims as a matter of law. Thus, XL's motion to dismiss must be denied.

Cross-motion by Plaintiff and WFA

Plaintiff and WFA cross-move to dismiss the third party complaint against them pursuant to CPLR §§ 3211(a)(1), (a)(8), and 1010, as well as an award of costs. Plaintiff and WFA have since abandoned their claim that the action should be dismissed pursuant to CPLR 3211(a)(8) and concede that the court has jurisdiction over them with respect to the third-party complaint. However, they argue that a third-party claim by Foreman against plaintiff is improper given that Walker is the plaintiff and cannot also be a third-party defendant in the same action. Plaintiff proffers that if Foreman wishes to assert his own claims against him, he must do so by seeking

leave to amend his answer to include counterclaims. The Court agrees. CPLR 1007 specifically states that a third-party claim may be initiated against "a person not a party who is or may be liable" to the defendant. Thus, if the defendant seeks relief from an existing party, the proper procedure is by means of a counterclaim against the plaintiff or cross-claim against a co-defendant (*see e.g. McBamara v Banney*, 227 AD2d 892 [4th Dept 1996]). Thus, the third-party complaint is dismissed as against plaintiff without prejudice for Foreman to seek leave to assert the same claims as a counterclaim in an amended answer.

The remainder of the third-party complaint asserts claims by Foreman concerning the purchase of a painting. Foreman alleges that plaintiff, through WFA, sold him a painting which plaintiff guaranteed was an original work by Andy Warhol. The third-party complaint alleges that plaintiff later admitted that the painting was not a genuine Warhol and agreed to honor his guarantee and refund Foreman the purchase price of \$74,000 and to pay Foreman an additional sum for lost profit/opportunity loss in the amount of \$75,000 for a total of \$149,000. Foreman alleges that plaintiff only paid him \$63,000 leaving a balance due of \$86,000 as of January 15, 2007. In his third-party complaint, Foreman asserts causes of action sounding in breach of contract against plaintiff and fraud against WFA. The cause of action for breach of contract against plaintiff is dismissed for the reasons stated above, without prejudice to seek leave to assert the claim as a counterclaim in an amended answer.

As to the cause of action asserted against WFA for fraud, the third-party complaint does not sufficiently allege a cause of action for fraud against WFA or for that matter any allegations against WFA, as opposed to plaintiff personally. It appears as if Foreman is attempting to reverse pierce the corporate veil and hold WFA liable for the alleged fraud committed by the plaintiff, however there are no allegations that suggest that plaintiff dominated the corporation as to the challenged transaction, nor is there any allegation that would suggest that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable

consequences (see *Retropolis, Inc. v 14th St. Dev LLC*, 17 AD3d 209, 210 [1st Dept 2005]).
Furthermore, there is no allegation that the plaintiff ever specifically represented to Foreman that the painting was a genuine Warhol, nor does Foreman claim that the plaintiff knew that it was not an authentic Warhol at the time it was sold. Accordingly, the fourth cause of action in the third-party complaint fails to state a cause of action against WFA and is hereby dismissed.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the motion by third-party defendant XL to dismiss the third-party complaint against it is denied; and it is further,

ORDERED that the cross-motion by plaintiff Rock J. Walker and Walker Fine Arts, LTD., to dismiss the third-party complaint as against them is hereby granted, and the third-party complaint against Walker and Walker Fine Arts is hereby dismissed with costs and disbursements to third-party defendants as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further,

ORDERED that the plaintiff is directed to serve a copy of this Order with Notice of Entry upon all parties and the Clerk of the Court, who is directed to enter judgment accordingly; and it is further,

ORDERED that the parties are directed to appear for a Preliminary Conference on April 10, 2013 at 11:00 a.m., at 60 Centre Street, Room 341, Part 7.1

This constitutes the Decision and Order of the Court.

FILED

MAR 08 2013

NEW YORK
COUNTY CLERK'S OFFICE

Paul Wooten J.S.C.

Dated: 2-25-13

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