

Katt v Markov

2013 NY Slip Op 33483(U)

April 9, 2013

Supreme Court, New York County

Docket Number: 651699/2012

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 49

MALCOLM KATT,
Plaintiff,

-against-

DMITRY MARKOV,
Defendant.

INDEX NO. 651699/2012
MOTION DATE April 8, 2013
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to were read on this motion for partial summary judgment.

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: [] Yes [x] No

Upon the foregoing papers, it is ordered that this motion for partial summary judgment is decided in accordance with the accompanying decision and order.

Dated: April 9, 2013

O.P. Sherwood
O. PETER SHERWOOD, J.S.C.

Check one: [] FINAL DISPOSITION [x] 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
NEW YORK COUNTY: COMMERCIAL DIVISION PART 49**

-----x
MALCOLM KATT,

Plaintiff,

-against-

DMITRY MARKOV,

Defendant.

DECISION AND ORDER

**Index No. 651699/2012
Mot. Seq. 001**

-----x
O. PETER SHERWOOD, J.:

Plaintiff Malcolm Katt (“Katt”), moves pursuant to CPLR 3212 for partial summary judgment on his first cause of action for breach of fiduciary duty, pursuant to CPLR 3211(b), to dismiss the first affirmative defense (accord and satisfaction) of defendant Dmitry Markov (“Markov”), and pursuant to CPLR 3211 (a) (5) and (7) to dismiss Markov’s first counterclaim for slander and harassment. At oral argument on the motion, Markov withdrew his first counterclaim. On February 22, 2013, the court converted that branch of plaintiff’s motion which seeks to dismiss the first affirmative defense (accord and satisfaction) into a motion for summary judgment, pursuant to CPLR 3211 (c). The parties then submitted additional briefs.

BACKGROUND

The following facts are drawn from the parties’ Rule 19-a statements and are not disputed. This case arises from plaintiff Katt’s consignment of twenty Russian Republic Orders and ten badges from the early Soviet era (the “Collection”) to defendant Markov, an auctioneer who specializes in Russian coins and medals. Katt purchased the Collection from various individuals and dealers over a five-year period, paying approximately \$90,000 for them altogether. In July 2007, Katt met with Markov in an attempt to sell the Collection. On August 1, 2007, the parties entered into an auction consignment agreement for the sale of the Collection. Markov provided Katt with a receipt for the Collection, wherein Markov estimated that the twenty Orders were worth \$250,000, and that the badges were worth \$15,000 (for a total estimated value of \$265,000). Pursuant to the consignment agreement, Markov added the Collection to his 2008 auction catalog. The auction was to be held on January 10, 2008 at the Waldorf-Astoria Hotel in Manhattan.

In late December 2007, Markov approached Katt and offered to purchase the Collection from him outright for \$500,000. Katt accepted the offer and on January 2, 2008, Katt and Markov signed a contract for the sale. The contract provides that “this agreement shall supersede the auction consignment agreement, dated August 1, 2007.”

At the auction held eight days later, Markov sold the Collection for his own account, for the sums of \$1,184,250 for the Russian Republic Orders and \$55,700 for the badges. Katt did not attend the auction having already sold the Collection to Markov.

Katt later learned of the auction results, and approached Markov about it. Markov claimed that he had not been paid for some of the Collection because the buyers had claimed that some of the items were not authentic. During the conversation, Markov offered to pay an additional \$100,000, at the rate of \$10,000 per month for ten months. Markov subsequently paid the \$100,000 in full.

Parties’ Contentions

Katt alleges that Markov lied to him when he said he had not been paid for some of the items because the buyers had claimed that some of the items were fakes. Katt asserts that he learned that Markov was paid in full for all the items, and that there were no questions raised about their authenticity. Markov generally denies these claims. Katt contends that had he known that Markov had been fully paid, he would have demanded much more than \$100,000. Katt also asserts that at no time did the parties discuss whether the \$100,000 would be full compensation, and that he did not offer to release Markov from any possible claims based upon his self-dealing.

Markov asserts that prior to his purchase of the Collection, Katt expressed concerns about the possibility of not being able to sell the Collection at auction. Markov states that, “[w]ishing to maintain good relations with the plaintiff and with the knowledge that he had other items of interest in his possession which he may one day wish to sell, I offered to purchase the entire [C]ollection set for auction for the amount of \$500,000.00 in December of 2007.”

Markov states that after the auction, Katt contacted him on January 16, 2008 to “obtain more monies from [him] in light of the fact that the [C]ollection was sold for more than what either one of [them] thought possible.” On January 17, 2008, Katt sent Markov an email demanding an additional \$150,000 in compensation. Markov alleges that after a series of phone calls and emails,

he agreed to pay Katt \$100,000 in addition to the \$500,000 already paid. Markov contends that contrary to Katt's assertion that the \$100,000 was never intended to constitute full compensation, such payment was intended to finalize the sale. Markov attaches to his affidavit a series of emails between the parties, one of which from Katt states, "I wanted to touch base on your commitment to mail me your check at the end of April for \$100,000 to finalize my sale of the Republic Orders" (Markov Ex. F).

In his affidavit, Katt states that at the time he received the \$100,000, he "was reasonably satisfied with the outcome, but it began to annoy and anger [him] that [Markov] had taken advantage of [him], and [he] later determined to bring an action for the full amount of the sales proceeds to which [he] was entitled" (Katt Aff. at 9). In his complaint, Katt asserts three causes of action: (1) breach of fiduciary duty, (2) fraud, and (3) constructive trust. As to the first cause of action, which is the only claim relevant to this motion for partial summary judgment, Katt seeks damages in the amount of \$641,950, which is comprised of the \$1,184,250 paid for the Russian Republic Orders at auction, plus the \$55,700 paid for the badges at auction, minus the \$600,000 Markov already paid him.¹

DISCUSSION

I. Breach of Fiduciary Duty

"To state a claim for breach of fiduciary duty, plaintiff[] must allege that (1) defendant owed [him] a fiduciary duty, (2) defendant committed misconduct, and (3) [he] suffered damages caused by that misconduct" *Burry v Madison Park Owner*, 84 AD3d 699, 699-700 (1st Dept 2011). An auctioneer acts as an agent on behalf of its consignor (*see Cristallina v Christie, Manson & Woods Intl.*, 117 AD2d 284, 292 [1st Dept 1986]). As an agent, an auctioneer has "a fiduciary duty to act in the utmost good faith and in the interest of" the consignor, "its principal, throughout their relationship" (*id.*) "When a breach of that duty occurs, the agent is liable for damages caused to the principal, whether the cause of action is based on contract . . . or on negligence" (*id.*) "[A]n agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have and

¹Katt made a computational error in calculating potential damages. The claim is overstated by \$2,000.

which can be communicated without violating a superior duty to a third person” (*id.* at 293, quoting Restatement (Second) of Agency § 381, at 182 [internal quotation marks omitted]).

“[T]he common law in New York contains an absolute prohibition against self-dealing, in that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect” (*Matter of Heller*, 6 NY3d 649, 655 [2006] [citation and internal quotation marks omitted]). “This is a sensitive and ‘inflexible’ rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary’s personal interest possibly conflicts with the interest of those owed a fiduciary duty” (*Birnbaum v Birnbaum*, 73 NY2d 461, 466 [1989] [citation omitted]). A fiduciary “is bound to single-mindedly pursue the interests of” his principal, who is owed a duty of loyalty (*id.*) The Court of Appeals held long ago that an auctioneer is “incapable of purchasing” for himself the property which has been entrusted to him (*see Gardner v Ogden*, 22 NY 327, 343 [1860] [citation omitted]). The court explained, “if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information and not to exercise it for the benefit of the persons relying on their integrity. The characters are inconsistent” (*id.* [citation omitted]). By purchasing the Collection while acting as Katt’s fiduciary, Markov engaged in self-dealing in violation of the duty of loyalty. As the Court of Appeals has instructed, Markov was “incapable” of purchasing the Collection (*id.*)

Regarding damages, Katt would have earned significantly more at auction than he did from the sale to Markov, causing Katt to suffer significant damages as a result. It is then incumbent on Markov to establish, by admissible evidence, the existence of a triable issue of fact.

In opposition to the motion, Markov argues that he did not breach any duty owed to Katt because Katt “was fully informed of the risks involved in submitting his [C]ollection at auction. [Markov] performed his duty as a fiduciary, rendering the best advice possible.” Markov contends that Katt “has presented no evidence of self dealing. [Katt] had long and frank discussions with [Markov] making his wishes clear. He willing[ly] prepared a contract of sale of personal property and intentionally inserted a clause rendering the auction consignment agreement null and void.” However, as an auctioneer to whom goods were consigned, Markov was strictly prohibited from purchasing goods consigned to him (*see Gardner*, 22 NY at 343).

II. Defendant's First Affirmative Defense (Accord and Satisfaction)

Markov asserts an affirmative defense of accord and satisfaction. In response, Katt moves to dismiss pursuant to CPLR 3211(b). The court has converted that branch of the motion into a motion for summary judgment pursuant to CPLR 3211(c).

Markov's affirmative defense of accord and satisfaction states:

"On or about February 1, 2008 plaintiff demanded from defendant an additional \$100,000.00 for the [Collection] On or about April 1, 2008 plaintiff agreed to accept ten \$10,000.00 monthly installment[] payments from the defendant as additional and final payment for the [Collection] On or about April 8, 2009 defendant made a final \$10,000.00 payment to plaintiff in full satisfaction for the [Collection] Plaintiff has been paid in full for the [Collection]"

(Answer at 68-71). The contract law defense of accord and satisfaction does not settle plaintiff's tort claim.

"It [is] well settled that the party asserting an affirmative defense has the burden of proof with respect thereto" (*Unitel Telecard Distrib. Corp. v Nunez*, 2010 NY Slip Op 33785(U), at *10-11 [Sup Ct, NY County 2010, Sherwood, J.]). "As a general rule, the acceptance of a check in full settlement of a disputed, unliquidated claim, without any reservation of rights, operates as an accord and satisfaction discharging the claim The theory underlying this common-law rule is that the parties have entered into a new contract discharging all or part of their obligations under the original contract . . . , but there must be a clear manifestation of intent by the parties that the payment was made, and accepted, in full satisfaction of the claim (*Nationwide Registry & Sec. v B&R Consultants*, 4 AD3d 298, 299-300 [1st Dept 2004] [citations omitted]). These are notions of contract law.

Although the concept of accord and satisfaction does not apply, the record contains evidence that the parties sought to "finalize" their dispute by a settlement that contemplated payment by Markov of \$100,000. Nevertheless, there remains a triable issue of fact as to whether the agreement to "finalize" the sale was made with full knowledge of all material facts and whether the parties intended a full settlement and release of all claims in exchange for payment of \$100,000. For this reason, judgment may not be entered in favor of Katt at this time.

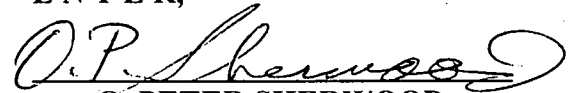
Accordingly, it is ORDERED that summary judgment is GRANTED as to the first cause of action for breach of fiduciary duty. The affirmative defense of accord and satisfaction is dismissed.

Defendant is granted leave to amend his answer to assert a defense of settlement and release provided such amended answer is served and filed within fourteen (14) days of service of a copy of this Decision and Order with notice of entry. Counsel are directed to appear at a preliminary conference in Part 49, Courtroom 252, 60 Centre Street, New York, New York on Wednesday, May 29, 2013 at 9:30 AM.

This constitutes the decision and order of the court.

DATED: April 9, 2013

ENTER,

A handwritten signature in cursive script, appearing to read "O. Peter Sherwood", written over a horizontal line.

O. PETER SHERWOOD

J.S.C.