

Arman v Louise Blouin Media Inc.

2014 NY Slip Op 30866(U)

April 2, 2014

Sup Ct, New York County

Docket Number: 1502078/2012

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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CORICE ARMAN,

Plaintiff,

Index No. 1502078/2012

-against-

DECISION/ORDER

LOUISE BLOUIN MEDIA INC.,

Defendant.

-----X
HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced this action to recover damages stemming from the destruction of a full-figure seated female terracotta statue from Nigeria, which is referred to in the primitive art world as a "Nok Figure" (the "Nok"). Defendant now moves for an order pursuant to CPLR § 3212 granting it summary judgment and dismissing plaintiff's complaint. Plaintiff cross-moves for an order granting her partial summary judgment on the issue of her ownership of the Nok and directing that defendant be precluded from challenging ownership at trial. For the reasons set forth below, defendant's motion is denied and plaintiff's cross-motion is granted.

The relevant facts are as follows. Plaintiff is the widow of the French-American artist, Armand P. Arman ("Arman"), and her home is filled with valuable artwork and antiquities

collected with her husband during their marriage. Defendant is the owner of a media conglomerate, including the online and print magazine Art+Auction, which was to publish a feature article on plaintiff and her art collection. For the story, on May 12, 2011, defendant conducted a photo shoot at plaintiff's home. Defendant's art director, Albert Toy, attended and directed the photo shoot along with his assistant Rena Ohasi. Also present at the photo shoot was the photographer Eric Guillemain, hired by Art+Auction for the shoot, and his assistant Britta Leuermann.

On the day of the photo shoot, it is undisputed that Mr. Toy, with the help of the photographer's assistant, moved the Nok, which was positioned on the fireplace hearth ledge in the living room to a spot on the living room floor adjacent to the living room sofa. Specifically, during his deposition, Mr. Toy testified that:

I notice[d] behind me there was a red clay statute standing there by the fireplace, and I said, [t]his is very stunning, I would like to have this in the shot, and really would be the piece, the piece that would really pull it together. So I asked [the photographer's assistant], we both carried the statue and the statue's little woven grass base to, adjacent to the sofa, set it down and placed the little matted reeds, padding under there . . .

At some point after the Nok was moved to the floor, it fell and shattered. According to Mr. Toy, after he moved the Nok, plaintiff "walked over to the statute, and look[ed] at it and ask[ed,] does anyone have a shim? . . . She patted the statue's head, back of the head, and she walked to the kitchen." Additionally, according to Mr. Toy, it was approximately five to ten minutes after plaintiff touched the figure that it fell and broke. Plaintiff, on the other hand, attests in her affidavit that: "On the day of the Photo Shoot, I did not touch the Nok. In fact, contrary to Mr. Toy's claims, after he moved it from the fireplace hearth ledge, where it had been for years, onto the floor of the living room, I never came anywhere near the Nok."

Plaintiff now brings the instant action asserting a claim of negligence against defendant for the destruction of the Nok. At the time this action was commenced, the Nok was owned by the Armand P. Arman Revocable Trust (the “Trust”), which plaintiff is the sole trustee of and its sole beneficiary for her lifetime. Pursuant to the terms of the Trust, distributions of the principal of the Trust would be made to plaintiff “at such times or times and in such manner or manners, (i) as [plaintiff] may demand by an acknowledged, written instrument delivered to the Trustees, or (ii) as the Trustees, in the exercise of sole and absolute discretion, shall determine.” On or about May 2, 2013, plaintiff executed the necessary paperwork to assign the Nok from the Trust to herself.

Defendant now brings the instant motion for summary judgment and an order dismissing plaintiff’s complaint on the grounds that: (1) plaintiff lacks standing and/or capacity to sue; (2) plaintiff is unable to demonstrate damages; and (3) plaintiff cannot establish defendant’s negligence. Plaintiff cross-moves for partial summary judgment on the issue of her ownership of the Nok.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Id.*

The court first turns to defendant's motion for summary judgment. As an initial matter, defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff lacks standing and the capacity to sue is denied. It is well settled that pursuant to CPLR § 3211, the affirmative defense that plaintiff lacks legal capacity is waived unless defendant asserts such defense in his answer or raises such defense in a pre-answer motion. Here, defendant did not bring a motion to dismiss for lack of legal capacity, nor did it assert such defense in its answer. Thus, defendant has waived such defense and the court need not discuss defendant's arguments going to the merits of the defense. To the extent defendant argues that it did not waive the defense as it asserted as an affirmative defense in its answer that plaintiff failed to state a cause of action, such contention is without merit as failure to state a cause of action is entirely separate and distinct defense from lack of legal capacity.

Additionally, defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff cannot demonstrate negligence is denied as defendant has failed to demonstrate it was not negligent as a matter of law. "The Court of Appeals has consistently instructed that, 'negligence cases by their very nature do not usually lend themselves to summary judgment for 'even when the facts are conceded there is often a question as to whether the defendant or the plaintiff acted reasonably under the circumstances, an issue which can rarely be decided as a matter of law.'" *Lugo v. LJM Toys*, 146 A.D.2d 168, 170 (1st Dept 1989) (internal citations omitted); *see also Johansdottir v. Kohn*, 90 A.D.2d 842 (2nd Dept 1982). Indeed, "[t]he question of whether defendants's conduct amounts to negligence is inherently one for the trier of fact." *Corbally v. Sikras Ralty Co.*, 161 A.D.2d 107 (1st Dept 1990). Here, defendant argues defendant cannot be found negligent as: (1) Mr. Toy "inspected the surface before he

moved it and recalls that it was level"; (2) Mr. Toy and Mr. Guillemain both testified that the statue was sturdy for fifteen to twenty minutes after Mr. Toy moved it; and (5) Mr. Toy testified that plaintiff was the last one to touch the statue before it fell and broke. On these facts, the court cannot find that defendant was not negligent as a matter of law. Defendant is arguing that Mr. Toy took all reasonable precautions in moving the Nok. However, whether or not Mr. Toy took all reasonable precautions is a determination for the trier of fact. Indeed, a jury could determine that Mr. Toy's actions in moving the Nok from the fireplace and placing it adjacent to the sofa was not reasonable. Additionally, Mr. Toy's testimony that plaintiff was the last one to touch the Nok is directly contradicted by plaintiff's affidavit. Thus, there also remains a disputed issue of fact precluding summary judgment.

Additionally, to the extent defendant argues that summary judgment should be granted and plaintiff's complaint dismissed as plaintiff cannot demonstrate that the Nok sculpture at issue has any monetary value, such contention is unavailing to grant summary judgment. The issue of the overall monetary value of the Nok is an issue of fact to be decided by the trier of fact and defendant itself presents the court with conflicting expert reports over the value of the Nok. Thus, there clearly is a disputed issue of fact as to the valuation of the Nok that must be left to the trier of fact.

The court now turns to plaintiff's motion for partial summary judgment on the issue of plaintiff's ownership of the Nok. Under New York law, the party who possesses property is presumed to be the party who owns it. *See Polock v. Rapid Indus. Plastics Co.*, 113 A.D.2d 520, 525 (2nd Dept 1985). Thus, a party challenging ownership must come back with evidence to refute the rebuttal presumption of ownership. *Id.* Here, plaintiff has met her prima facie burden

by testifying to the fact that the Nok was in her possession at the time of the incident and has been since her husband Arman purchased the Nok over 15 years ago. In response, defendant has failed to present any evidence to rebut the presumption of ownership other than mere speculation that the Nok is stolen as other Nok figures of this kind were allegedly known to be stolen from Nigeria. Such speculation is insufficient to defeat summary judgment. Additionally, there is no authority to support defendant's contention that plaintiff must present documentation demonstrating the legal exportation and legal importation of the Nok in order to establish ownership in this action. Indeed, the case cited by defendant is inapposite. *See Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311 (1991). *Guggenheim* did not involve a claim for negligence but was an action for replevin against the good faith purchaser of an allegedly stolen chattel and, as such, it is distinguishable and inapplicable to the present case.

Accordingly, defendant's motion is denied in its entirety and plaintiff's cross-motion is granted. It is hereby ORDERED and ADJUDGED that plaintiff is the owner of the Nok and defendant cannot challenge ownership at trial. This constitutes the decision and order of the court.

Dated: 4/2/14

Enter: _____


J.S.C.