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

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ELLEN SWAIN, as Executrix of the Estate of Arthur Brown,

Index No. 158122/2012

Plaintiffs,

-against-

DELAINE M. BROWN,

Defendant.

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JOAN A. MADDEN.

In 1993, the late Arthur Brown (hereinafter "the Deceased") obtained a decision on appeal to the First Department regarding the distribution of certain marital property ("1993 Decision"). See Brown v. Brown, 191 A.D.2d 301 (1st Dept 1993), lv dismissed, 82 N.Y.2d 748 (1993). This judgment established the Deceased's ownership of seven Max Weber artworks and 32 Indian miniatures (the "subject works"); however, the subject works were never restored to the Deceased's actual possession. In this action, plaintiff Ellen Swain, the executrix of the Deceased's estate, alleges that the Deceased's ex-wife, defendant Delaine Brown, has "wrongfully" withheld the subject works from the Deceased for the past 21 years and asserts various causes of action seeking to recover them.

Defendant now moves, pursuant to CPLR 3211(a)(1), (5) and (7), for an order dismissing the complaint based on the statute of limitations, documentary evidence, and for failure to state a cause of action. Plaintiff opposes the motion, which is granted in part and denied in part.

Background

Accepting the allegations of the complaint as true (Leon v. Martinez, 84 N.Y.2d 83 [1994]), the following facts emerge: Arthur and Delaine Brown were divorced by judgment entered in 1983 with issues of personal property reserved for a separate trial. Prior to that judgment, Delaine Brown had stored certain items, including the subject works, in the New Yorker Warehouse, which the court directed be placed under "joint control."

By decision and order dated March 23, 1989 ("1989 Decision"), the First Department, inter alia, awarded the Deceased "ownership of those items of personalty [Delaine Brown] admitted in the record was acquired from [the Deceased's] father's apartment; provided that costs of storage for the parties' personal property be shared equally by both parties." Brown v. Brown, 148 A.D. 2d 377, 378 (1st Dep't 1989).

Thereafter, the Deceased sought an order directing that Delaine Brown transfer to him certain articles of personal property pursuant to the 1989 Decision (presumably including the subject works). The Supreme Court awarded only some of that property which Delaine Brown had conceded to the Deceased owning prior to their marriage. In the 1993 Decision, the First Department specifically awarded the Deceased the subject works, writing that, "[t]he [trial] court erred in failing to award defendant all the Max Weber artworks and Indian miniatures." Brown v. Brown, 191 A.D.2d at 303. As to the remaining items of joint property, the court wrote, "it would be more equitable to direct distribution in kind of the remaining items, upon payment by [the Deceased] of his share of monies owed for storage." Id.

On December 2, 1993, the Deceased's attorney contacted Delaine Brown's attorney and requested the personal property awarded to him by the 1993 Decision to be turned over to him

("1993 Demand"). The complaint alleges that subsequent to this request, Delaine Brown "failed to and/or refused to turn over said property" but later entered into an agreement ("Agreement") with the Deceased evidenced by the following communications: A letter in reply to the 1993 Demand from Delaine Brown's attorney dated December 7, 1993 ("1993 Letter") and another letter from the same dated January 27, 1995 ("1995 Letter") (collectively, "The Letters").

The 1993 Letter informed the Deceased that the works had been set aside for him previously and that he "[was] at liberty to take possession without prejudice to any rights or claims that he may have." The 1995 Letter encloses an inventory of the New Yorker Warehouse divided into two categories: Property to be delivered to Delaine Brown and Property to be delivered to the Deceased. The subject works are included in the latter category. The remainder of the letter proposes the terms of turn over and reads:

> It is proposed that you and I meet (without our clients) . . . to designate the item of joint property desired by our client. . . . Prior to our meeting, Arthur Brown will execute a general release to Delaine Brown, and Delaine Brown will execute a general release to Arthur Brown which shall be delivered by each client to their respective attorney. . . . Thereafter, Delaine Brown will effectuate segregation of the respective party's property at the New Yorker Warehouse for each party to remove within a reasonable time to be agreed on in writing in advance of our meeting. . . . Will you please advise.

The record contains no evidence of an acceptance of this proposal by the Deceased or his counsel does not otherwise indicate how the parties proceeded after this proposal. The Deceased died in 2011. Plaintiff Ellen Swain, executor of the Deceased's estate, subsequently sent a letter to Delaine Brown dated June 29, 2012, which demanded the immediate return of the subject works ("2012 Demand"). This action was commenced thereafter on November 19, 2012, by filing a summons and complaint. The complaint contains the following six causes of action:

breach of agreement, civil contempt, replevin, conversion, fraud and unjust enrichment. Defendant now moves for an order dismissing the complaint based on CPLR §3211(a)(1), (5) and (7).

Discussion

Plaintiff's first cause of action is for breach of contract based on the alleged Agreement between defendant and the Deceased purportedly evidenced by both the 1993 and 1995 Letters annexed to the complaint.

Defendant first argues that the breach of contract claim is time barred pursuant to CPLR 213, which requires an action based on contract to be commenced within six years from the time the cause of action accrues. Defendants maintain that any breach of the alleged Agreement, presumably demonstrated by a refusal to turn over the works, would have occurred, at the latest, in 1995 and therefore, plaintiff's claims are untimely. Moreover, defendants argue that the letters annexed to the complaint do not evidence an enforceable agreement, and thus plaintiff's claim fails to state a cause of action.

In opposition, plaintiff contends that the Agreement does not establish a time frame for Arthur Brown to collect his property and thus the Agreement was breached when defendant allegedly refused to return the works upon plaintiff's demand made shortly before commencing this action in June 2012; thus the claim is not time-barred.

On a motion pursuant to CPLR 3211 (a)(7) for failure to state a cause of action, the complaint must be interpreted in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. Guggenheim v. Ginzburg, 43 NY2d 268 (1977); Morone v. Morone, 50 NY2d 481 (1980). However, "the complaint 'must contain allegations concerning

each of the material elements necessary to sustain recovery under a viable legal theory.'" MatlinPatterson ATA Holdings LLC v. Federal Express Corp., 87 A.D.3d 836, 839 (1st Dep't 2011) (quoting Huntington Dental & Med. Co. v. Minnesota Mining & Mfg. Co., 1998 WL 60954, at 3 [S.D.N.Y. 1998]).

To state a cause of action for breach of contract, a plaintiff must establish the existence of an enforceable agreement. See Barber-Greene Co. v. M.F. Dollard Jr., Inc., 239 A.D.655, 657 (3d Dept 1934) aff'd 267 N.Y. 545 (1935). Furthermore, a complaint must specify "the terms of the agreement, the consideration, the performance by plaintiff and the basis for the alleged breach by defendant." Furia v. Furia, 116 A.D.2d 694, 695 (2d Dept 1986). "[T]o constitute an agreement, there must be an unqualified acceptance of the terms of defendant's offer." Malis v. Knapp & Baxter, 196 A.D. 628 (1st Dep't 1921) (holding the pleadings insufficient because terms of acceptance were inconsistent with terms of offer);see also Barber-Greene Co. v. M.F. Dollard Jr., Inc., 239 A.D. at 657; see 22 N.Y. Jur. 2d Contracts §52 ("There is no contract unless the offeror assents to the condition or qualification made by the offeree.").

Under these standards, the complaint is insufficient to allege the existence of an enforceable contract. Specifically, the complaint alleges, "[Delaine Brown] entered into an Agreement with the Deceased, whereby she agreed to turn over the aforesaid property." (Complaint, ¶15). Besides conclusively labeling any understanding as "an Agreement," nothing is alleged other than Delaine Brown's unilateral promise to "turn over the aforesaid property." Furthermore, the complaint alleges the existence of said Agreement to be evidenced by "communications attached hereto" which include both the 1993 Letter and the 1995 Letter. (Complaint, ¶11) Both letters are from Delaine Brown's attorneys and do nothing to suggest that

the Deceased intended to accept any proposal set forth by Delaine Brown or that there was any consideration exchanged for Delaine Brown's "turning over" of the works by which acceptance may be implied at this stage. Thus, the existence of an Agreement cannot be inferred.

As the complaint fails to contain allegations concerning all of the elements for breach of contract, plaintiff's first cause of action must be dismissed for failure to state a cause of action, and the court need not reach issue of whether the claim is barred by the statute of limitations.

In addition, as plaintiff's fifth cause of action, for fraud in the inducement, is premised on the existence of the aforementioned Agreement (See Complaint, ¶30-33), it must also be dismissed.

Plaintiff's second cause of action for civil contempt is based on defendant's alleged failure to comply with the First Department decisions finding that the works were the property of the Deceased. The complaint alleges that because "the Deceased was adjudged to be the rightful owner of the works" pursuant to the 1993 Decision, Defendant's failure to "turn over said personal property" and "wrongful" detainment of the same constitutes a "violation of the 1983 Judgment, [1989 Decision], and 1993 Decision." (Complaint, ¶18,19)

Defendant argues that this claim is untimely pursuant to CPLR 213 (1), which provides a six-year limitations period for actions to which no limitations period is specifically prescribed by statute. Defendant maintains that this "catch-all" limitation is applicable when seeking to recover based on a divorce judgment. See Tauber v. Lebow, 65 N.Y.2d 596, 598 (1985); Woronoff v. Woronoff, 70 A.D.3d 933, 934 (2d Dep't 2010); Ricca v. Valenti, 24 A.D.3d 647, 648 (2d Dep't 2005); Dolan v. Ross, 172 A.D.2d 1013 (4th Dep't 1991).

Defendant also maintains that a claim for civil contempt is only available as a last resort

where a party has already sought execution of a judgment as a remedy. In this connection, defendant argues that the 1993 Decision merely establishes property rights and does not meet the threshold of an "unequivocal mandate" specifically directing or prohibiting the performance of a certain act, which acts as a prerequisite to sustaining a claim for civil contempt.

In opposition, plaintiff does not address the timeliness question and argues only that she has stated a cause of action for contempt based on defendants' failure to comply with 1993 Decision.

"Contempt is a drastic remedy, which should not issue absent a clear right to such relief." Coronet Capital Co. v. Spodek, 202 A.D.2d 20, 29 (1st Dept 1994) (quoting Usina Costa Pinto, S.A. v. Sanco Sav. Co. Ltd., 174 A.D.2d 487 (1st Dept 1991). To establish civil contempt based on an alleged violation of a court order, the movant must establish, by clear and convincing evidence, that a lawful order of the court expressing an unequivocal mandate was in effect, and that the order was disobeyed to a reasonable certainty. See Matter of Dep't of Envt'l Protection of City of N.Y. v. Dep't of Envt'l Cons. Of State of N.Y., 70 N.Y.2d 233 (1987); McCormick v. Axelrod, 59 N.Y.2d 574, amended 60 N.Y.2d 652 (1983); Vujovic v. Vujovic, 16 A.D.3d 490 (2d Dept 2005). The party to be held in contempt must be shown to have had knowledge of the order, and the disobedience must have prejudiced the right of another party. See McCain v. Dinkins, 84 N.Y.2d 216 (1994).

Under this standard, the court finds that the complaint fails to allege sufficient allegations to state a claim for contempt. Moreover, it cannot be said that either of the First Department decisions constituted an unequivocal mandate. In any event, as the last decision related to the rights of the Deceased in the property was entered in 1993, plaintiff's claim for

civil contempt based on this decision (as well as the 1989 Decision) is untimely. See Ricca v. Valenti, 24 A.D. 3d 647 (2d Dep't 2005) ("An action seeking a judgment declaring rights in property subject to equitable distribution is subject to a six-year statute of limitations. Furthermore, 'the six-year statute [begins] to run from the date of entry of the ... equitable distribution judgment, which determined the plaintiff's rights in the property.'"). Accordingly, the cause of action for contempt must be dismissed.

The next cause of action, for replevin, alleges defendant's "wrongful" detainment of the works and her "refusal to turn over the same to the Plaintiff, the rightful owner." (Complaint, ¶21-22) Defendant first argues that these allegations are refuted by the documentary evidence including the Letters submitted by plaintiff as well as the 1993 Decision, which both show that defendant had already segregated the works for the deceased and that he was "at liberty to take possession." Defendant maintains that this language reflects an "unequivocal offer" to turn over the works and thus does not amount to a refusal or wrongful detainment. Alternatively, defendant maintains that taking plaintiff's allegations as true, such a claim is again time barred pursuant to CPLR 214(3), which provides a three-year limitations period for a cause of action to recover a chattel.

In opposition, plaintiff argues that the limitations period begins anew with each demand and refusal for the return of the property. Thus, plaintiff maintains that the period was re-triggered upon the most recent refusal, which may be inferred from plaintiff's letter of demand dated June 29, 2012, and the existence of this lawsuit.

Defendant counters that the limitations period only renews upon an independent act of conversion, which is not indicated by the record, and therefore plaintiff's claims are time barred

because any refusal would have occurred at the latest in 1995.

To make out a prima facie case for replevin, a plaintiff must establish that she "was entitled to immediate possession of the property . . . and that demand for the return of the property has been made and refused by the possessor of the chattel." In re Peters, 34 A.D.3d 29 (1st Dep't 2006). Consequently, the statute of limitations begins to run once the requirements of a demand and a refusal have been met. Solomon R. Guggenheim Foundation v. Lubell, 77 N.Y.2d 311 (1991). Moreover, "[A] refusal need not use the specific word "refuse" so long as it clearly conveys an intent to interfere with the demander's possession or use of his property." Feld v. Feld, 279 A.D.2d 393, 394 (1st Dep't 2001) (holding that a letter conditioning the return of the disputed property on resolution of other disputes constituted a refusal because it was inconsistent with plaintiff's claim of ownership). Once a cause of action for replevin has been sustained, "the burden then falls upon the defendant either to show that he is rightfully entitled to possession of the goods or that he is a bona fide purchaser thereof for value." Thorer & Hollander, Inc. v. Fuchs, 241 A.D. 359, 360 (1st Dep't 1934).

Here, based on the 1993 Decision, plaintiff has shown that the Deceased's estate is entitled to the immediate possession of the works. Moreover, it can be inferred from the record that the Deceased and the plaintiff demanded the return of the subject works in the 1993 Demand and the 2012 Demand, respectively. Thus, the only inquiry that remains is whether, and when, defendant refused to return the works.

While the complaint alleges that defendant initially refused the 1993 Demand for the works (Complaint, ¶10), it also alleges, and the Letters attached to the complaint indicate that, this initial refusal was subsequently withdrawn. Thus, the 1993 Letter offered by plaintiff states

"[t]he Webers and Indian miniatures previously were set aside for the Deceased and on presentation of the letter sent to you, he is at liberty to take possession without any prejudice to any rights or claims that he may have." However, taking all the allegations it can be inferred from the allegations in the complaint and the existence of this action, that plaintiff's 2012 Demand for return of the subject works was refused either expressly or impliedly.

The question remains, however, whether the claim is timely. The three-year statute of limitations period for replevin begins to run upon refusal of a demand. See Feld v. Feld, 279 A.D.2d at 394. While the initial demand was refused in 1993, accepting the allegations in the complaint as true that refusal, while sufficient to trigger the limitations period, does not render the replevin action untimely since such refusal was withdrawn by the 1993 Letter which unconditionally permitted the Deceased to take possession of the subject works. Accordingly, it would appear that the limitations period did not begin to run until sometime after the 2012 Demand, and as this action was commenced in 2012, the claim for replevin is timely.

Plaintiff bases her fourth cause of action for conversion on defendant's refusal "to turn over possession of said personal property and [continued] exercise of control" which is "inconsistent with the Plaintiff's rights therein despite numerous demands for turnover by Order of the Court, the Deceased and the Plaintiff . . ." (Complaint, ¶26). Defendant argues that defendant did not exercise exclusive dominion over the works (see Vigilant Insurance Co. of America v. Housing Authority of the City of El Paso, 87 N.Y.2d 36, 44 [1995]) as the complaint only refers to the defendant's storage of the works in the warehouse, which was under joint control. Alternatively, defendant contends that the claim for conversion is time barred by the same three-year statute of limitations.

In opposition, plaintiff argues that the statute of limitations was triggered more recently upon the most recent act of conversion, namely Delaine Brown's failure to turn over the works sometime after the 2012 Demand from plaintiff's attorneys and is thus timely. (Aff. in Opp., ¶25, 26)

In reply, defendant argues that any claim for conversion based on a speculation that Delaine Brown has "done something" with the works since 1995 is unsupported by the complaint or evidence attached thereto and therefore plaintiff's claim fails to state a cause of action.

As a conversion claim begins to accrue for purposes of the three-year statute of limitations at the same time as a replevin claim (upon demand and refusal), the claim for conversion is not subject to dismissal on statute of limitations grounds. See generally CPLR 214 (3); Feld v. Feld, 279 A.D.2d at 394.

In addition, the court finds that the complaint sufficiently states a cause of action for conversion. It is well settled in New York that a claim for conversion requires "[s]ome affirmative act--asportation by the defendant or another person, denial of access to the rightful owner or assertion to the owner of a claim on the goods, sale or other commercial exploitation of the goods by the defendant." State of New York v. Seventh Regiment Fund, 98 N.Y.2d 249, 260 (2002) (citing Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex., 87 NY2d 36, 43 [1995]; Sporn v. MCA Records, 58 N.Y.2d 482, 488 [1983]; Bristol v. Burt, 7 Johns 254 [1810]). Moreover, unlike replevin, "conversion 'is concerned with possession, not title." Id. at 259 (quoting Pierpoint v. Hoyt, 260 N.Y. 26, 29 [1932]). However, "it is not necessary for a defendant to take or destroy goods to constitute a conversion, . . ." At the same time, "it is also

not sufficient for a defendant secretly to declare ownership, when that declaration does nothing to inform the owner or any other interested party that an interference with ownership is intended." Id. at 260.

Here, defendant claims that she did not acknowledge the 2012 Demand and, while defendant correctly points out that the complaint is silent as to the current whereabouts of the subject works, she does not deny that she is in possession of the works or that she is refusing to return them. Accordingly, the claim for conversion is not subject to dismissal.

Plaintiff's final cause of action alleges "the Defendant has been unjustly enriched by retaining the subject [w]orks, along with the various personalty awarded to her pursuant to the [1989 Decision] and 1993 Decision, and therefore plaintiff is entitled to recover the personal property or the value of the same under a theory of unjust enrichment." (Complaint, ¶35)

Defendant argues that since the unjust enrichment claim is based on the same alleged violations of the 1989 and 1993 Decisions, the applicable six-year statute of limitations begins to run, at latest, at the time of the 1993 Decision and is therefore time-barred. In opposition, plaintiff counters that the six-year period was tolled by continued enrichment in question. See Coombs v. Jervier, 74 A.D.3d 724 (2d Dep't 2010).

"To prevail on a claim for unjust enrichment, the plaintiff must establish that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against good conscience and equity to permit the other party to keep what is sought to be recovered. Cruz v. McAneney, 31 A.D.3d 54, 59 (2d Dep't 2006)." Under this standard, the complaint sufficiently states a cause of action for unjust enrichment based on the allegations that defendant has wrongfully retained the works, which are presumably of some considerable economic and aesthetic value;

thus, whether or not they have been sold or converted to some other use, defendant has been enriched simply by possessing them and depriving plaintiff of their value.

As for the statute of limitations issue, "unjust enrichment claims are governed by the six-year statute of limitations," (Natmir Restaurant Supply Ltd. v. London 62 Co., 140 A.D.2d 261 [1st Dept 2001]) and accrue upon "the occurrence of the alleged wrongful act giving rise to restitution." Kaufman v. Cohen, 307 A.D.2d 113 (1st Dept 2003).

At present, the record does not yet indicate if, and at what point, defendant wrongfully acted in a manner giving rise to a duty of restitution. Because, at this stage, all inferences must be drawn in the light most favorable to the plaintiff, defendant's motion to dismiss on this count must be denied.

In view of the above, it is

ORDERED that the motion to dismiss is granted to the extent of dismissing the first cause of action for breach of contract, the second cause of action for civil contempt, and the fifth cause of action for fraud; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that defendant shall file and serve an answer within 30 days of the date of this decision and order, a copy of which is being mailed by my chambers to counsel for the parties; and it is further

ORDERED that a preliminary conference shall be held in Part 11, Room 351, 60 Centre Street, New York, NY on September 18, 2014, at 9:30 a.m.

DATED: July 18 2014

J.S.C. HON. JOAN A. MADDEN J.S.C.