

24 Art Holdings, LLC v Berry-Hill Galleries, Inc.
2014 NY Slip Op 32083(U)
August 5, 2014
Sup Ct, NY County
Docket Number: 650045/2011
Judge: Shirley Werner Kornreich
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SHIRLEY WERNER KORNREICH
J.S.C

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

-----X
 624 ART HOLDINGS, LLC,

Plaintiff,

-against-

BERRY-HILL GALLERIES, INC., JAMES HILL,
 FREDERICK D. HILL, R.H. BLUESTEIN & COMPANY,
 and JOHN DOES 1-5,

Defendants.
 -----X

SHIRLEY WERNER KORNREICH, J.:

DECISION & ORDER

Index No. 650045/2011

Before the court is a motion to dismiss by defendant R.H. Bluestein & Company (Bluestein), which originally was filed in March 2012. The action was stayed against Bluestein and Frederick D. Hill (Frederick), pending conclusion of an arbitration by plaintiff 624 Art Holdings, LLC (Plaintiff) against defendants Berry-Hill Galleries, Inc. (Gallery) and James Hill (James). The Gallery is owned by James and Frederick. The arbitration is now concluded, the stay has been lifted, the court has granted the motion to confirm the award against the Gallery and James, dated April 1, 2012 (Award), and the parties were given time to submit supplemental memoranda of law on Bluestein's motion. Before the action was stayed, on June 7, 2012, the court granted Plaintiff leave to amend the complaint, excluding the proposed ninth cause of action. Doc 46.¹ The motion is directed to the amended complaint (AC) and is granted in part and denied in part.

Background

¹References to "Doc" followed by a number refer to documents filed in the New York State Electronic Filing System.

The Gallery and Plaintiff entered into an Art Administration Agreement, dated March 18, 2004 (Agreement). Pursuant to the Agreement, the Gallery was to administer artworks owned by and acquired for Plaintiff, who would retain title to them. If the Gallery transferred an artwork belonging to Plaintiff, it was required to obtain from the buyer and transmit to Plaintiff a written acknowledgment that Plaintiff was the owner. Transfer of title was required to be from Plaintiff to the buyer. All sales proceeds were to be transmitted to Plaintiff.

The two causes of action in the AC against Bluestein are the third cause of action for replevin and the seventh cause of action pursuant to Debtor and Creditor Law (DCL) §276. Plaintiff seeks return by replevin of two paintings: -- *Mrs. Tarbell, Sketch at Evening* by Edmund Tarbell (Tarbell) and *Beach Scene, Newport* by Worthington Whittredge (Whittredge, collectively with Tarbell, Paintings). The seventh cause of action alleges that James, Frederick and/or the Gallery (collectively, BH Defendants) transferred the Paintings without fair consideration with intent to defraud Plaintiff. AC, ¶¶ 98-99. The AC alleges that the BH Defendants transferred the Whittredge to Bluestein, but does not identify Bluestein as the buyer of the Tarbell, a fact that has now come to light as more fully described below. *Id.*

As this is a motion to dismiss, the allegations of the AC are accepted as true and must be accorded the benefit of every favorable inference. *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 (1976); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 (1st Dept 2005). Where the defendant seeks to dismiss a complaint based upon documentary evidence, the motion should be denied unless "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law [citation omitted]." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002); *Leon v Martinez*, 84 NY2d 83, 88 (1994). Affidavits and other evidence may be freely used to preserve

inartfully pleaded claims. *Cron v Hargro Fabrics*, 91 NY2d 362, 366 (1998). The recitation of facts that follows is drawn from the complaint, as well as inferences in favor of Plaintiff that can be drawn from the Award and the other documentary evidence submitted by the parties.

Plaintiff entrusted the Whittredge and the Tarbell to the BH Defendants. Bluestein is an investment advisor located in Michigan. Sometime in June 2008, James and Frederick transferred the Whittredge from the Gallery to Bluestein. Bluestein at all relevant times was sophisticated in the acquisition of artwork and acquired the Whittredge for the purpose of investment only. Bluestein's website makes the following claim about its research of investments:

With access to an extensive universe of research reports, reference materials, and periodicals we remain abreast of critical information sources necessary for the effective management of our clients' financial assets.

Doc 43, Ex 2.

Bluestein and John Does 1-5 (John Does) took custody of the Whittredge and other artworks, including the Tarbell,² without obtaining genuine title or truthful evidence of its ownership and neglected to undertake a reasonable assessment of provenance. Bluestein was on notice from widespread news coverage that the Gallery was in the midst of financial difficulties, had been engaged in art transactions involving title contests, had tried to manipulate the value of its paintings through bogus sales activities, and had attempted to convey artwork in a manner intended to remove it from the reach of its creditors.

James and Frederick traded the Tarbell without Plaintiff's consent for a painting of far less face-value. James and Frederick kept the consideration received for the Paintings for their

²The AC defines "Artworks" as including the Whittredge and the Tarbell. AC, ¶20.

own benefit and to the exclusion of Plaintiff's contractual or ownership rights, and did not notify Plaintiff that they had been transferred. While the Gallery was empowered to consummate sales on Plaintiff's behalf, pursuant to the Agreement, title to the Paintings was to pass only from Plaintiff to the buyer.

In 2010, Plaintiff went to the Gallery and learned that three of its pieces, including the Paintings, had been moved to an undisclosed location. Despite "due demand therefore," Bluestein refused to restore the Whittredge to Plaintiff.

In connection with the replevin claim, Plaintiff seeks a declaration that it is the rightful owner of the Paintings and that Bluestein has no legal or equitable interest in them. Plaintiff also seeks money damages and an injunction ordering Bluestein to return the Paintings.

The Award found that the Gallery purchased the Whittredge for Plaintiff on November 2, 2007, at which time the Gallery assigned it a value of \$225,000, in an in-kind sale for another painting that Plaintiff owned. The Award determined that, on March 30, 2004, the Gallery bought the Tarbell for Plaintiff for \$252,000.

The Award found that the Gallery sold the Tarbell and Whittredge with another painting not owned by Plaintiff (3 Works) on July 1, 2008. The 3 Works were sold for \$800,000 cash and an in-kind exchange of two Milton Avery Paintings, *Park Riders* and *Horse Grazing*. Out of the proceeds of the 3 Works, the Gallery and James gave \$300,000 and ownership of *Park Riders* to Plaintiff, which the arbitrator found was not a fair price for the Paintings. The Award ordered the Gallery to disgorge *Horse Grazing* or its value, \$300,000, which it had kept as a commission.³

³ The Paintings were bought for \$477,000 and the arbitrator found that a \$300,000 commission on their sale was not reasonable.

Thus, the court can infer that Plaintiff has alleged that one of the John Does was Bluestein, who bought the 3 Works, including the Tarbell. Bluestein's supplemental memorandum says that if Plaintiff amends its pleading to include the Tarbell, then Bluestein's arguments apply equally to the Tarbell.

The fraudulent conveyance cause of action alleges, in pertinent part, that the title to the Paintings (and other artworks) were "transferred to purchasers" by James, Frederick and/or the Gallery without fair consideration to their owner, Plaintiff, and "with specific intention of defrauding it." Among the transfers by the BH Defendants was the 2008 sale of the Whittredge to Bluestein. Plaintiff seeks to void the transfer of the Whittredge, obtain possession of it, and an award of attorneys' fees.

A time line is important with respect to Bluestein's knowledge, prior to its purchase of the Paintings in June 2008, of the "widespread" media coverage of the Gallery's financial troubles, title contests, etc. In December 2005, the Gallery filed for bankruptcy, pursuant to Chapter 11 of the United States Bankruptcy Code. It emerged from bankruptcy with a reorganization plan on March 2, 2007, a little over a year before Bluestein bought the Paintings.

As evidence of the "widespread" adverse publicity about the Gallery, Plaintiff submits five newspaper articles published by: 1) the New York Times, on December 22, 2005; 2) the Wall Street Journal, on June 30, 2011; and 3) the Maine Antique Digest, in December 2005, June 2006 and March 2007. The articles reported that the Gallery defaulted on millions of dollars in loans to various creditors and lenders; was sued by clients, its lenders and another gallery; failed to pay Christie's \$14 million for a Hopper painting; sold artwork consigned to it without authorization and then told the client that the sale had been for \$1 million less than the true sales price; sold artwork that was secured by UCC filing statements as security for loans; double

pledged artwork as collateral to different lenders; engaged in bid rigging to inflate prices for its own artwork; and defaulted on its mortgage. On a more positive note, the 2007 article indicated that the Gallery emerged from bankruptcy, settled with one lender, settled with Christie's, settled with the other gallery and obtained new financing in the amount of \$20 million. The 2011 article, published after Bluestein bought the Paintings, reported that the Gallery was bailed out of its bank loans and mortgage by a billionaire financier, who bought them in 2011. Plaintiff filed UCC statements for the Paintings in September 2009. Docs 30, ¶¶ 5-6; 35 & 36. Consequently, prior to the sale of the Paintings to Bluestein, the Gallery was reported to be emerging from bankruptcy with fresh capital and to have settled some major liabilities, and the UCC statements were filed in 2009, after Bluestein acquired the Paintings.

Discussion

Replevin

Replevin is strictly a possessory action. *Hofferman v Simmons*, 290 NY 449, 455-456 (1943). If based upon wrongful detention, the plaintiff must plead that he is entitled to possession and facts showing wrongful detention. *Id.*

Bluestein contends that, pursuant to UCC 2-403, as a matter of law, it has title to the Paintings because it bought them in the ordinary course of business, in good faith, without knowledge of Plaintiff's rights. Plaintiff counters that it has stated a claim of title, pursuant to UCC 4-203, because Bluestein is a merchant with respect to artwork, bound to act in a commercially reasonable manner, and on notice of warnings or "red flags" that should have alerted Bluestein to check the provenance of the Paintings. In addition, Plaintiff argues that UCC §2-403 does not apply because the Gallery was not authorized to transfer title to the Paintings under the terms of the Agreement.

The applicable UCC provisions are §§ 2-102 , 2-103, 2-104, and 2-403. Section 2-403, entitled "Power to Transfer; Good Faith Purchase of Goods; 'Entrusting'", provides, in pertinent part:

- (1) A purchaser of goods acquires all title which his transferor had or had power to transfer
- (2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.
- (3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods has been such as to be larcenous under the criminal law.

Here, the AC alleges that Plaintiff entrusted the Paintings to the Gallery, pursuant to the Agreement, which gave the Gallery the right to buy, sell and transfer title to artwork for Plaintiff.

The AC alleges:

It was expressly understood that Plaintiff would retain title to all of its paintings and that Berry-Hill [the Gallery] would be merely entrusted with the custody, promotion and care of Plaintiff's property.

AC, §13. This is sufficient to allege that Plaintiff delivered possession of the Paintings to the Gallery, pursuant to subsection 3. Having entrusted the Paintings to the Gallery, which clearly was a merchant dealing in goods of that kind, it could transfer Plaintiff's title to a buyer in the ordinary course, pursuant to subsections 1 and 2.

UCC §1-201(9) defines "buyer in ordinary course of business" to mean

a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, ... in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices.

Section 2-103(1)(b) defines good faith in the case of a merchant as:

honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

An art merchant's reasonable commercial standard includes inquiry as to the ownership of a work of art where there are warning signs or "red flags" indicating problems with the sale. *Porter v Wertz*, 53 NY2d 696, 701 (1981); *Dorothy G. Bender Foundation, Inc. v Carroll*, 40 Misc3d 1231(A) (Sup Ct NY Co 2013); *Davis v Carroll*, 937 F Supp2d 390 (SDNY 2013); *Brown v Mitchell-Innes & Nash, Inc.*, 2009 U.S. Dist. LEXIS 35081; 68 U.C.C. Rep. Serv.2d (Callaghan) 599; 2009 WL 1108526 (SDNY 2009)(nor). Red flags include: (1) whether the sale price is obviously below market, (2) whether the negotiations or procedure of the sale differed from previous transactions between buyer and seller, (3) whether the buyer was aware of the seller's financial difficulties, or (4) whether the buyer would have reason to doubt the seller's ownership of the artwork. *Davis, supra* at 426.

Section 2-104(1) defines "merchant" as:

a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

Comment 2 to §2-104 states that:

The term "merchant" as defined here roots in the "law merchant" concept of a professional in business. The professional status under the definition may be based upon specialized knowledge as to the goods, specialized knowledge as to business practices, or specialized knowledge as to both

One can be a merchant without being in the business of buying and selling a product.

National Microsales Corp. v Chase Manhattan Bank, N.A., 761 F Supp 304, 306 (SDNY 1991) (bank's purchase and sale of microfilm equipment used in its business sufficient to establish it as merchant); *Brown v Mitchell-Innes & Nash, Inc.*, *supra* (art collector is merchant); *Pecker Iron Works, Inc. v Sturdy Concrete Co.*, 96 Misc2d 998, 1001-1002 (N.Y. Civ. Ct. 1978) (general contractor is merchant with request to contract to buy steel based upon familiarity with steel, its use in construction, manner of ordering, and what contractors do with it before delivery).

Based on these principles, Plaintiff has alleged a claim that Bluestein is a merchant with respect to artwork. The AC says that Bluestein bought the Paintings for "investment" and Bluestein's website touts its expertise in researching investments for its clients. Under UCC 2-104, it could be inferred that Bluestein was a merchant because it had specialized knowledge as to the goods it acquired for investment, i.e., the Paintings. *National Microsales Corp.*, *supra*; *Brown*, *supra*; *Pecker Iron Works, Inc.*, *supra*.

If Bluestein were a merchant, then good faith would require it to use reasonable commercial standards of fair dealing in the trade of buying artwork. That would include investigating provenance where there are red flags (and perhaps in the absence of red flags). *Porter*, *supra*; *Dorothy G. Bender Foundation, Inc.*, *supra*; *Davis*, *supra*; *Brown*, *supra*; see *Davis v Carroll*, 937 F Supp2d 390, 423 (SDNY 2013) ("Reasonable commercial standards of fair dealing in the trade'...should not and cannot be interpreted to permit, countenance or condone commercial standards of sharp trade practice or indifference as to the 'provenance', i.e., history of ownership or the right to possess or sell an object d'art." citing *Porter*, *supra*). The news articles submitted by Plaintiff are sufficient for purposes of pleading to state a claim that red flags should have alerted Bluestein. They reported that the Gallery had financial difficulties,

had sold works without authorization, had sold pledged artwork and engaged in other sharp practices. Whether Bluestein read the articles, whether the Maine Digest is a publication in “widespread” circulation, and whether art merchants should have read the articles submitted are factual issues that cannot be resolved at this stage and will benefit from disclosure. While Bluestein argues that the red flags did not alert Plaintiff, who entrusted its art investments to the Gallery and its principals for years, both before and after the bankruptcy, that goes to the credibility of Plaintiff’s claim, not whether one is stated.

Plaintiff is incorrect that UCC §2-403 does not apply because the Gallery could not convey title to Bluestein under the terms of the Agreement. A good faith purchaser can obtain title of an artwork sold by an art merchant, even where the sale violates the agreement between art merchant and the owner. The UCC applies, “regardless of any condition expressed between the parties to the delivery”, i.e., despite the contractual terms, when a good faith purchaser buys in the ordinary course from a merchant to whom the owner gave possession of the goods. Title can pass from a merchant entrusted with goods to a good faith purchaser in the ordinary course. Factual issues as to whether Bluestein’s transaction was in good faith and it bought the Paintings in the ordinary course mandate denial of the motion to dismiss the replevin claim.⁴

DCL §276

DCL §276 provides that:

[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

⁴ Of course, Plaintiff cannot recover twice. Should it be fully compensated pursuant to the Award, it cannot be successful in its replevin action against Bluestein.

One of the elements of a claim under §276 is that *the defendant made a conveyance or incurred obligations* with intent to hinder, delay or defraud creditors. *ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 228 (2011)(statute requires plaintiffs to allege that defendants made conveyances and incurred obligations with intent to hinder, delay, or defraud creditors).

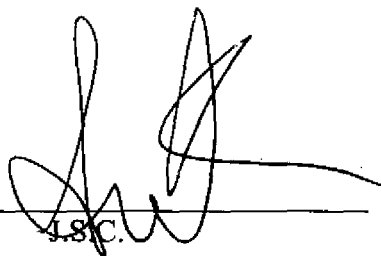
Plaintiff has not stated a claim against defendant Bluestein under DCL §276 because the AC does not allege that Bluestein made a conveyance or incurred an obligation. The AC alleges that *Frederick and James traded the Tarbell* for a painting of lower value and that *the Gallery, James and/or Frederick transferred title to Paintings* without fair consideration. AC, ¶¶ 37 & 98. There is no allegation that Bluestein transferred or incurred obligations. As a result, Plaintiff has not stated a claim against Bluestein pursuant to DCL §276 and the seventh cause of action against Bluestein is dismissed. Accordingly, it is

ORDERED that the motion by R.H. Bluestein & Company (Bluestein) to dismiss the amended complaint's third and seventh causes of action against it is granted solely to the extent of dismissing the seventh cause of action pursuant to Debtor and Creditor Law 276, and is otherwise denied; and it is further

ORDERED that the parties shall appear for a status conference on August 19, 2014 at 10:30 a.m., in Room 228 of the courthouse located at 60 Centre Street, New York, NY 10007.

Dated: August 5, 2014

ENTER:



A handwritten signature in black ink, appearing to be "J.S.C.", is written over a horizontal line. The signature is stylized and cursive.