

<b>Ginley v J. Pocker &amp; Son, Inc.</b>
2017 NY Slip Op 30454(U)
March 6, 2017
Supreme Court, New York County
Docket Number: 654227/2016
Judge: Arlene P. Bluth
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK PART 32

-----X  
VANESSA NOEL GINLEY,

Plaintiff,

**DECISION & ORDER**  
**Index No. 654227/2016**

-against-

Mot. Seq. 001

J. POCKER & SON, INC.,

Defendant.

-----X

The motion by defendant to dismiss plaintiff's complaint is denied.

**Background**

This action arises out of artwork that plaintiff purportedly left with defendant, a custom framing business located at 135 East 63<sup>rd</sup> Street, New York, New York. Plaintiff maintains that she left these items with defendant on April 10, 2013 in order to have the art framed. Plaintiff contends that these items are very valuable with at least two of the pieces – Peter Gee screen prints – valued at \$35,000 each.

Plaintiff asserts that she has demanded her artwork back and that defendant has refused to return the items. Plaintiff contends that the artwork is missing and seeks at least \$100,000 in damages.

Defendant moves to dismiss on the basis that the documentary evidence shows that plaintiff's action is time-barred. Defendant claims that plaintiff brought the artwork to defendant

on October 3, 2011 and that under either date (October 3, 2011 or April 10, 2013), this lawsuit was not brought within the three-year statute of limitations period.

Defendant insists that under CPLR 214(3) and (4) plaintiff had three years to commence an action to recover chattel or for damages for injury to property. Plaintiff concludes, therefore, that plaintiff's claims for negligence (first cause of action) and conversion (second cause of action) must be dismissed. Defendant contends that plaintiff's third cause of action for a declaratory judgment that defendant must deliver and return the artwork must also be dismissed on statute of limitations grounds.

In opposition, plaintiff claims that the statute of limitations did not begin to run until plaintiff made a demand for the return of the artwork and the demand was refused. Plaintiff contends, in her affidavit in opposition, that she had a medical emergency in February 2014, which delayed the completion of the custom framing and that when she reached out to defendant, they informed her that they could not locate her artwork. Plaintiff insists that after more discussions in which defendant tried to locate the artwork, plaintiff was informed by defendant that the artwork had been picked up or returned. Plaintiff then claims she demanded the return of her artwork in September 2015.

In reply, defendant claims that plaintiff's complaint does not state anything about the date of plaintiff's demand for return of the artwork. Defendant insists that plaintiff's delay in demanding the artwork was unreasonable because it was made nearly four years after she first delivered the artwork to defendant.

## Discussion

“On a CPLR 3211 motion to dismiss, the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Nonnon v City of New York*, 9 NY3d 825, 827, 842 NYS2d 756 [2007] [internal quotations and citation omitted]). A motion to dismiss based on documentary evidence “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]).

“On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. To meet its burden, the defendant must establish, inter alia, when the plaintiff’s cause of action accrued” (*Lebedev v Blavatnik*, 144 AD3d 24, 28, 38 NYS3d 159 [1st Dept 2016] [internal quotations and citations omitted]). “The burden then shifts to plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable” (*Baptiste v Harding-Marin*, 88 AD3d 752, 753, 930 NYS2d 670 [2d Dept 2011]). “[P]laintiff’s submissions in response to the motion must be given their most favorable intendment” (*Benn v Benn*, 82 AD3d 548, 548, 918 NYS2d 465 [1st Dept 2011] [internal quotations and citation omitted]).

“In a chattel bailment of indefinite duration, the Statute of Limitations does not begin to run against a bailee in lawful possession until the bailor makes a demand for the chattel’s return and the demand is refused” (*Martin v Briggs*, 235 AD2d 192, 198, 663 NYS2d 184 [1st Dept

1997]), “However, an owner of property who has knowledge of its location, as plaintiff did, cannot unreasonably delay making demand upon the person in possession of the property” (*Rahanian v Ahdout*, 258 AD2d 156, 159, 694 NYS2d 44 [1st Dept 1999] [internal quotations and citation omitted]).

“[W]hen the proceeding has been commenced in the form of a declaratory judgment action, for which no specific Statute of Limitations is prescribed, ‘it is necessary to examine the substance of that action to identify the relationship out of which the claim arises and the relief sought’ in order to resolve which Statute of Limitations is applicable” (*New York City Health & Hospitals Corp. v McBarnette*, 84 NY2d 194, 200-01, 616 NYS2d 1 [1994] quoting *Solnick v Whalen*, 49 NY2d 224, 229 425 NYS2d 68 [1980]).

The instant motion turns on paragraph 7 of plaintiff’s complaint, which states that plaintiff demanded the return of her artwork and defendant refused. Although the complaint does not state when this demand occurred, the inclusion of this paragraph (taken together with the rest of the complaint) put defendant on notice that plaintiff is alleging a bailment of indefinite duration.<sup>1</sup> Allegations based on this legal theory accrue when the demand for the return of the chattel is made (and last three years).

Here, defendant fails to identify when the demand was made and, therefore, defendant did not meet its burden to show when plaintiff’s causes of action accrued. Defendant’s alleged documentary evidence, the framing estimate, only purports to show that an estimate of the

---

<sup>1</sup>Certainly, it would have been more convenient for defendant if plaintiff had alleged a specific date when she demanded the return of her artwork. But in a complaint, a plaintiff is only required to allege facts that establish a cognizable cause of action. Plaintiff need not allege every relevant date or fact; that is the purpose of a bill of particulars and the discovery process.

artwork was completed in October 2011 (affidavit of Pocker, exh B). This exhibit also contains an unexplained notation that the quote was cancelled. In any event, this document does not establish the date of plaintiff's demand for the return of her artwork.

Defendant's memorandum of law characterizes plaintiff's causes of action as the 'taking' of chattel in support of its theory that the three-year statute of limitations began to run from the date plaintiff brought in the artwork. But that contention is not supported in plaintiff's complaint. Defendant appears to acknowledge this point in its reply, which focuses on whether plaintiff's delay in requesting the return of her artwork was reasonable.

Besides, plaintiff's affidavit in opposition raises an issue of fact regarding the date the statute of limitations began to accrue (*Baptiste*, 88 AD3d at 753). Plaintiff claims that she demanded the return of the artwork in September 2015, which would make plaintiff's causes of action timely.<sup>2</sup>

---

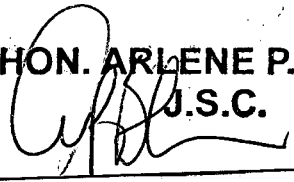
<sup>2</sup>The Court observes that plaintiff filed a sur-reply (which this Court will not consider since it was filed without permission) in which she claimed that the defendant made the "reasonable delay" argument for the first time in reply. However, as defendant points out in its reply, plaintiff identified, for the first time in her affidavit in opposition, a specific date when she demanded the return of her artwork (September 2015). Therefore, it was proper for defendant to consider the relevant standard regarding the statute of limitations when a bailor demands the return of chattel. However, on a motion to dismiss, this Court is unable to find that plaintiff's purported delay in demanding the return of her artwork was unreasonable, especially because plaintiff maintains that she suffered from an illness in February 2014 that delayed her demand.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is denied and defendant is directed to serve and file an answer pursuant to the CPLR. The parties are directed to appear for a preliminary conference on May 23, 2017 at 2:30 p.m.

This is the Decision and Order of the Court:

Dated: March 6, 2017  
New York, New York

  
**HON. ARLENE P. BLUTH**  
**J.S.C.**

---

ARLENE P. BLUTH, JSC