

GEM of Mount Vernon , Inc. v Cassino
2018 NY Slip Op 30387(U)
March 6, 2018
Supreme Court, Suffolk County
Docket Number: 6708/2012
Judge: Joseph Farneti
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PUBLISH

SHORT FORM ORDER

INDEX NO. 6708/2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

 GEM OF MOUNT VERNON, INC.,

Plaintiff,

-against-

ROBERT CASSINO, JAMIE CASSINO
 (husband & wife), and JOHN DOES #1-10,

Defendants.

**DECISION AFTER
 NON-JURY TRIAL**

PLAINTIFF'S ATTORNEY:

PAUL J. SOLDA, ESQ.
 EMPIRE STATE BUILDING
 350 FIFTH AVENUE - FLOOR 68
 NEW YORK, NEW YORK 10118
 212-967-3393

SELF-REPRESENTED DEFENDANT:

JAMIE (CASSINO) BAUM
 22 WILLOW POND LANE
 MILLER PLACE, NEW YORK 11764

After a non-jury trial held before this Court on March 28, 2017 and May 16, 2017, the Court makes the following findings of fact and conclusions of law:

Procedurally, as to the appearing self-represented defendant JAMIE CASSINO n/k/a Jamie Baum ("defendant" or "Ms. Baum"), the FIRST, SECOND, THIRD and SIXTH causes of action are dismissed with prejudice. Defendant had no contact with the plaintiff or the plaintiff's representatives at or around the time the defaulting defendant, ROBERT CASSINO ("Mr. Cassino"), provided the diamond ring in question as collateral for a loan. As will be discussed more fully below, there is no proof of any kind proffered by plaintiff to meet their burden on the FIRST, SECOND, THIRD and SIXTH causes of action relative to Ms. Baum. The FOURTH cause of action sounding in replevin, and the FIFTH cause of action for declaratory relief will be considered by this Court.

Defendant answered the complaint, and asserted twelve affirmative defenses and four counterclaims, to wit: (1) negligence; (2) aiding and abetting

breach of fiduciary duty and/or aiding and abetting conversion; (3) violation of General Business Law § 349; and (4) for declaratory relief. Inasmuch as defendant did not meet her burden at trial with respect to her counterclaims, the counterclaims are hereby dismissed with prejudice, save the FOURTH counterclaim for declaratory relief.

This matter was tried before this Court without a jury on March 28 2017, and was adjourned to and concluded on May 16, 2017. Plaintiff GEM OF MOUNT VERNON, INC. ("GEM" or "plaintiff") is a collateral loan broker frequently referred to as a pawn broker. The home office for GEM is located at 378 Schermerhorn Street, Brooklyn, New York (Tr1 p11 L11-19).¹ The plaintiff has multiple locations, and at the time of this transaction was in the process of acquiring the business of Empire Pawn, Inc. ("Empire"), which conducted business at 430 Middle Country Road, in Selden, New York.

The transaction in question took place on August 11, 2011. Mr. Cassino appeared at the Selden location and sought a loan collateralized by a five carat platinum diamond engagement ring. Plaintiff's Exhibit "1" describes the ring as:

JEWELRY OWNER 8.1DWT PLT DIA ENGMT RNG PEAR
SHAP APX 5CT H/S13 W/ 12 BAGUETTES ON SIDE

The second page of Exhibit "1" is an affidavit made by Mr. Cassino wherein he sets forth the terms and conditions of his transaction with "GEM FINANCIAL SERVICES, INC., D/B/A GEM PAWNBROKERS," located at 378 Schermerhorn Street, Brooklyn, New York 11217. In exchange for the ring, plaintiff loaned Mr. Cassino the sum of \$14,500. Ms. Baum was neither present during the transaction nor a signatory on any of the loan documents.

According to Rachael Wilen, president of GEM, upon presentment of collateral by a customer she will check the value of the collateral, discuss ownership of the collateral and, after reaching an agreement, proceed with a loan transaction (Tr1 p10 L20-25, p11 L1). Ms. Wilen recalled the transaction because it was a large transaction which stuck out in her mind (Tr1 p15 L20-21).

¹ "Tr1 p___ L___" refers to the trial transcript of March 28, 2017, while "Tr2 p___ L___" refers to the trial transcript of May 16, 2017.

Ms. Wilen further acknowledged that it was her duty to inquire as to the ownership of the ring. Through further testimony, Ms. Wilen acknowledged that she did not have all of the requisite forms at the Selden location and had the Brooklyn store fax her the forms necessary to complete the transaction, namely the affidavit in Exhibit "1" and the UCC-1 Financing Statement Authorization as contained in Exhibit "2." Both documents are signed and notarized. Mr. Cassino presented his driver's license confirming to Ms. Wilen that he was who he said he was (Tr1 p17 L24-25, Tr1 p18 L1-6). For transactions in excess of \$3000, the plaintiff requires an affidavit of ownership and the UCC-1. Ms. Wilen testified that the Suffolk County Police Department seized the ring in question on January 17, 2012. She testified further that there was no contact from anyone about the ring between the time of the loan and the sending of the 30-day notice of sale. No 30-day notice correspondence was offered in evidence by the plaintiff.

Upon cross examination by Ms. Baum, Ms. Wilen testified that it often occurs that one member of a couple will appear without the other. Ms. Wilen volunteered that the ring was marital property (Tr1 p30 L1-8).² Ms. Wilen testified that the receipt was not signed by Mr. Cassino, and that the affidavit would supercede the receipt. As noted, both the unsigned receipt and the affidavit comprise Exhibit "1." The affidavit as submitted is dated and notarized August 11, 2011. The unsigned receipt containing the loan amount, interest, and payment provisions is dated August 30, 2011. The plaintiff proffered no additional documentation or evidence of payment of funds to Mr. Cassino.

Ms. Baum was called to testify by GEM. Ms. Baum testified that she did not know of the disposition of the ring until she received a notice from GEM. She further testified that she went directly to GEM's office and no one would speak with her because her name was not on the ticket. Ms. Baum then proceeded to the Second Precinct of the Suffolk County Police Department and filed a report. Upon examination by plaintiff's counsel, Ms. Baum was confronted with a prior statement she had sworn to in her divorce action that the ring and other jewelry was stolen at or about the time of the commencement of the divorce action in October of 2011. There was no report to the police at the time of the alleged taking in October. In addition, Ms. Baum acknowledged that there were financial difficulties in or about August 2011, and that she had given her husband

² Ms. Wilen's characterization of the ring as marital property is incorrect (see *Lipton v Lipton*, 134 Misc 2d 1076 [Sup Ct, NY County 1986]).

a different diamond ring which was missing a stone for the purpose of having it repaired (Tr1 p43 L2-24).

There was no testimony or other evidence provided by either plaintiff or defendant concerning whether or not there was any judicial determination or other disposition concerning the ring in question in the context of the defendants' divorce action. When questioned about this by plaintiff's counsel, Ms. Baum testified that there were other more pressing matters in the divorce and that the issue of the ring got "pushed aside" (Tr1 p38 L11-23). As separate property, if the ring was misappropriated by her then-husband Mr. Cassino, adjustment could be made with respect to any distributive award in the context of the divorce action. It is unclear if any such adjustment or award was made by the court or considered by the defendants in their divorce.

The plaintiff called Harold Dambrot, vice-president of GEM, to testify. Mr. Dambrot recalled the events of August 11, 2011, and it was he who instructed Ms. Wilen that both the affidavit of ownership and the UCC-1 authorization would be required for the purpose of this transaction (Tr1 p58 L1-21). All of the documents which were signed were the representations of Mr. Cassino. Mr. Dambrot recalled the conversation with Mr. Cassino, and that Mr. Cassino stated the purpose of the loan was a temporary loan to support a failing business (Tr1 p60 L2-21). Mr. Dambrot claims that Mr. Cassino said he and his wife needed to raise the money, and that she gave him the ring and told him to pawn it (Tr1 p60 L22-25, p61 L1).

The testimony and evidence revealed that GEM was in the process of completing an asset purchase agreement with Empire and executed a management agreement for the purpose of running the business in the interim and until such time as the asset purchase agreement was closed and finalized (Exhibit "4"; Tr1 p73 L10-21). At the time of the transaction, GEM was actually running Empire's business for them pursuant to the agreement (Tr1 p75 L21-25).

GEM filed an application for a collateral loan broker's license on July 22, 2011 (Tr2 p18 L8-12). Ms. Wilen allegedly received a verbal approval of the license on August 8, 2011 (Tr2 p19 L12-25, p20 L1-2). No documents were proffered with respect to any licenses possessed by Empire at the time of the asset purchase agreement or prior to the time of the Precious Metal Dealer License to GEM. Exhibit "5" in evidence indicates that the Precious Metal Dealer License was issued by the Suffolk County Department of Labor, Licensing &

Consumer Affairs on August 24, 2011, thirteen days after the subject transaction of August 11, 2011. There is no indication in this record as to whether GEM and/or Empire possessed a valid license for the purpose of making a collateral loan on August 11, 2011.

Section 563-36 of the Suffolk County Code defines "Precious Metal and Gem Exchange" as:

Persons engaged in the business of a collateral loan broker, as defined in Article 5 of the New York General Business Law, or in the business of sale, purchase, or exchange of precious metals and/or gems for other objects of precious metals or gems, for United States currency, bank drafts or other negotiable instruments as defined in the Uniform Commercial Code

(Suffolk County Code § 563-36).

Furthermore, Subdivision (A) of Section 563-37, entitled "License required," provides in its entirety:

It is unlawful for any person to engage in any business as a precious metal and gem exchange establishment without first obtaining a license therefor from the office in accordance with and subject to the provisions of this article and Article I³

(Suffolk County Code § 563-37 [A]). Moreover, Section 563-8, entitled "Effect on validity of contracts," provides in pertinent part that "[a] contract entered into ... by a person who engages in a business regulated by this chapter, who on the date of the contract does not possess a valid license to engage in such business, is unenforceable by him" (Suffolk County Code § 563-8).

Based upon the foregoing, it is clear that a license is currently required in Suffolk County to engage in the business of a collateral loan broker.

³ Article I of the Suffolk County Code contains the provisions applicable to all licenses issued in Suffolk County.

As discussed hereinabove, the testimony at trial showed that the subject transaction occurred on August 11, 2011; that GEM applied for a collateral loan broker's license on July 22, 2011; and that the license was actually issued on August 24, 2011, thirteen days after the subject transaction. Notwithstanding the foregoing, Chapter 563 of the Suffolk County Code was amended to include pawn brokers or collateral loan brokers by Local Law 2-2012, which became effective on December 6, 2011, approximately four months *after* this transaction. As such, plaintiff may enforce its rights and pursue its remedies against Mr. Cassino pursuant to the parties' agreement, who the Court notes remains in default in appearing in this action.

However, with respect to Ms. Baum, it is undisputed that she was not a party to the agreement between GEM and Mr. Cassino. Therefore, plaintiff's FIRST cause of action for breach of contract, and SIXTH cause of action for an award of attorney's fees pursuant to the contract, are both hereby dismissed as asserted against Ms. Baum. In addition, the Court finds that the testimony and evidence at trial was insufficient to establish that Ms. Baum was complicit in any illegal activity or wrongdoing committed by Mr. Cassino vis-à-vis this plaintiff. Thus, plaintiff's SECOND cause of action for fraud, and THIRD cause of action for conversion, are hereby dismissed as asserted against Ms. Baum.

Accordingly, plaintiff's FOURTH cause of action for replevin, and plaintiff's FIFTH cause of action and defendant's FOURTH counterclaim both for declaratory relief, are determined to the extent that the Court finds that the subject diamond ring is the separate property of Ms. Baum (*see Lipton*, 134 Misc 2d 1076), and she is declared to be the rightful owner thereof. As such, the diamond ring, currently in the possession of the Suffolk County Police Department, shall be returned to Ms. Baum upon presentment of a certified copy of this Order with notice of entry upon the Suffolk County Police Department.

The foregoing constitutes the decision and Order of the Court.

Dated: March 6, 2018



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

X NON-FINAL DISPOSITION