

Shchukin House OU v Iseev
2018 NY Slip Op 32156(U)
September 4, 2018
Supreme Court, New York County
Docket Number: 155936/2016
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Shchukin House OU,

Index No.: 155936/2016

Plaintiff,

DECISION/ORDER

-against-

Mot. Seq. 005, 006, 007

Rustam Iseev,

Defendant.

Rustam Iseev,

Third-Party Plaintiff,

- against-

Nikolay Shchukin and Pavel Abramov,

Third-Party Defendants.

PAUL A. GOETZ, J.S.C.:

This action was commenced by plaintiff Shchukin House OU, an art gallery dealing primarily in Russian fine art, against defendant Rustam Iseev, to recover five pieces of artwork that defendant Iseev allegedly took from plaintiff on August 26, 2015 on a consignment basis and then refused to return. The five pieces of artwork at issue are: (1) Kazimir Malevich, *Suprematism, 1929*; (2) Kazimir Malevich, *Suprematism, 1929*; (3) Kazimir Malevich, *The Artist Klun Portrait, 1910s*; (4) Natalia Gontcharova, *Thunderstorm, 1911*; and (5) Natalia Gontcharova, *Soldier Washing Horses, 1910*. Complaint, Exh. 1. According to plaintiff, the approximate value of this artwork is at least \$60,000,000. In its complaint, plaintiff asserts seven causes of action against defendant Iseev for conversion, breach of fiduciary duty, breach of the alleged consignment agreement, replevin, unjust enrichment, accounting and prima facie tort.

Defendant Iseev's version of events is diametrically opposed to those alleged by plaintiff. According to defendant Iseev, plaintiff's principal, Nikolay Shchukin, and his associate, Pavel Abramov, pledged these five artworks, along with many others, as collateral for a loan agreement between the parties pursuant to which defendant Iseev lent \$2,000,000 to Shchukin and Abramov. Defendant Iseev alleges that Shchukin and Abramov never repaid the loan and thus he is entitled to foreclose on the artwork. In his answer and third-party complaint, Iseev asserts causes of action against Shchukin and Abramov for breach of the loan agreement, implied indemnification, prima facie tort and breach of implied warranty of title.

There are three motions which are currently at issue in this action. In motion #005, defendant Iseev moves for sanctions, or alternatively, for an order to compel plaintiff and third-party defendant Shchukin to produce document discovery. In motion #006, plaintiff opposes the relief sought in motion #005 and cross-moves for an order: granting plaintiff's motion to permit filing of documents under seal; denying defendant's motion to dismiss and extending time to file Note of Issue; granting plaintiff's motion to consolidate this action with another related action pending in this court captioned *Gershkovich v. Shchukin*, Index No. 655982/2017; granting permission to amend the caption and to add and remove claims and parties; pursuant to CPLR 7109 enjoining defendant from transferring the artwork; requiring defendant to disclose the current location of the art; and pursuant to CPLR 2701 requiring defendant to return the artwork to plaintiff or post a bond. In motion #007, defendant Iseev moves pursuant to CPLR 3211 and 3212 seeking an order granting summary judgment and dismissing plaintiff's complaint. Plaintiff opposes the motion and cross-moves for an order requiring defendant to disclose the current location of the artwork and for sanctions.

Motion for Summary Judgment

Defendant Iseev spends a considerable portion of his motion devoted to arguing that as a pledgee, he has a superior right to the artwork and, given Shchukin and Abramov's default on the loan agreement, he is entitled to foreclose on his interest. However, in his third-party complaint, defendant Iseev does not seek foreclosure nor a declaration from the court that he has a superior right to this artwork. Moreover, defendant Iseev's notice of motion states that he is only seeking dismissal of plaintiff's complaint, and not any affirmative relief on the causes of action he has asserted in the third-party complaint (NYSCEF Doc. # 161, Notice of Motion; *see generally Capital One Bank (USA) v. Koralik*, 51 Misc.3d 74, 78 [App. Term. 1st Dep't 2016] [holding that court erred in *sua sponte* granting summary judgment for relief not sought in notice of motion]). Accordingly, these arguments will be considered only for purposes of evaluating whether plaintiff's causes of action should be dismissed.

In its first cause of action for conversion, plaintiff alleges that it lent defendant Iseev the five pieces of artwork on a consignment basis and that defendant Iseev wrongfully retained the artwork without plaintiff's permission and without any written consignment agreement. In order to state a cause of action for conversion, plaintiff must show a superior right to possession of the property, intent of the defendant, and defendant's interference with plaintiff's property rights to the exclusion of plaintiff's rights (*Komolov v. Segal*, 101 A.D.3d 639 [1st Dep't 2012] [allegations regarding defendant's removal of two paintings from plaintiffs' office were sufficient to state conversion claim]).

Defendant Iseev does not dispute that the five pieces of artwork belong to the plaintiff gallery but argues that he has a superior right of possession to the artwork because of the pledge agreements. Under the pledge agreements, third-party defendants Shchukin and Abramov

pledged their interest in certain artwork in exchange for the \$2,000,000 loan from Iseev. However, plaintiff Shchukin House OU is not a party to these pledge agreements nor do the agreements state that Shchukin, as one of the principals of Shchukin House OU, pledged the plaintiff gallery's interest in this artwork. Affidavit of Rustam Iseev sworn to on February 22, 2018, Exhs. B, C, E, F, G, J, K. Moreover, Shchukin never pledged, even as an individual, his interest in the three Malevich pieces which are in dispute. *See* Iseev Aff., Exhs. E, F, G (whereby Abramov, not Shchukin, pledged his interest in the three Malevich pieces). Therefore, defendant Iseev has failed to show that the repayment of the loan he allegedly extended to Shchukin and Abramov was guaranteed by plaintiff's interest in the five pieces of artworks. Since there are material issues of fact with respect to the parties' rights to the artwork, summary judgment on this cause of action must be denied. Likewise, the fourth and fifth causes of action for replevin and unjust enrichment, which also hinge on the parties' rights to the artwork, will not be dismissed (*see Pivar v. Graduate School of Figurative Art of the New York Academy of Art*, 290 A.D.2d 212 [1st Dep't 2002] [holding that in order to be entitled to replevin, plaintiff must establish a superior possessory right in the chattel]; *Dragon Inv. Co. II LLC v. Shanahan*, 49 A.D.3d 403, 405 [1st Dep't 2008] [stating that "[t]he essential inquiry in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered."]).

In the second cause of action, plaintiff alleges that defendant Iseev breached his fiduciary duty to plaintiff by refusing to return the artwork which was allegedly given to him on a consignment basis. However, plaintiff's own allegations undermine its contention that defendant Iseev took the artwork on consignment. Indeed, plaintiff alleges that it attempted to enter into a consignment agreement with defendant Iseev, who refused to sign the agreement. Complaint, ¶¶

7, 16, 23-24, 41 and Exh. 1 (unsigned consignment agreement). Moreover, the proposed written consignment agreement is from Shchukin Gallery Inc., not Shchukin House OU, which is the plaintiff asserting the claims herein. Since plaintiff's own allegations and documentary evidence refute the existence of a consignment agreement between the parties and there is no other basis to support a fiduciary relationship, this cause of action must be dismissed. Likewise, plaintiff's third cause of action for breach of contract and its sixth cause of action for accounting must be dismissed since there was no consignment agreement between the parties and hence no fiduciary relationship (*DiTolla v. Doral Dental IPA of New York, LLC*, 100 A.D.3d 586 [2d Dep't 2012] [right to accounting rests on existence of fiduciary relationship]).

Finally, plaintiff's seventh cause of action for prima facie tort must be dismissed as the facts alleged indicate sufficient grounds for a cause of action sounding in traditional tort, namely, conversion (*Chen v. U.S.*, 854 F.2d 622, 628 [2d Cir. 1988]; *see also Siotkas v. LabOne, Inc.*, 594 F.Supp.2d 259, 276 [E.D.N.Y. 2009]).

Cross-Motions to Amend Complaint, Consolidate Actions, and Injunction

In motion #006, which is styled as a cross-motion to defendant's motion to compel (seq. #005), and in motion #007, plaintiff moves for various relief against defendant Iseev.

First, plaintiff seeks to amend its complaint in this action and to consolidate this action with a related case pending in this court captioned *Gershkovich v. Shchukin*, Index No. 655982/2017. Through its submission of multiple affidavits, e-mails, and letters, plaintiff attempts to cobble together evidence to support its allegations of an alleged conspiracy between defendant Iseev in this action and plaintiff Gershkovich in the related action, who allegedly conspired together to steal the artwork and bankrupt the Shchukin gallery. Yet plaintiff's submission of evidence is completely disjointed, non-sensical and fails to provide any specific

facts to support plaintiff's allegations of a conspiracy between Iseev and Gershkovich. Indeed, the only relevant facts which the court can glean from plaintiff's submissions that purportedly support the alleged conspiracy are that Gershokovich has brought multiple civil and criminal lawsuits against Shchukin and that Iseev and Gershokovich had some correspondence with Shchukin and his wife regarding repayment of their loan agreements. These facts fail to support plaintiff's contention that Gershokovich played any role in Iseev's alleged theft of the artwork and plaintiff's vague and conclusory allegations of a conspiracy are insufficient to support a common scheme or plan (*Diederich v. Nyack Hosp.*, 49 A.D.3d 491, 494 [2d Dep't 2008] [holding that "conclusory, vague, and general allegations of a conspiracy" were insufficient to support plaintiff's claims]). Accordingly, plaintiff's cross-motion to amend and consolidate must be denied.

Second, plaintiff renews its motion to enjoin defendant from transferring the artwork pursuant to CPLR 7109, require defendant to return the artwork to plaintiff or post a bond pursuant to CPLR 2701, and to disclose the location of the artwork to plaintiff. This is plaintiff's fourth attempt to obtain this relief, which was previously granted by the court only to the extent that defendant was required to advise the court, *in camera*, as to the location of the artwork. Plaintiff has not presented any new facts which would entitle it to this relief. Moreover, given the evidence presented by defendant concerning the loan and pledge agreements, plaintiff has not shown that it is likely to prevail on the merits of its remaining causes of action (*Danae Art Intern. Inc. v. Stallone*, 163 A.D.2d 81, 82 [1st Dep't 1990] [holding that plaintiff's motion under CPLR 7109 must still meet requirements for a preliminary injunction, including a clear right to the relief sought]).

Finally, plaintiff has not submitted anything to support its motion to file documents under seal and thus this request for relief must be denied (*Mosallem v. Berenson*, 76 A.D.3d 345 [1st Dep't 2010] [holding that good cause must exist in order to seal court record]).

Discovery Motion

Defendant's motion to compel discovery responses from plaintiff and third-party defendants is denied without prejudice. The outstanding discovery issues will be addressed at the next court conference.

Accordingly, it is

ORDERED that the motion for summary judgment is granted to the extent of dismissing the second, third, and sixth causes of action and is otherwise denied; and it is further


ORDERED that plaintiff's motion to amend and consolidate is denied; and it is further

ORDERED that plaintiff's motion to enjoin defendant from transferring the artwork pursuant to CPLR 7109, to require defendant to return the artwork to plaintiff or post a bond pursuant to CPLR 2701, and to disclose the location of the artwork to plaintiff is denied; and it is further

ORDERED that plaintiff's motion to seal is denied; and it is further

ORDERED that defendant's motion to compel is denied without prejudice.

Dated: September 4, 2018


HON. PAUL A. GOETZ, JSC