O'Hayon v Sendowski
2019 NY Slip Op 35271(U)
October 22, 2019
Supreme Court, Orange County
Docket Number: Index No. EF004818-2019
Judge: Sandra B. Sciortino
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To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE
---X
ALBERT O'HAYON,
Plaintiff,

-against-

OREN SENDOWSKI,
Defendant.
---X

DECISION AND ORDER
INDEX NO.: EF-004818-2019
Motion Date: 9/11/2019
Sequence No. 1

SCIORTINO, J.

The following papers numbered 1 to 10 were read on defendant's motion to dismiss:

PAPERS	NUMBERED
Notice of Motion/Affirmation (Spiegelman)/Exhibits A-C	1 - 5
Defendant's Memorandum of Law	6
Affirmation in Opposition (Ferrara)/Exhibits 1-2	7 - 9
Affirmation in Reply (Spiegelman)	10

Background and Procedural History

This is plaintiff's third action for injunctive relief, damages, treble damages and replevin, arising out of the purchase, possession and subsequent intent to sell certain Andy Warhol paintings (collectively, the "artwork"). A prior action, under Index Number EF004071-2018, was dismissed without prejudice by Decision and Order of this Court dated August 6, 2018, upon a finding that plaintiff failed to timely and properly effect personal service upon defendant. (Exhibit B) A second action, under Index Number EF008727-2018, was dismissed without prejudice by Decision and Order dated January 28, 2019. (Exhibit C) The provisions of both Decisions and Orders are incorporated by reference into this Decision and Order.

This most recent matter was commenced on June 20, 2019, by the electronic filing of a Summons and Verified Complaint. Defendant was served at his place of work, pursuant to Civil Practice Law & Rules section 308(2), on July 23, 2019, and subsequent mailing.

The factual background as alleged by plaintiff is well-known to the parties and to the Court, and may be summarized from the Complaint (Exhibit A), as follows: Plaintiff claims to have been employed in the field of fine arts, purchasing, selling and appraising paintings and other artwork, for thirty years. In 2015, plaintiff purchased the first of two Andy Warhol paintings for approximately $156,000. At an unidentified date in 2015, plaintiff and defendant agreed that defendant would pay plaintiff 50% of the purchase price, and when the painting was eventually sold, they would share the profits equally. The parties subsequently jointly purchased a second painting in 2015 for $130,000. The parties agreed to hold both paintings until they appreciated to 125% of the purchase value. The paintings would then be sold and the profits divided equally. Plaintiff alleges that defendant made representations about experience in purchasing, marketing and selling artwork. It was agreed that, until a sale, defendant would store, house and market the paintings.

An April 2016 appraisal purportedly showed the value of the two paintings to be $700,000. Plaintiff then demanded that the paintings be sold. Defendant, however, refused to do so and withheld the paintings from the plaintiff. Defendant further refused to give plaintiff any information about the location or condition of the artwork despite many attempts and offers on plaintiff's part. Eventually, defendant stopped communicating with plaintiff.[1]

The Complaint states six causes of action: (1) a temporary restraining order and preliminary

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[1]Plaintiff's Complaint goes on to allege that defendant wrongfully used the paintings as security for the purchase of his condominium apartment. These allegations are not the subject of the within motion and have not been further discussed herein.

injunction; (2) conversion; (3) breach of contract; (4) misrepresentation; (5) breach of implied contract; and (6) fraud.

Motion to Dismiss

By Notice of Motion electronically filed on August 22, 2019, defendant seeks, by pre-answer motion, to dismiss each cause of action and to grant him additional time to respond to any causes of action which survive.

Defendant argues that the cause of action for conversion is barred by the applicable three-year statute of limitations, which was not tolled by either of the two prior actions, both of which were dismissed for lack of personal jurisdiction. Moreover, the conversion claim is predicated on a "mere breach of contract."

Defendant also asserts that the alleged agreement between plaintiff and defendant is violative of the Statute of Frauds (Gen. Oblig. §5-701) and, therefore, is unenforceable Not only was the alleged contract of indefinite term, it was subject to the will of a third party (a potential buyer) and must, therefore, be in writing. He submits that plaintiff's claim for breach of implied contract is an improper attempt to circumvent the Statute of Frauds and must likewise fail.

Plaintiff's cause of action for "misrepresentation" should be read as one for fraudulent inducement as no tort of misrepresentation exists. To the extent such a claim is premised on the alleged breach of contract, it is likewise an attempt to avoid the Statute of Frauds.

The cause of action for fraud is another avoidance attempt. Such a cause of action may not lie when the only fraud charged relates to a breach of contract. Moreover, the allegations are deficient in the specificity required by Civil Practice Law & Rules section 3016(b).

Finally, defendant argues that plaintiff has failed to demonstrate a likelihood of success on the merits of the complaint or any irreparable or imminent injury. The compliant is therefore insufficient to justify the imposition of restraints.

Opposition

Plaintiff rejects each and every one of defendant's arguments. With respect to the conversion claim, plaintiff asserts that this third action was commenced upon its filing, June 20, 2019. Thus, the three-year statute requires that the cause of action must have accrued not later than June 20, 2016. Plaintiff disputes defendant's assertion that the cause of action accrued in April 2016.He instead relies on a previously-undisclosed letter apparently sent by his counsel to defendant on January 3, 2018, containing a "formal demand" for return of the paintings by January 17, 2018. (Exhibit 1) It is plaintiff's position that the cause of action for conversion accrued when plaintiff's 2018 letter demanded return of the paintings and not during the prior demands that the paintings be sold. Moreover, the conversion claim (failure to return) is separate and apart from the breach of contract claim (failure to sell).

Plaintiff further disputes the Statute of Frauds defense. He asserts that the contact was not only capable of being performed within one year, it was, in fact, performed in that time. Plaintiff's procurement of the April 2016 appraisal (although several times in his papers, plaintiff states that *defendant* procured the appraisal) was the triggering event requiring the sale, an occurrence concluding the contract. Nor was the contract between plaintiff and defendant dependent on the acts of any third party.

Plaintiff asserts that he has sufficiently pled the elements of a fraud and material misrepresentation claims. Defendant has been "informed of the complained of incidents" sufficient to withstand dismissal.

Finally, plaintiff argues that the paintings can never be replaced and defendant's "propensity to duck legal process" demonstrates that he is likely to continue to frustrate plaintiff's efforts to recover the property. In his opposing papers, he asks the Court to issue a temporary restraining order directing defendant to post an undertaking, or, alternatively, appointing a receiver.

Reply

Defendant takes issue with plaintiff's claim that the action was commenced on June 20, 2013, the date of filing, and claims instead that it was commenced on July 23, 2020 (sic), the Affidavit of Service date. (The affidavit of service claims July 23, 2019) More significantly, defendant points to the allegations of the complaint that assert that defendant refused to sell the paintings despite plaintiff's demand that he do so. Further, plaintiff claims to have demanded return of the paintings, and defendant's refusal, all under the cause of action for conversion. These "numerous acts of conversion" make it clear that the conversion took place, if at all, in April 2016. Regardless, the conversion claim stems from the same facts as the breach of contract claim and are duplicative.

The balance of the reply is a reiteration of defendant's arguments regarding the Statute of Frauds and the insufficient pleading of fraud and fraudulent misrepresentation allegations.

The Court has fully considered the submissions of the parties.

DISCUSSION

For the reasons which follow, defendant's motion to dismiss is granted in part and denied in part.

Motion to Dismiss, Generally

In determining whether a complaint is sufficient to withstand a motion to dismiss for failure to state a cause of action, the sole criterion is whether the pleading states a cause of action, and if, from its four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law. (*Quinones v. Schaap*, 91 AD3d 739 [2d Dept 2012]) The complaint must be construed liberally and its factual allegations deemed to be true. The non-moving party is entitled to the benefit of every possible favorable inference. (*Id.*)

On a motion to dismiss for statute of limitations grounds, the moving defendant must establish, *prima facie*, that the time in which to commence the action has expired. (Civ. Prac. Law & Rules sec. 3211(a)(5); *Doukas v. Ballard*, 135 AD3d 896 [2d Dept 2016])

Conversion

Defendant's application to dismiss the second cause of action for conversion is granted. "A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." (*Colavito v. New York Organ Donor Network, Inc.*, 8 NY 3d 43, 49-50 [2006]) The statutory period for determining whether the statute of limitations will bar the action is computed from the time the cause of action accrued. (*Sporn v. MCA Records, Inc.*, 58 NY 2d 482 [1983]) "Some affirmative act–asportation (detachment, movement or carrying away) 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–has always been an element of conversion." (*McGough v. Leslie*, 65 AD3d 895896 [1st Dept 2009]) (parenthetical added)

In the matter at bar, notwithstanding plaintiff's claim that his first formal demand for return was not until January of 2018, the complaint is rife with assertions of his efforts to exercise dominion and control over the paintings beginning in April 2016 and with his allegations that defendant "diverted and stonewalled" his efforts. It is clear that, while there may have been repeated acts of conversion, any conversion first took place in April 2016.

A conversion cannot be predicated upon a mere breach of contract, unless there is a breach of a duty distinct from or independent of the contract claim. (*Connecticut New York Lighting Co. v. Manos Business Mgt. Co., Inc.*, 171 AD3d 698 [2d Dept 2019]) No claim for conversion has been made apart from defendant's refusal to do what plaintiff alleges was his contractual obligation. Regardless of whether this action is deemed to have commenced in June or July of 2019, the cause of action is time-barred and dismissed.

Breach of Contract (Statute of Frauds)

Defendant's application to dismiss the third cause of action for breach of contract is denied. The New York Statute of Frauds, General Obligations Law section 5-701 provides, in relevant part, that "[e]very agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing....if such agreement promise or undertaking: 1. by its terms is not to be performed within one year from the making thereof... ."

Conversely, if a contract is one which by its terms can be performed within a year, it is without the Statute of Frauds, even if, as a practical matter, "it were well nigh impossible of performance within a year." (*Shirley Polykoff Advert. Inc. v. Houbigant, Inc.*, 43 NY 2d 921, 922 [1978]; *see also, William Morris Endeavor Entertainment, LLC v. Rivera*, 43 Misc. 3d 1203(A) [New York Co. 2014])

Defendant argues that the alleged contract was for an indefinite term and that such lack of definitiveness makes a writing obligatory. But, giving plaintiff the benefit of every inference as the Court is bound to do on such a motion, the contract was able to be and was, in fact, performed within one year.

Nor is the Court persuaded by defendant's argument that the purported contract is dependent on the will of a third party. Unlike the cases relied upon by defendant, the contract at issue is not a service contract (*see, e.g., McCollester v. Chisholm*, 104 AD3d 361 [2d Dept 1984]); a commission sales arrangement that extends beyond the employee's termination (*see, e.g., Zupan v. Blumberg*, 2 NY 2d 547 [1957]); or a contract which contemplated continuing compensation far into the future (*see, e.g. Kantor v. Watson*, 167 AD3d 297 [1st Dept 1990]) Rather, while the unwritten agreement lacked specific dates for performance, there was at least an implied termination–that date when the paintings could be sold for 125% of value. As such, the Statute of Frauds is inapplicable, and the motion to dismiss on those grounds denied.

"Misrepresentation" and Fraud

Defendant's application to dismiss the fourth and sixth causes of action, respectively, is granted. Defendant argues that a contract which is void under the Statute of Frauds cannot be a predicate for an action in fraud. Having declined to dismiss the breach of contract claim on Statute of Fraud grounds, this Court nevertheless dismisses the misrepresentation and fraud claims on the grounds that the complaint fails to state a cause of action for which relief can be granted.

"To make out a prima facie case of fraud, the complaint must contain allegations of a representation of a material fact, falsity, scienter, reliance and injury." (Civ. Prac. Law & Rules §3016(b); *Scott v. Fields*, 92 AD3d 666, 668 [2d Dept 2012], *quoting Moore v. Liberty Power Corp.*, 72 AD3d 660, 661 [p2d Dept 2010]) The circumstances of the wrong constituting the fraud must be stated in detail, including specific dates and times. (*Moore*, 72 AD3d at 661; *Doukas*, 135 AD3fd at 898))

In this matter, plaintiff has failed to allege and provide details of any misstatements or misrepresentations made specifically by defendant to him. (*Id.*) Moreover, in order to maintain a fraud claim stated in conjunction with a breach of contract claim, a plaintiff must either demonstrate a legal duty separate from the duty to perform under the contract or demonstrate a fraudulent misrepresentation collateral or extraneous to the contract. (*Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 837 F. Supp. 2d 162 [S.D.N.Y. 2011]) In this matter, plaintiff has done neither. The causes of action are thus dismissed.

Implied Contract

The application for dismissal of the fifth cause of action is denied. Under New York law, quasi-contract claims may survive dismissal where there is a dispute as to the validity of a governing contract. (*Ellington Credit Fund, Ltd.*, 837 F. Supp. 2d at 202) If and when there has been a determination that there is a valid and binding contract between the parties, the application may be renewed. (*Id.*)

Injunctive Relief

A plaintiff seeking injunctive relief must demonstrate a likelihood of success on the merits, irreparable injury in the absence of injunctive relief, and a balancing of the equities in plaintiff's favor. (*Network Fin. Planning v. Prudential-Bache Sec.*, 194 AD2d 651 [2d Dept 1993]) Plaintiff has not demonstrated any of the requisite elements. While the express and implied contract claims remain, plaintiff has not established that he is likely to succeed on either.

Nor has he demonstrated irreparable injury. In fact, he has asserted over and over again that the value of the paintings (which he seeks to sell) is ascertainable and has already been determined, at least as of 2016. Plaintiff has not even discussed the equities. Accordingly, the cause of action for such relief is dismissed, without prejudice to renew if and when a proper showing can be made.

The Court notes that plaintiff's inclusion in his opposing papers of requests for interim relief, such as an injunction, bond or appointment of a receiver, is not an application for relief that the Court may consider.

Conclusion

On the basis of the foregoing, it is ORDERED as follows:

1. Defendant's application for dismissal is granted as to the first (temporary restraining order and preliminary injunction), second (conversion), fourth (misrepresentation) and sixth (fraud) causes of action. With respect to the first cause of action only, the dismissal is without prejudice.

2. Defendant's application for dismissal is denied as to the third (breach of contract) and fifth (breach of implied contract) causes of action.

3. Defendant's application for additional time to answer the remaining causes of action in the Complaint is granted. Such answer shall be served an filed not later than November 29, 2019.

4. Preliminary Conference shall be held on December 10, 2019 at 9:00 a.m.

All other relief sought and not addressed herein is denied.

The foregoing constitutes the decision and order of the court.

Dated: October 22, 2019
Goshen, New York

E N T E R:

HON. SANDRA B. SCIORTINO, J.S.C.

TO: *Counsel of record via NYSCEF*