Reis Family 1995 Trust v Lachaise Found.
2020 NY Slip Op 30044(U)
January 3, 2020
Supreme Court, New York County
Docket Number: 155112/2018
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK **PART** IAS MOTION 38EFM

Justice

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REIS FAMILY 1995 TRUST,

Plaintiff,

- v -

THE LACHAISE FOUNDATION and PAULA HORNBOSTEL,

Defendants.

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INDEX NO. 155112/2018

MOTION DATE 03/28/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motion of defendant Lachaise Foundation to dismiss the first and second causes of action in the complaint is granted, and the cross-motion of plaintiff Reis Family 1995 Trust for partial summary judgment is denied, in accord with the following memorandum decision.

Background

This action arises from the disputed ownership of a sculpture (the "Garden Figure") by Gaston Lachaise, cast in 1927. Plaintiff is a New York trust that purports to have purchased the Garden Figure in 2005. Defendant Lachaise Foundation (the "Foundation") is a charitable trust dedicated to preserving the artistic legacy of Gaston Lachaise, and Defendant Paula Hornbostel ("Hornbostel") (together, the "Defendants") is the director of the Foundation. Defendants allege that the Foundation acquired a share of ownership in the Garden Figure in 1997 and became its

sole owner in 2001. The ownership dispute arises out of the parties' independent business relationships with non-party Salander-O'Reilly Galleries ("Salander") and its principal, Lawrence Salander, who was later found to have been involved in extensive frauds involving artworks held by the gallery (*In re Salander O'Reilly Galleries*, 453 BR 106, 129 [SDNY 2011]).

In 1992, the Foundation entered into a consignment agreement (the "Consignment Agreement") with Salander for "all Sculptures now or hereafter delivered" to Salander by the Foundation (Wallace Aff. Ex. F). As set forth in the affidavit of Marie P. Charles, a trustee of the Foundation, the Foundation purchased a one-half interest in the Garden Figure from Salander in 1997 after Salander was the winning bidder for the Garden Figure at a public auction held at Sotheby's (Charles Aff. ¶¶ 2-4, Ex. 1). The Foundation further alleges that it subsequently bought the remaining one-half interest from Salander in October 2001, making it the sole owner of the sculpture (*id.* ¶ 6). Despite the Foundation's purchase of the work, Salander maintained possession of the Garden Figure throughout this time. As set forth in the affidavit of defendant Hornbostel, a former employee of Salander and director and trustee of the Foundation, the Garden Figure was listed in Salander's database as "not-for-sale" at the instruction of the Foundation (Hornbostel Aff. ¶ 3). Hornbostel attests that "Salander exhibited other works that were not for sale, including works from museum collections. Exhibits of such works promoted appreciation of the artists being exhibited, and enhanced the reputation of the gallery" (Hornbostel Aff. ¶ 4). Plaintiff disputes this account and contends that it purchased the Garden Figure from Salander on or about September 19, 2005, paying the full purchase price contemptuously by wire transfer (Compl. ¶ 10, 12). Plaintiff further alleges that it took delivery of the Garden Figure on April 12, 2007, and which has been in its possession since that time (Compl. 13). Documents submitted by Plaintiff in support of its cross-motion suggest that non-

party Dina Reis arranged the wire transfer for the alleged purchase and took delivery of the Garden Figure (Reis Aff. Exs. C-D).

Later that year, on November 1, 2007, three creditors of Salander commenced an involuntary case against it under chapter 7 the Bankruptcy Code, which was subsequently converted to a voluntary case under chapter 11 of the Bankruptcy Code (the "Bankruptcy Case").[1] By the time the Bankruptcy Case was commenced, Salander's books and records had been impounded and art sales enjoined pursuant to orders issued by the New York state courts, and at least nineteen lawsuits were pending against Salander (*Salander*, 453 BR at 129). By order dated January 20, 2010, the Bankruptcy Court approved a procedure for the continuing resolution of the competing claims to art held by Salander (*id.*). It is unclear from the record before the court on this motion whether the Foundation participated in this procedure, but it did file a proof of claim in the Bankruptcy Case to which it attached a copy of the Consignment Agreement with a schedule of relevant artworks that included a notation for "Standing Woman (Garden Figure)," which Defendants assert is a reference to the Garden Figure (Wallace Aff. Ex. F).

In March 2009, both Salander and Lawrence Salander, were indicted on a 100-count indictment for, *inter alia*, fraud, larceny of artworks, and falsifying business records (Wallace Aff. Ex. B). The larceny charges were connected to Salander's alleged theft of artwork from numerous victims between February 2004 and November 2007 (*Id.*). Lawrence Salander ultimately pled guilty to Grand Larceny in the First and Third Degrees and Scheme to Defraud and was sentenced to 6-18 years in prison (Wallace Aff. Ex. B, C). Although for activities apparently unrelated to the purchase of the Garden Figure, in May 2011, Dina Reis also entered

[1] The court takes judicial notice of the docket in Case No. 07-300005 of the United State Bankruptcy Court, Southern District of New York.

into a plea agreement in the Southern District of Indiana for conspiracy to commit wire fraud she perpetrated between June 2003 through July 2006, and was ultimately sentenced to 19 months imprisonment and ordered to pay a $1,000,000.00 fine and $5,678,190.16 in restitution (Wallace Aff. Exs. D, E).

The nexus of Plaintiff's allegations in this action arise from its purported attempt to sell the Garden Figure in 2018. As alleged in the complaint, in early 2018, Plaintiff arranged to deliver the Garden Figure to Bernard Goldberg Fine Arts, LLC for display and sale at the Winter Antiques Show in New York City where Plaintiff "anticipated selling the Garden [Figure]) for $1,200,000 to a specific client of Goldberg" (Compl. 14-15). Plaintiff alleges, upon information and belief, that in advance of the Winter Antiques Show, Hornbostel telephoned Bernard Goldberg and stated that Plaintiff "did not own or have good title to the Garden Figure and that she would cause the sculpture to be 'seized' if it was displayed at the Winter Aniques Show" (*Id.* ¶ 16). This action, Plaintiff continues, "prevented the Garden [Figure] from being exhibited or sold at the Winter Antiques Show," and "as a result of the Defendants' action, the Plaintiff has suffered substantial losses and has been intentionally and wrongfully deprived of the opportunity to sell the Garden [Figure]" (*id.* at 17, 19).

In the verified complaint filed on May 31, 2018 (the "Complaint"), Plaintiff asserts claims for Interference with Prospective Economic Advantage ("Tortious Interference") and Fraud, and seeks a declaratory judgment that it is the sole and rightful owner of the Garden Figure and Defendants have no title, ownership, or interest in the sculpture. Defendants now move pursuant to CPLR 3211(a)(7) to dismiss the first and second causes of action for Tortious Interference and Fraud for failure to state a cause of action. Plaintiff opposes and cross-moves for summary judgment on its cause of action for declaratory judgment.

Standard of Review

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). When reviewing such a motion, the court must "accept the facts as alleged as true, [and] accord plaintiffs the benefit of every possible favorable inference" (*id.*). "The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law'" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]).

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*id.* at 853). Upon proffer of evidence establishing a *prima facie* case by the movant, "the party opposing a motion for summary judgment bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]). In considering a summary judgment motion, evidence should be "viewed in the light most favorable to the opponent of the motion" (*Id.* at 544).

Discussion

A. The Motion to Dismiss

Defendants move to dismiss Plaintiff's first and second causes of action for, respectively, Tortious Interference and Fraud for failure to state a cause of action. To state a claim for Tortious Interference, also commonly referred to as Tortious Interference with Business Relations (*see Catskill Dev., LLC v Park Place Entm't Corp.*, 547 F.3d 115, 132 [2nd Cir. 2008]), a party must

allege (1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party (*Amaranth LLC v JP Morgan Chase & Co*, 71 AD3d 40, 47 [1st Dept 2009]).

Tortious Interference with Business Relations is distinguished in New York law from a cause of action for Tortious Interference with Contract; the latter involving the existence of a binding agreement. Where the alleged interference is to a binding contractual agreement, a plaintiff may recover if it can prove that the "defendant's deliberate interference resulted in a breach of the contract," but where the alleged interference is to a prospective contract, the plaintiff "must show more culpable conduct on the part of the defendant" (*Carvel Corp. v Noonan*, 3 NY3d 182, 189 [2004]). Generally, to satisfy the third prong of the test (*Amaranth, supra*), the conduct must be criminal, independently tortious, or the defendant must act for the sole purpose of inflicting intentional harm on the plaintiff (*Carvel, supra*, at 190). Whereas, here, Plaintiff does not plead the existence of a binding contractual agreement between itself and either Goldberg or the potential buyer, it must sufficiently plead that that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort.

As applicable to this prong of the test for Tortious Interference, Plaintiff alleges only that "Defendants' sole purpose in interfering with Plaintiff's business relations and negotiations was malicious and intentional and intended to cause harm to the plaintiff" (Compl. ¶ 22). Absent further factual allegations regarding Defendants' purpose for interfering with Plaintiff's business relations, these conclusory allegations alone are insufficient to support a claim for Tortious Interference (*Jacobs v Continuum Health Partners, Inc.*, 7 A.D.3d 312, 313 [1st Dep't 2004]).

Whereas Plaintiff's Fraud claim is insufficient as a matter of law (*see infra* at 7), Plaintiff also has not alleged sufficient "wrongful means" to otherwise support the claim (*Carvel*, 3 NY3d at 191). Accordingly, Plaintiff's first cause of action for Tortious Interference fails as a matter of law.

Defendant next moves to dismiss Plaintiff's second cause of action for Fraud. In order to state a claim for Fraud, a Plaintiff must allege (1) a misrepresentation or a material omission of fact which was false and known to be false by defendant, (2) made for the purpose of inducing the other party to rely upon it, (3) justifiable reliance of the other party on the misrepresentation or material omission, and (4) injury to the plaintiff (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 827 [2016]). Additionally, Fraud is subject to the heightened pleading requirements of CPLR 3016(b) and "the circumstances constituting the wrong shall be stated in detail" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]). Plaintiff's cause of action for Fraud alleges that Defendants made false representations to Bernard Goldberg regarding the Foundation's ownership claim to the Garden Figure with the intent to "deprive the Plaintiff of its ownership of the Garden Sculpture and to interfere with the sale of the sculpture" and to induce Goldberg to rely on said misrepresentations and that Goldberg did rely on and refused to display the Garden Sculpture at the Winter Antique Show to the detriment of Plaintiff. However, a cause of action for Fraud may not be maintained where the plaintiff was injured as a result of a third party's reliance on a false representation (*Pasternack*, 27 NY3d at 829). Therefore, this claim is facially deficient as a matter of law and must also be dismissed.

B. The Cross-Motion for Summary Judgment

Plaintiff's cross-motion for summary judgment seeks a declaratory judgment that Plaintiff is the sole and rightful owner of the Garden Figure and that Defendants have no title,

ownership, or interest in the sculpture. In support of its cross-motion, Plaintiff submits an affidavit of David Reis, trustee of the Plaintiff trust, with the following attached exhibits: (A) a copy of the verified complaint, (B) a "paid" bill of sale issued by Salander to Plaintiff, (C) a letter signed by Dina Wein Reis address to Jason Dull, Vice President of North Fork Bank directing a wire transfer of funds to Salander, (D) a letter purportedly from Salander indicating release of the Garden Figure to Dina Reis, (E) a copy of the Proof of Claim filed by the Foundation in the Bankruptcy Case, and portions of emails purportedly from (F) the Hirshhorn Museum, and (G) Sotheby's (Reis Aff., Exs. A-G). These materials are insufficient to demonstrate Plaintiff's entitlement to a declaratory judgment regarding ownership of the Garden Statute.

At the outset, Exhibits B, C, and D are addressed to or signed by Dina Reis, not the affiant, David Reis. Mr. Reis offers no explanation in his affidavit regarding how he came to be in possession of these items and does not indicate that they are business records of the trust. Nor does he offer any other explanation regarding the materials. As such, these exhibits have no evidentiary value. Exhibits F and G similarly are incomplete, appear to belong to Dina Reis, and substantively, do not refute Defendants' claims that it an interest in the Garden Figure from Salander after he won the item at auction in 1996, as Plaintiff asserts (Opp. Mem. at 11). Furthermore, numerous issues of material fact exist regarding the circumstances of each party's alleged purchase of the Garden Figure, what actions were taken in the Bankruptcy Court and what preclusive effect the proceedings in that court may have on this proceeding, and whether Plaintiff is a "buyer in the ordinary course" for the purposes of N.Y. U.C.C. § 2-403(2). In light of these circumstances, Plaintiff has not met its *prima facie* burden on the motion for summary judgment.

Finally, to the extent that Plaintiff argues it is entitled to a declaratory judgment because Defendants' potential claim to ownership of the Garden Figure is time barred, the court need not consider these arguments raised for the first time on reply (*Lumbermans Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 626 [1st Dept 1995]). Assuming *arguendo* that the court did consider these arguments, Plaintiff incorrectly asserts that the applicable statute of limitations runs from the date that Salander allegedly sold the sculpture to Plaintiff. Although the statute of limitations for Defendants to commence an action against Salander may have run, "[t]he rule in this State is that a cause of action for replevin against the good-faith purchaser of a stolen chattel (i.e., Plaintiff) accrues when the true owner makes demand for return of the chattel and the person in possession of the chattel refuses to return it" (*Solomon R. Guggenheim Found. v Lubell*, 77 NY2d 311, 317-318 [1991]). Plaintiff identifies no such demand.

Accordingly, it is

ORDERED that Defendants' motion to dismiss the first and second causes of action is granted, and the first and second causes of action are dismissed; and it is

ORDERED that Plaintiff's cross-motion for summary judgment is denied; and it is

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 1166, 111 Centre Street, New York, New York, on March 5, 2020 at 2:15 p.m.

This shall constitute the decision and order of the court.

ENTER:

Louis L Nock

1/3/2020
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE