

Shubert Org., Inc. v Partridge
2020 NY Slip Op 32748(U)
August 24, 2020
Supreme Court, New York County
Docket Number: 159989/2016
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

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THE SHUBERT ORGANIZATION, INC.,
Plaintiff,

- v -

VILMA PARTRIDGE, ANNE PARTRIDGE
Defendant.

INDEX NO. 159989/2016

MOTION DATE N/A

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION - INCLUDES
REFERENCE**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the instant motion by defendants for summary judgment is denied.

Background

The Theatre

On October 16, 1907, the Stuyvesant Theatre opened, to great acclaim from architects and critics, at 111 West 44th Street, in the heart of Manhattan’s fabled Theater District. Three years later the theatre’s owner, the impresario David Belasco, renamed it for himself. Over the years the Belasco Theatre (“the Belasco”) has presented such famous, or infamous, shows as The Crucible, Hamlet, Hedwig and the Angry Inch, Oh, Calcutta, and The Rocky Horror Show. Marlon Brando had his first widely noticed success there, playing Sage McRae in a 1946 production of Truckline Cafe; the play flopped, but the press celebrated Brando as a new “genius” actor. In 1987 the New York City Landmarks Preservation Commission declared the Belasco a “historic landmark,” stating that David Belasco

conceived of his house as a ‘living room’ and consciously attempted its domestication with a warm color scheme, intimate spaces and especially with light diffused through stained and leaded glass fixtures on the walls and ceiling of the auditorium. [I]t was for magically lit interiors that [Mr.] Belasco and his house were most famous. [T]he

auditorium's lighting was diffused through stained and leaded glass with small pendant lanterns under the balcony and on the side of the boxes and other Tiffany fixtures along the rear wall.

The Belasco closed on March 12, 2020 due to the Covid-19 pandemic but purportedly plans to re-open on January 3, 2021.

The Organization

Also in the early 1900s (or late 1800s; sources differ) brothers Lee, Jacob, and Sam Shubert formed what is now plaintiff, The Schubert Organization, Inc. Over the years it has presented You Can't Take It With You, Annie Get Your Gun, South Pacific, The Diary of Anne Frank, A Chorus Line, Cats, and The Phantom of the Opera. In 1948 plaintiff purchased the Belasco. Plaintiff claims that the Belasco contains "specially commissioned," "historically and artistically significant Tiffany Studios lighting fixture[s]."

The Designer

Louis Comfort Tiffany (1848–1933) was born in New York City. Working at first for the company his father founded, Tiffany & Co., he designed stained glass windows and lamps, glass mosaics, blown glass, ceramics, etc., generally in Art Nouveau style. He designed the interior of the Mark Twain house in Hartford, CT, which still stands; and, at the request of President Chester Alan Arthur, he redesigned the East, Blue, Red, and State Dining Rooms in the White House, adding Tiffany glass to the gaslight fixtures and windows and an "opalescent" floor-to-ceiling glass screen to the entrance hall (most of which President Theodore Roosevelt removed in 1902 to restore the interior to the Federal style of the building's architecture).

The Thefts

On February 28, 1976, an unknown person(s) broke into the Belasco and stole five of the 16 Tiffany lighting fixtures. Later that year, on August 29, an unknown person(s) again broke into the Belasco and stole two more lighting fixtures. The remaining nine Tiffany lighting fixtures, which resemble, and in some cases seemingly exactly match, the stolen ones, still hang in the theatre. Plaintiff reported both thefts to its insurance company and to the New York City Police Department and described the lighting fixtures as follows: "Octagonal Bronze, Favrele Glass And Leaded Chandelier[s] Center With White Glass Hinged Top Borders With Ball Shaped Prism Drops And Square Medallions." The stolen items have never been recovered.

The Aftermath

To fill the lighting voids created by the thefts, plaintiff commissioned Arthur Femenella (“Femenella”), an expert in antique glass preservation and restoration, to produce replicas of the stolen fixtures. Sometime in the late 1970s or early 1980s defendant Vilma Partridge (united in interest with her daughter Anne; collectively, “defendants”) purchased, at a public auction, a “chandelier,” comprised of handcrafted lead stained glass approximately 24” in diameter. There were no identification, model, or serial numbers on the “chandelier.”

On or about June 28, 2016, Arlie Sulka, the owner of Lillian Nassau LLC (“Lillian Nassau”), a gallery that specializes in the works of Tiffany and Tiffany Studios, notified plaintiff that a Lillian Nassau client (later identified as Vilma) had consigned a possible Tiffany Studios lighting fixture (“the subject fixture”) to the gallery for sale. Lillian Nassau personnel recognized the subject fixture as one that might have been stolen from the Belasco. On August 2, 2016, Femenella examined the subject fixture at Lillian Nassau and declared that it was one of the lighting fixtures stolen from the Belasco. Photographs of the subject fixture (NYSCEF Doc 1, Summons and Complaint, at 8-9, ¶ 39 and Exhibit C) and originals still hanging in the Belasco (*id.*, Exhibits D and E), show an unmistakable resemblance. The subject fixture could be a knock-off, but if so, it is a rather good one.

On August 15, 2016, plaintiff demanded that Lillian Nassau return the subject fixture. On August 17, 2016, Lillian Nassau responded by informing plaintiff that defendants were notified of plaintiff’s demand and thereafter terminated the consignment agreement and took back the subject fixture. On August 18, 2016, plaintiff demanded that defendants return the subject fixture. To date, they have refused.

(The foregoing Background is comprised of matters of public record, of which this Court takes judicial notice; or, if plaintiff submitted them in admissible form, are assumed to be true for present purposes (only) as made by the party opposing the motion).

The Case

The Pleadings

On November 29, 2016, plaintiff commenced the instant case, asserting causes of action for replevin, conversion, and “declaratory judgment,” and seeking return of the subject fixture or, in the alternative, monetary damages. On December 15,

2016, defendants responded with a general denial, fourteen affirmative defenses, and a counterclaim seeking their own declaratory judgment, arguing that they were bona fide purchasers of the subject fixture and therefore have good title, superior to any interest plaintiff may have. Plaintiff replied to the counterclaim with a general denial. On October 15, 2019, this Court granted plaintiff's request to amend its complaint to allege that defendants are wrongfully withholding the subject fixture. Subsequent pleadings have not changed the basic nature of this case.

The Instant Motion

Defendants now move for summary judgment. They essentially argue that plaintiff cannot make out a prima facie case, with admissible evidence, that plaintiff ever owned the subject fixture, or that it was stolen from plaintiff.

Discussion

Boiler Plate and Academic Jargon

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). Only if the movant satisfies that burden must the opponent tender evidence in admissible form “sufficient to require a trial of material questions of fact on which [s]he rests [his or her] claim ... mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” Zuckerman v City of New York, 49 NY2d 447, 562 (1980).

Summary judgment is a drastic remedy, and a court must deny it if the issue is “arguable” or “debatable,” because it deprives a party of his or her “day in court.” “To state a cause of action for replevin, a plaintiff must establish a superior possessory right to property in a defendant's possession.” Reif v Nagy, 175 AD3d 107, 120 (1st Dep't 2019). “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.” Id. at 120.

Laches?

Defendants argue that the doctrine of laches bars plaintiff's claims. That argument is unavailing. Laches is “an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party.” Bank of Am. Nat. Assn. v Lam, 124 AD3d 430, 431 (1st Dep't 2015). Defendants claim that plaintiff's delay in asserting its right harmed them. However, a party can fail to assert a right only if the party is aware of said right. Although the item was stolen

in 1976, plaintiff was not aware that defendants allegedly possessed the subject fixture until Lillian Nassau provided notice in 2016, whereupon plaintiff promptly filed the instant action. Thus, plaintiff did not delay in asserting its (alleged) right. Furthermore, this Court sees no legal prejudice. In any event, as the instant action is one at law, not one at equity, the doctrine of laches does not apply. Defendants would come closer to the mark if they argued “estoppel,” but that is not applicable given the alacrity with which plaintiff acted once it learned of the location of the subject fixture.

Bona Fide Purchaser?

Plaintiff demonstrates, and defendants do not dispute (nor could they), that under New York law, an owner of property that is stolen has superior title to a subsequent possessor, superior even to a bona fide purchaser, *i.e.*, one who obtains an item for value and without notice of any adverse claims (“b/f/p”). “New York case law has long protected the right of the owner whose property has been stolen to recover that property, even if it is in the possession of a good-faith purchaser for value.” DeWeerth v Baldinger, 38 F3d 1266, 1278 (2d Cir. 1994); accord, Kozar v Christie’s, Inc., 31 Misc 3d 1228(A) (Sup Ct, Westchester County 2011) (Scheinkman, J.) (“art is subject to the usual rule that a thief of property is generally not able to convey good title, even to a bona fide purchaser”), aff’d on other grounds, 109 AD3d 967 (2nd Dep’t 2013).

This Court notes in passing its support for this salutary rule. New York law has long held that a b/f/p from someone who obtained property by fraud obtains good title. *E.g.*, Barnard v Campbell, 65 Barb. 286 (Sup Ct, NY 1873). The law presumably distinguishes between fraud and theft because the owner who is defrauded acted affirmatively and could have protected herself by due diligence, whereas the owner from whom property is stolen has not acted affirmatively, and, in many instances, could not have protected herself. The b/f/p may be equally innocent in both cases, but the original owner from whom property is obtained by fraud is more blameworthy than the original owner from whom property is stolen, and the former is entitled to less legal protection than the latter. In any event, that appears to be the (or one) theory behind the rule, and this Court thinks it is justifiable.

Issue of Fact?

How do you make out a prima facie case that you owned something that (rounding off) was created a century ago; that your predecessors-in-interest purchased three quarters of a century ago; and that someone stole from you half a century ago? Obviously not primarily with eye-witness testimony; rather, with documents. And

plaintiff has submitted reams of them. Defendants understandably, indeed correctly, claim that the documents are all hearsay. However, plaintiff understandably, indeed correctly, explains that they are admissible under the “business records” and/or “ancient documents” (more than 30-years-old being one requirement) exceptions. Vilma’s statements that when she purchased the subject fixture, the seller told her that it was a “Tiffany” creation and that it came from a (“destroyed”) theatre are also, arguably, admissions against interest. To sketch out its narrative, plaintiff has submitted numerous overlapping, consistent, admissible documents (the word “overkill” comes to mind) to, at the very least, create issues of fact as to whether plaintiff owned the subject fixture and that, if it did, whether someone stole it (this latter being almost a given, although plaintiff will have to prove it at trial, if one is necessary). A detailed examination of these documents and their provenances is beyond the scope of this opinion; simply put, there is plenty of admissible documentary evidence, documentary evidence galore, and some testimonial evidence, from which a reasonable finder of fact could conclude that someone stole the subject lamp from plaintiff. “We owned it; someone stole it,” is a simple proposition; there are not that many moving parts or pieces to the puzzle. This Court has closely examined defendants’ moving and, particularly, reply papers and simply disagrees with many of the legal deductions therein.

Conclusion

For the reasons set forth herein, the instant motion is denied.

Given how vociferously each side has litigated this dispute and argued the instant motion, settlement would seem far out of reach. However, nothing is impossible, especially these days. A simple conference call to the Court at 646-386-4375 or a simple email to all concerned (AENGORON@NYCOURTS.GOV), with or without a demand by plaintiff and an offer (if any) by defendants, can get the ball rolling.


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8/24/2020	
DATE	ARTHUR F. ENGORON, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED <input type="checkbox"/> GRANTED <input checked="" type="checkbox"/> DENIED <input type="checkbox"/> SETTLE ORDER <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN
APPLICATION:	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE
CHECK IF APPROPRIATE:	