

Zai v RoGallery Image Makers Inc.

2020 NY Slip Op 35667(U)

September 30, 2020

Supreme Court, Richmond County

Docket Number: Index No. 151145/2016

Judge: Catherine M. DiDomenico

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
NANCY BUMIN ZAI

Plaintiff

Part- IAS 11

Present: Hon. Catherine DiDomenico

-against-

DECISION AND ORDER

ROGALLERY IMAGE MAKERS INC.
and ROBERT ROGAL

Defendants.
-----X

Index No. 151145/2016
Motion Sequence No.: 001

Recitation as required by CPLR 2219(a) of the papers considered in the review of Motion
Sequence Number 001

	<u>Numbered</u>
Notice of Motion to Dismiss by Defendants (001),	1
Affidavit and Affirmation in Opposition by Plaintiff,	2
Affirmation in Reply by Defendants	3
Sur-Reply by Plaintiff	4

Upon the foregoing cited papers, the Decision and Order is as follows:

Defendant’s Motion / Relevant Facts

Defendants, RoGallery Image Makers Inc. (hereinafter “RoGallery”) and Robert Rogal move by Notice of Motion (Seq. No. 001) for an order dismissing the Plaintiff’s causes of action which sound in tort pursuant to CPLR §3211(a)(1) and (a)(7). Plaintiff has filed written opposition to the motion arguing that the allegations in his Complaint are sufficient to survive a dismissal motion at this procedural juncture. However, after a motion conference, the parties agreed by So Ordered Stipulation dated July 14, 2020 to discontinue all actions against Defendant Robert Rogal as an individual “provided that he remains available as a witness for discovery purposes.” Accordingly, only those aspects of the Plaintiff’s Complaint that relate to Defendant RoGallery remain.

Many of the facts relevant to this motion are not in dispute, and the Court is generally required to accept the Plaintiff’s version of those facts as true when considering a motion to dismiss. **See *Leon v. Martinez*, 84 N.Y.2d 83 (1994)**. In sum and substance, the Plaintiff alleges that she is an individual who had an ongoing contractual business arrangement with Defendant RoGallery. The nature of this arrangement was that RoGallery would cosign and sell paintings for her. Plaintiff claims that she suffered actionable damages in relation to the consignment of 15 paintings with the Defendant between December of 2011 and November of 2013. The parties further agreed that 14 of these paintings would

be displayed and auctioned on a Royal Caribbean Cruise Line ship. In or around January of 2015, Plaintiff emailed the Defendant and requested the return of all the paintings that had not sold. It is alleged that in March of 2015 the Defendant informed the Plaintiff that all 14 of the “cruise auction” paintings were “lost” on the cruise ship and could not be recovered. The parties are currently in the process of arranging the return of the 15th painting which was not transferred to the ship (see SFO 7/2/20). To date Plaintiff has not recovered the paintings or received any payment from the Defendants.

Plaintiff has commenced causes of action sounding in breach of contract, conversion and negligence related to the facts above. Defendants argue that the actions for conversion and negligence are barred by their respective 3-year statutes of limitation. In their reply papers the Defendants further argue that the negligence and conversion causes of action cannot survive a motion to dismiss as they are duplicative of the cause of action sounding in breach of contract. As these arguments were raised for the first time in reply, Plaintiff was given the opportunity to file a “Sur Reply” to address the newly raised arguments.

Applicable Law

When considering a motion to dismiss pursuant to CPLR §3211 a pleading is to be afforded a liberal construction. The Court must generally accept the facts as alleged as true, and accord the Plaintiff every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. See *Rushaid v. Pictet & Cie*, 28 N.Y.3d 316 (2016). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss. See *Watts v. City of New York*, 2020 NY Slip Op 05084 (2d Dept. 2020).

Decision

At the onset, the Defendants argue that the Plaintiff’s causes of action sounding in tort must be dismissed as a matter of law as they were filed after their respective three-year statutes of limitation. See *Obstfeld v. Thermo Niton Analyzers, LLC*, 168 A.D.3d 1080 (2d Dept. 2019); see also CPLR §214. In support of this position, the Defendants argue that the paintings at issue were cosigned throughout the years 2011 and 2012 with the last painting having been cosigned in November of 2013. As the current action was commenced with the filing of a Summons and Complaint in September of 2016, they argue that both the conversion and negligence causes of action are time barred in relation to most of the relevant contractual transactions.¹

The relevant dates are not in dispute. The September 2016 filing date for the conversion causes of action are after the applicable statute of limitations for 14 out of the 15 paintings. However, Plaintiff

¹ Six paintings were cosigned on December 12, 2011, 8 paintings on February 15, 2020 and 1 painting on November 25, 2013.

correctly argues that the cause of action sounding in conversion did not accrue when they lawfully transferred custody to the Defendants but rather when a demand for return of the property was made and rebuffed. See *Wei Su & Hai Wang v. Sotheby's, Inc.*, 2019 U.S. Dist. LEXIS 172881 (S.D.N.Y. 2019); see also *Solomon R. Guggenheim Found. V. Lubell*, 77 N.Y.2d 311 (1991). “In a chattel bailment of indefinite duration, the Statute of Limitations does not begin to run against a bailee in lawful possession until the bailor makes a demand for the chattel’s return and the demand is refused.” See *Martin v. Briggs*, 235 A.D.2d 192 (1st Dept. 1997). Here, the Plaintiff alleges that she first demanded the return of the paintings in January of 2015. Accordingly, the conversion cause of action was properly commenced within the three-year statute of limitations.

A negligence cause of action must be commenced within three years of “when the invasion of the plaintiff’s personal rights occurred.” *Cubito v. Kreisberg*, 69 A.D.2d 738 (2d Dept. 1979). In other words, a negligence cause of action accrues when an injury to the Plaintiff occurs. See *Gerschel v. Christensen*, 143 A.D.3d 555 (1st Dept. 2016). Here, the Plaintiff states that she is unaware of “the exact time and manner of the alleged loss” and further alleges that the Defendant’s may still actually be in possession of the paintings. In so doing, she acknowledges that she cannot state with sufficient specificity when the cause of action for negligence allegedly accrued. As such, it is impossible for this Court to determine, absent additional discovery, if a theoretical negligence cause of action would be time barred. However, regardless of whether the Plaintiff timely filed her negligence action, the Defendants correctly argue that *either* cause of action sounding in tort must be dismissed as a matter of law, as the Defendants owed no independent duty of care to the Plaintiff other than the duty created by the terms of their contract.

Generally, “a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated.” *Ocean Gate Homeowners Assn., Inc. v. T.W. Finnerty Prop. Mgt., Inc.*, 163 A.D.3d 971 (2d Dept. 2018). This legal duty must spring from circumstances extraneous to, and not constituting elements of the contract at issue. See *Board of Mgrs. of Beacon Tower Condominium v. 85 Adams St., LLC*, 136 A.D.3d 680 (2d Dept. 2016). Merely changing breach of contract language to “breach of duty” language does not, without more, transform a simple breach of contract claim into a tort claim. See *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382 (1987). Where a plaintiff is essentially seeking enforcement of the bargain, the action should simply proceed under a contract theory. See *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540 (1992). The court must dismiss any tort claim that is duplicative of a breach of contract claim. See *Lynn v. Maida*, 170 A.D.3d 573 (1st Dept. 2019); see also *Edury Fund 1, LP v. Arque Tax Recievable Fund, LP*, 175 A.D.3d 1486 (2d Dept. 2019).

Here, the Plaintiff entered into a contract with the Defendant to sell her paintings and to utilize the services of Norwegian Cruise Lines as an auction house. The parties further contracted that the paintings would be returned in the event that they were unsold. It is undisputed that the paintings were

not sold and were not returned. However, the Plaintiff does not allege with any specificity that a duty of care somehow existed *outside* of this contractual agreement. Rather, she argues that the same course of events that resulted in the loss of her paintings amounted to both a breach of contract, and a tort. Under these circumstances the Defendants motion to dismiss both the negligence and conversion causes of action is hereby granted as Plaintiff “failed to set forth allegations which would constitute a wrong separate and distinct from an alleged breach of contract which could give rise to independent tort liability.” *East End Labs., Inc. v. Sawaya*, 79 A.D.3d 1095 (2d Dept. 2010); see also, *City of New York v. Shellbank Rest. Corp.*, 159 A.D.3d 581 (1st Dept. 2019); *Greater Bright Light Home Care Servs., Inc. v. Jeffries-El*, 151 A.D.3d 818 (2d Dept. 2017).

Accordingly, for the reasons set forth above, the Defendant’s CPLR §3211(a)(7) motion to dismiss the Plaintiff’s causes of action that sound in negligence and conversion are hereby granted. As the Plaintiff has failed to set forth an actionable tort claim, a dismissal with prejudice is appropriate. See *Ming v. Hoi*, 163 A.D.2d 268 (1st Dept. 1990); see also *Shahid v. Legal Aid Soc’y*, 173 A.D.3d 1099 (2d Dept. 2019). However, this Court does not find that the Plaintiff’s cause of action was so devoid of merit that sanctions are warranted. Accordingly, the aspect of the Defendant’s motion which seeks sanctions is hereby denied. Any other claims raised in motion sequence number 001 that have not been specifically addressed herein are also denied, without prejudice.

While the Plaintiff’s tort causes of action have been dismissed, her breach of contract claim remains. Accordingly, the parties are hereby directed to complete discovery in compliance with this Court’s Orders. The next conference date shall be December 2, 2020 at 12:00 PM via teleconference.

This constitutes the Decision and Order of the Court.

Dated: September 30, 2020



Hon. Catherine M. DiDomenico