

Koblence v Modern Pawn Brokers, Inc.

2022 NY Slip Op 30155(U)

January 24, 2022

Supreme Court, New York County

Docket Number: Index No. 653282/2017

Judge: Sabrina B. Kraus

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

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RAFAEL KOBLANCE, Plaintiff and Counterclaim Defendant. <p style="text-align: center;">- v -</p> MODERN PAWN BROKERS, INC., AUCTION HOUSE 43, INC. Defendants and Counterclaim Plaintiffs, NAZIHA BOULMAROUF, Counterclaim Defendant.	INDEX NO. <u>653282/2017</u> MOTION DATE <u>1/24/2022</u> MOTION SEQ. NO. <u>006 007 008</u> <u>009 010 010</u>
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**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 168, 169, 170, 171, 172, 173, 174, 181, 183, 184, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199

were read on this motion and cross-motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 162, 163, 175, 185 were read on this motion to STRIKE EXIBITS FROM THE RECORD.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 164, 165, 176, 186 were read on this motion to STRIKE EXIBITS FROM THE RECORD.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 166, 167, 177, 187 were read on this motion to/for STRIKE EXIBITS FROM THE RECORD.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 178, 179, 180, 182 were read on this motion to/for STRIKE EXIBITS FROM THE RECORD.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 178, 179, 180, 182 were read on this motion to/for STRIKE EXIBITS FROM THE RECORD.

Upon the foregoing documents, the motions Seq No. 6 through 10 are consolidated herein for disposition and denied for the reasons set forth below.¹

BACKGROUND

This action centers on a dispute regarding the ownership and provenance of a rare and valuable blue Kashmir sapphire that weights over 55 carats (the Sapphire).

ALLEGED FACTS

On November 29, 2011, Rafael Koblence (RK) pawned the Sapphire to Modern Pawn Brokers, Inc. (MPI) in exchange for a loan of \$3.75 million dollars. The loan was documented by a promissory note, a security agreement, and four pawn tickets.

RK represented that he had clear title to the Sapphire. Pursuant to the parties' security agreement, RK had the right to sell the Sapphire prior to July 29, 2012 for a price not less than 15 million dollars. If RK failed to do so, the Agreement provided that MPI could sell the Sapphire at an Auction House, that MPI would take what was due from the sale and remit the balance to RK.

Under the Security Agreement, RK agreed to defend the title to the Sapphire against all claims.

RK never made any payments on the 3.75 million dollar loan and did not sell the Sapphire before July 29, 2012.

In November 2015, MPI assigned its rights to the Sapphire to its affiliate Auction House 43, Inc (AHI) for stated consideration of \$6,828,179.00.

¹ There is some confusion as to the motion sequence numbers. Under motion Seq No 6 in NYSCEF are both the motion and cross-motion for summary judgment. NYSCEF Motion Seq No 7 is the motion to strike the Beesley affidavit, which is labeled as Seq No 8 on the papers filed. NYSCEF Motion Seq No 8 is the motion to strike exhibits T & W from the Fromer affirmation but is labeled as Seq. No. 9 on the papers filed. NYSCEF Motion Seq No 9 is a motion to strike exhibits C, F, K, U, V and X from the Fromer affirmation, but is labeled Seq No 10 on the papers filed. NYSCEF Motion Seq No 10 is the motion to strike Ex A to the Koblence affidavit and to award legal fees.

On November 6, 2015, AHI consigned the Sapphire to Phillips Auction House for a potential sale on December 8, 2015. Phillips retained the Swiss Gemological Institute to analyze the Sapphire in November 2015. Shortly thereafter, Phillips advised that it believed the Sapphire had been stolen in 1996 while on display in Milan. The consignment to Phillips was cancelled and the Sapphire was returned to AHI.

The sapphire stolen in 1996 was originally owned by a Geneva based gemstone dealer, Horovitz & Totah, S.A. (H&T). At that time, the sapphire was inlaid in a Cartier sapphire and diamond bracelet. H&T planned to sell the bracelet at an Auction in Milan. On November 14, 1996, the sapphire and bracelet were stolen while on display at the Four Seasons Hotel. At the time of its theft, the sapphire was insured by a consortium of insurers and H&T was paid an insured amount by the consortium.

In December 2015, the consortium of insurers commenced an action in Supreme Court New York County under Index Number 654328/2015, alleging that the Sapphire pawned by RK was the same sapphire that was stolen in 1996. RK was named as a party to that litigation and was aware of the litigation, but never appeared in that action to defend title. That action was settled by an agreement pursuant to which MDI and AHI paid \$4.625 million dollars in exchange for a full release of any claims to the Sapphire.

THE PENDING MOTIONS

Before the court are a motion and cross-motion for summary judgment, as well as several motions to strike exhibits submitted in conjunction with the summary judgment motions. The motion and cross-motion for summary judgment are denied, as the court finds that the question of whether the Sapphire pawned by RK was the same sapphire that was stolen in 1996 is a material question of fact that must be determined at trial.

DISCUSSION

To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd. (b)), and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. (b)). Normally if the opponent is to succeed in defeating a summary judgment motion he, too, must make his showing by producing evidentiary proof in admissible form.

Zuckerman v. City of New York, 49 N.Y.2d 557, 562(1980).

Issue finding, not issue determination, is the purpose of a summary judgment motion. (*See, Assaf v. Ropog Cab Corp.*, 153 AD2d 520, 521 [544 N.Y.S.2d 834 (1st Dept 1989)].)

Thus, summary judgment is to be granted only when there are no genuine issues of material fact.... In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility. (*Assaf v. Ropog Cab Corp.*, *supra.*)

Garcia v. J.C. Duggan, Inc., 180 A.D.2d 579, 580 (1992).

Summary judgment is drastic remedy and should only be employed when there is no doubt as to the absence of triable issues. *Andre v. Pomeroy*, 35 N.Y.2d 361, 364 (1974).

In this case MPI's expert, CR Beesley, opines that the Sapphire pawned by RK is the same sapphire stolen in 1996. Beesly argues that the Sapphire contains unique "inclusions" (mineral or structural characteristics inside a gemstone akin to a human fingerprint). Thus, Beesley opines simply comparing the Sapphire's inclusions to the stolen gemstone's previously mapped inclusions conclusively demonstrates that the Sapphire and the stolen gemstone are one and the same. In addition, Beesley states that other characteristics of the Sapphire, including its weight, measurements, cut, and its "unheated" nature further corroborate that the Sapphire is the stolen gemstone, as those characteristics match those of the stolen gemstone after accounting for changes due to re-cutting of the Sapphire.

However, RK's expert Robert James, makes exactly the opposite conclusion, finding that the Sapphire pawned and the sapphire stolen are two different stones. Mr. James opines that it's

not unusual for the stones to have similar inclusions, as they are both Kashmir sapphires from the same region. Mr. James finds that the Sapphire pawned contains a distinctive cluster of inclusions not found in the stolen sapphire. Mr. James argues these inclusions are clearly visible to the “unaided eye”.

RK provides affidavits from his wife and her family members stating that the Sapphire has been in their family for generations and that they have no documentation to show its title because they are from Morocco and that is not unusual for that time period in Morocco. These statements are not corroborated by any documentary evidence.

After the motion papers were marked submitted MPI came upon new evidence, filed on NYSCEF prior to oral argument. Incredibly, MPI provides a statement from Vinko Tomic (Tomic). Mr. Tomic, an admitted “retired jewel thief” states that he stole the Sapphire from Milan in 1996 and sold it and the bracelet it was set in to RK for \$600,000.00 in 1997. Tomic states RK stiffed him for \$420,000.00 out of the \$600,000.00. Tomic also asserts that he has known RK for thirty years and that he sold RK several stolen gemstones in the 1990s for three to four million dollars. Mr. Tomic states he learned of this lawsuit through the press, and after being released from prison in 2021 contacted Rafael Aronov, a principal of MPI and AHI in order to provide evidence in this action. Tomic provides many details as to how the theft was accomplished, who witnessed the theft and when and how the sale was made to RK.

Both parties argue that the evidence provided by the other side is inadmissible and should not be relied upon. Additionally, the court notes that both parties elected to move for summary judgment prior to the completion of discovery and the filing of a note of issue.

What is clear to this Court is that this is not a case where summary judgment is appropriate. There are questions of fact and determinations of credibility to be made at trial in

answering the multimillion-dollar question as to whether the Sapphire pawned by RK was the same sapphire stolen in Milan in 1996.

As the court is denying both the motion and cross-motion, the remaining motions which all seek to strike exhibits in the summary judgment record are denied as moot.

CONCLUSION

Wherefore it is hereby

ORDERED that motion Seq Nos 6-10, as defined above, re denied in their entirety; and it is further

ORDERED that, within 20 days from entry of this order, MPI shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the parties appear before the court for a Preliminary Conference on March 28th 2022 at 10:00 am, said appearance to be virtual and for which a link for MS Teams will be forwarded to the parties by the Part Clerk.

This constitutes the decision and order of this Court.

1/24/2022		SABRINA KRAUS, J.S.C.
DATE		
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE
653282/2017 KOBLENCE, RAFAEL vs. MODERN PAWN BROKERS, INC. Motion No. 006 007 008 009 010 010		Page 6 of 6