

<b>Bonito v Empire Chesapeake Holdings LLC</b>
2022 NY Slip Op 30295(U)
January 26, 2022
Supreme Court, New York County
Docket Number: Index No. 656943/2021
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. NANCY BANNON PART 42**

*Justice*

-----X

VIRGINIA BONITO,

Plaintiff,

- v -

EMPIRE CHESAPEAKE HOLDINGS LLC, CHELSEA ARTS  
HOLDINGS LLC and IAN PECK

Defendants.

-----X

INDEX NO. 656943/2021

MOTION DATE 01/14/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 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

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

**I. INTRODUCTION**

This action arises from a dispute over rights to a 16<sup>th</sup> century painting entitled Portrait of Ottaviano de ‘Medici by the artist Andrea del Sarto, which is scheduled for auction at Sotheby’s. The plaintiff challenges the validity of a UCC-1 lien filed by the defendants against the painting in May 2021, arguing that they have no security interest. The plaintiff now moves for injunctive relief and the defendants cross-move to dismiss the complaint. Both motions are denied.

**II. BACKGROUND**

The plaintiff, an art historian with a Ph.D. in Art History, acquired a 51% interest in the painting in 1997 for approximately \$200,000 from its owner, non-party Giorgio Gibelli, who apparently retains his interest. According to the plaintiff, she thereafter embarked on a mission to restore the painting so as to have it take its proper place in the world of Old Masters and her

investment in the restoration process over the years resulted in a personal debt of approximately \$850,000.

In 2020, defendant Ian Peck, offered to purchase the painting for \$1,250,000. Peck, an “art lender”, buys and sells fine art and is the principal of defendants Empire Chesapeake Holdings, LLC and Chelsea Fine Arts Holdings, LLC. The plaintiff and defendant Chelsea Arts Holding, LLC, entered into a protracted negotiation wherein Chelsea Arts was to purchase the piece for \$1,250,000 and the plaintiff would also receive a percentage of the sale price upon a resale by Chelsea Arts pursuant to a residual contingency profit-sharing arrangement. The written agreement was never signed, and Chelsea Arts did not pay the \$1,250,000. However, at her request, Peck advanced certain monies to the plaintiff in 2020 as she was in a poor financial position. She claims she was “desperate.” Specifically, Peck advanced approximately \$35,000 over three payments, and paid an insurance premium of \$8,800 to insure the painting. The defendants claim that these advances create a security interest in the painting.

Peck sent a letter to the plaintiff on December 7, 2020, to memorialize their agreement.

The letter stated in part:

As discussed, this letter is to confirm our interest pursuant to the purchase and sale agreement that the purchaser has advanced certain sums listed below. These payments have been made in good faith and at the seller’s request with the understanding and agreement that they constitute a pro-rated direct ownership interest in the subject painting by Andera del Sarto and that they will be applied as a credit against the purchase price.

...

The seller grants the purchaser a perfected security interest in the subject painting to secure purchaser’s rights regarding amounts owed, totaling \$43,000 as identified below. Lastly, it is agreed and understood that the seller grants the purchaser the right of first exclusivity and a right of first refusal as it relates to the purchase closing by December 31, 2020, as noted, on the acquisition on previously agreed terms.

In closing, the letter stated, “Please confirm your acceptance and agreement with the above terms by return e-mail.” The plaintiff responded by e-mail on December 8, 2020 suggesting revisions to the proposal regarding the crediting of the advances.

Five months later, in May 2021, Peck filed a UCC-1 against the painting on behalf of defendant Chelsea Arts, claiming a 13% interest. The plaintiff and counsel for the plaintiff were made aware of the filing sometime between May and November 2021, the exact date is disputed.

In the meantime, the defendants, by Peck, were also negotiating with an unnamed “business partner” to consign the painting to an auction house, once they obtained it. The details of that deal are not made clear except that Peck claims that, for that deal to go through, he needed access to the painting for expert evaluation and access was refused by the plaintiff. She denies that assertion. The defendants further claim that there was a prior \$80,000 lien against the painting, filed by creditor Ansible Ventures, Inc. that had to be removed before the defendants could purchase the painting. The lien was satisfied in December 2021.

The plaintiff, in turn, was engaged in negotiations to sell the painting to yet another entity, non-party Bottom Line Exchange Company, Inc., whose principal is a private collector. The painting was sold by the plaintiff and Gibelli to Bottom Line in December 2021 for \$1,200,000. Bottom Line arranged a consignment to Sotheby’s and the painting was included in the Old Masters Auction scheduled for January 27, 2022. According to the defendants, Bottom Line also knew that the defendant had filed a UCC-1 claiming a security interest. Also, there were unsuccessful attempts by the plaintiff to reimburse the defendants for the advances made.

The plaintiff commenced this action on December 13, 2021, alleging that the defendants’ UCC-1 was invalid because the defendants had no security interest in the painting and seeking (1) an order directing the defendants to file a UCC-3 to terminate the UCC-1 or, in the

alternative, an order of the court terminating the UCC-1 and (2) money damages for the filing of an invalid UCC-1 pursuant to UCC 9-625. The plaintiff maintains that the parties never reached a final agreement and the defendants never paid the \$1,250,000 purchase price. She argues that the UCC-1 lien is therefore invalid within the meaning of Article 9 of the UCC. She also argues that the lien impairs its value at auction and that the painting from the auction now will also serve to diminish its value in the estimation of potential purchasers.

On December 27, 2021, the plaintiff moved by Order to Show Cause seeking an order “immediately directing the defendants to file UCC-3 Termination Statements which were filed against plaintiff relating to the artwork” or “an order immediately discharging and terminating the UCC-1 filed against the plaintiff with regard to the artwork.”

The defendants oppose the motion and cross-move, pre-answer, to dismiss the complaint pursuant to CPLR 3211(a)(2), (a)(3) and (a)(7), lack of subject matter jurisdiction, no legal capacity to sue and failure to state a cause of action, respectively, and for the imposition of sanctions against the plaintiff pursuant to 22 NYCRR 130-1.1.

### III. DISCUSSION

#### (A) The Plaintiff’s Motion

The plaintiff’s motion is denied as she has failed to establish entitlement to the relief sought on the papers submitted. That is, she has not established by clear and convincing evidence all that is necessary for a preliminary injunction: (1) a likelihood of success on the merits, (2) irreparable injury if a preliminary injunction is not granted, and (3) a balance of equities in her favor. See CPLR 6301; Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 (2005);

Doe v Axelrod, 73 NY2d 748, 750 (1988); St. Paul Fire and Marine Ins. Co. v Yorks Claim Service, Inc., 308 AD2d 347 (1<sup>st</sup> Dept. 2003).

The legal underpinnings of the application are found in Article 9 of the Uniform Commercial Code (UCC). That article:

“governs the enforcement of a creditor’s security interest.... UCC 9-625 .. address[es] the remedies available to a debtor when a secured party fails to comply with article 9. The section provides for injunctive relief ‘if it is established that a secured party is not proceeding in accordance with this article’ and permits a court to ‘order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions’ (UCC 9-625[a]). Money damages are available ‘in the amount of any loss caused by a failure to comply with this article’ (UCC 9-625[b]).” Atlas MF Mezzanine Borrower, LLC v Macqaurie Texas Loan Holder, LLC, 174 AD3d 150, 161-162 (1<sup>st</sup> Dept. 2019).

Initially, the court notes that although in her proposed Order to Show Cause the plaintiff seeks an order directing the defendants to file a UCC-3 or an order granting a discharge of the UCC-1, in her supporting papers the plaintiff presents her application as one for a preliminary injunction, and opines that she has satisfied the requirements for that relief - (1) a likelihood of success on the merits, (2) irreparable injury if a preliminary injunction is not granted, and (3) a balance of equities in his or her favor. See CPLR 6301. In the supporting papers, she also requests other relief and relief against a non-party, asking the court to “enjoin the defendants from interfering in the sale of the artwork on January 27, 2022, and to direct Sotheby’s to conduct the sale.”

Contrary to the defendants’ contention, the court could issue an order granting interim relief such as halting the sale or otherwise restraining a disposition of the painting, since the court has the authority to ‘order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions’ (UCC 9-625[a]).” Atlas MF Mezzanine Borrower, LLC v Macqaurie Texas Loan Holder, LLC, supra at 161. However, the defendants correctly argue that

the relief sought here cannot be granted as it constitutes ultimate relief in the action. See Sithe Energies, Inc. v 335 Madison Avenue, LLC, 45 AD3d 469 (1<sup>st</sup> Dept. 2007); St. Paul Fire and Marine Ins. Co. v Yorks Claim Service, Inc., 308 AD2d 347 (1<sup>st</sup> Dept. 2003). As stated, in their complaint and by the instant motion, the plaintiff essentially seeks a finding or declaration that the defendants' have no security interest in the painting and the subject UCC-1 lien is invalid and a directive that the UCC-1 be canceled or terminated in order to facilitate the sale of the painting.

A preliminary injunction which gives plaintiff the ultimate equitable relief sought in the action is generally improper and may only be granted under "extraordinary circumstances" (see Village of Westhampton Beach v Cayea, 38 AD3d 760 [2<sup>nd</sup> Dept. 2007]) or circumstances which are "imperative, urgent or of grave necessity" so as to warrant such relief (see Xerox Corp. v Neises, 31 AD2d 195 [1<sup>st</sup> Dept. 1968])." Sithe Energies, Inc. v 335 Madison Avenue, LLC, supra at 469. The plaintiff has not established those "extraordinary circumstances" or "grave necessity." Indeed, to grant the relief sought in the motion would be tantamount to an award of summary judgment to the plaintiff. See Booston LLC v 35 W. Realty Co., , 194 AD3d 609 (1<sup>st</sup> Dept. 2021). Here, no answer has been filed and no discovery has taken place, and the parties' submissions on this motion make clear that discovery is necessary to determine the issues presented. See CPLR 3212(f).

That the complaint also seeks money damages under UCC 9-625 in addition to injunctive or declaratory relief is of no moment since any money damages arise directly from and are dependent upon a finding or declaration that the UCC-1 lien is invalid, all such available relief being encompassed by UCC 9-625. Stated otherwise, the request for money damages is not an independent form of relief that would bar application of the rule that a preliminary injunction which gives plaintiff the ultimate equitable relief sought in the action cannot be granted.

Since money damages are expressly authorized by statute, there is no showing of irreparable harm should the motion for equitable relief be denied. “Where the plaintiff can be fully compensated by a monetary award, an injunction will not issue because no irreparable harm will be sustained in the absence of such relief.” Mar v Liquid Mgmt. partners, LLC, 62 AD3d 762, 763 (2<sup>nd</sup> Dept. 2009); see Meissner v Yun, 126 AD3d 565 (1<sup>st</sup> Dept. 2015); GFI Securiteis, LLC v Tradition Asiel Securities, Inc., 61 AD3d 586 (1<sup>st</sup> Dept. 2009); Zodkevitch v Feibush, 49 AD3d 424 (1<sup>st</sup> Dept. 2008). Any diminution in value at auction or other sale resulting from the defendants’ UCC-1, as averred by the plaintiff, is compensable by a monetary award, pursuant to UCC 9-625, albeit by employing art valuation experts.

Nor would the granting of the injunctive relief sought serve to maintain the status quo pendente lite. Rather, it would change it and, indeed, grant the ultimate relief. See Spectrum Stamford, LLC v 400 Atlantic Title, LLC, 162 AD3d 615 (1<sup>st</sup> Dept. 2018). The status quo is maintained by having the defendants UCC-1 lien remain until a determination can be made as to its validity. In that regard, the plaintiff does not dispute that she had been aware of the defendants’ UCC-1 filing for some time before filing this application as an emergency. Moreover, the alleged emergency, an imminent auction, was one created largely by her and Bottom Line, who arranged for the painting to be placed in a January 27, 2022 auction, notwithstanding the lien. By her own admission, the plaintiff has held the painting for two decades and, save for stating that her financial situation is still tenuous, does not explain why the painting could not be sold at a later date.

Finally, a balancing of the equities does not favor the plaintiff. A termination of the UCC-1 would indisputably harm the defendants while leaving the lien in place pendente lite would result in only speculative damage to the plaintiff. Further, notwithstanding her

accusations of bad faith on the part of the defendants, the plaintiff's own conduct in these transactions is equally questionable, even if she acted out of desperation or even naivete.

B. The Defendants' Cross-Motion

In addition to opposing the motion, the defendants cross-move to dismiss the complaint on the grounds of lack of subject matter jurisdiction (CPLR 3211[a][2]), lack of legal capacity to sue (CPLR 3211[a][3]), and failure to state a cause of action upon which relief can be granted (CPLR 3211[a][7]), and for the imposition of sanctions against the plaintiff pursuant to 22 NYCRR 130-1.1. for bringing this action and motion.

To the extent that the plaintiff's CPLR 3211(a)(2) argument concerns the court's authority to grant equitable relief, that argument is addressed above in Section (A).

In regard to CPLR 3211(a)(3) and (a)(7), the defendants maintain that the plaintiff has no legal capacity or standing to sue since she alleges that she sold her interest in the painting to Bottom Line, retaining only a speculative interest dependent on a future sale price. Therefore, the defendants argue, her complaint fails to state a cause of action upon which relief can be granted. Although she submits an affidavit of its principal, the plaintiff does not explain the absence of Bottom Line, or Gibelli for that matter, in this action and appears to argue that her retained interest as per her agreement with Bottom Line is sufficient to maintain the action. If the court credits the defendants' argument that the plaintiff has no legally recognizable interest in the painting as a result of the sale of the painting to Bottom Line, then the defendants undercut their own claim of interest. On these papers, the defendants fail to establish that their purported interest is superior to that of Bottom Line, plaintiff or anyone else.

Thus, both the defendants’ and the plaintiff’s papers raise issues that are more appropriately addressed on a summary judgement motion or trial. The defendants’ cross-motion is denied without prejudice.

Finally, the defendants seek sanctions against the plaintiff arguing that the action is frivolous with the meaning of 22 NYCRR 130-1.1. Frivolous conduct is defined by that statute as that which “is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law,” is undertaken to delay or prolong the litigation, or asserts material factual statements that are false. See 22 NYCRR 130-1.1(c); Tornheim v Blue & White Food Products, Corp., 88 AD3d 869 (2<sup>nd</sup> Dept. 2011); Benishai v Benishai, 83 AD3d 420 (1<sup>st</sup> Dept. 2011). Under the circumstances presented and for the reasons set forth herein, no sanctions are warranted.

IV. CONCLUSION

Accordingly, it is

ORDERED that the plaintiff’s motion for injunctive relief is denied, without prejudice, and it is further

ORDERED that the defendants’ cross-motion to dismiss the complaint and for sanctions is denied, without prejudice., and it is further

This constitutes the Decision and Order of the court.

1/26/2022

DATE



NANCY M. BANNON, J.S.C.  
HON. NANCY M. BANNON

CHECK ONE:

CASE DISPOSED  
GRANTED

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART

OTHER