

Congregation Anshei Liozna v Barlan Enters. LTD.

2022 NY Slip Op 32014(U)

June 13, 2022

Supreme Court, Kings County

Docket Number: Index No. 508962/2021

Judge: Ingrid Joseph

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At IAS Part 83 of the Supreme Court, State of New York, County of Kings, held at the Courthouse thereof at 360 Adams Street, Brooklyn, New York on the 13th day of June 2022.

P R E S E N T: HON. INGRID JOSEPH, J. S. C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
CONGREGATION ANSHEI LIOZNA and
RABBI SAUL SHIMON DEUTSCH,

Index No.: 508962/2021

Plaintiffs,

-against-

Decision and Order

BARLAN ENTERPRISES LTD. d/b/a
GUERNSEY'S and ARLAN ETTINGER.,

Defendants.
-----X

MS #122

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The following e-filed papers considered herein:

	<u>E-Filed Papers Numbered</u>
Order to Show Cause/Affidavit in Support/Exhibits	2 - 12
Memorandum of Law in Opposition/Affidavit/Exhibits	15 - 30; 43 - 52
Responsive Papers	41

In this matter, plaintiffs, Congregation Anshei Liozna and Rabbi Saul Shimon Deutsch ("Rabbi Deutsch") (collectively "plaintiffs" or "Rabbi Deutsch and Congregation Liozna"¹) move by order to show cause (Motion Seq. 1) for an order of seizure pursuant to CPLR § 7102 (Motion Seq. 1), granting plaintiffs the right to seize the Krumbach

¹Rabbi Saul Shimon Deutsch founded The Living Torah Museum, to which the Ark was allegedly given as a conditional gift, or donation, for display. Rabbi Deutsch, The Living Torah Museum and Congregation Anshei Liozna are affiliated; however, Rabbi Deutsch and Congregation did not bring this action in the name of The Living Torah Museum.

Torah Ark (“the Ark”), from defendants, Barlan Enterprises LTD d/b/a Guernsey’s and Arlan Ettinger (referred to collectively as “the Auctioneers”). The Auctioneers move (Motion Seq. 2) for an order dismissing the instant matter pursuant to CPLR § 3211 (a)(1); (2); (3); (4); (7); (8); and (10), based upon documentary evidence, lack of subject matter jurisdiction, lack of legal capacity, on the ground that the instant action is duplicative of an action pending in another court, failure to state a cause of action, lack of personal jurisdiction, and failure to name a necessary party, respectively.

The Ark is an 8 feet by 5 feet, handmade, wooden cabinet that was constructed by the United States Army Corps of Engineers at the end of World War II. The Ark, constructed to hold Torah scrolls, was gifted to the late Rabbi Menaqchem Mendel Rubin (“Rabbi Rubin”), the religious leader of the Muzsayer Chassidic Dynasty. Rabbi Rubin brought the Ark with him to the United States in or about 1948 via the SS Marine Flasher ship. The Ark was installed in Rabbi Rubin’s new synagogue, the Congregation Yeshurin, located on Ocean Parkway in the Flatbush section of Brooklyn. The Ark remained at Congregation Yeshurin’s synagogue until 2004, when it was placed in storage after it was determined that the Torah scrolls should be kept in a safe instead of the Ark.

In or about 2006, Rabbi Rubin’s successor-in-interest and son, Rabbi Hyman Rubin, provided the Ark to The Living Torah Museum, an entity that was formed by plaintiff, Rabbi Saul Shimon Deutsch. The conditions and terms of the exchange of the Ark from Rabbi Rubin to Rabbi Deutsch and The Living Torah Museum are unclear.

However, on May 2, 2019, The Living Torah Museum, through Rabbi Deutsch, allegedly caused a Consignment Agreement² to be drafted, such that the defendant-Auctioneers, would sell the Ark at a Holocaust Auction. The Consignment Agreements provides, among other things, that The Living Torah Museum would receive two advances totaling \$100,000 by July 25, 2019 and further that the projected auction bid price for the Ark would range from \$250,000 to \$2 million.

In September 2019, Congregation Yeshurin and Rabbi Hyman Rubin (“original owners”), commenced an action in Supreme Court, New York County styled *Congregation Yeshurin and Hyman Rubin v Barlan Enterprises LTD, Alan Ettinger, The Living Torah LTD, Congregation Anshei Liozna, Saul Simon Deutsch, et al.*, Index No. 655185/2019 (“New York County case”), wherein they claim that The Living Torah Museum, Rabbi Deutsch, and Congregation Liozna had no authority to put the Ark up for an auction. They requested a temporary restraining order precluding the Auctioneer from removing the Ark from the State of New York, transferring, selling, pledging, assigning, or otherwise disposing of the Ark.

The New York County case remains sub judice; however, the original owner discontinued their causes of action against the Auctioneer. The remaining causes of action consist of the original owner’s breach of contract and promissory estoppel claims

²A copy of the alleged Consignment Agreement, at plaintiffs’ Exhibit 2 (NYSCEF Doc. No. 7), consists of three pages. The document, dated May 2, 2019, indicates the such agreement is between the Seller, The Living Torah Museum, and Guernsey’s, A Division of Barlan Enterprises, Ltd. The document bears the illegible signature of a individual who purportedly signed the Consignment Agreement on behalf of Guernsey’s, on page three, under “AGREED TO AND ACCEPTED BY:.” Such Consignment Agreement is without an endorsement, or marking, from a representative of the “Seller.”

against Rabbi Deutsch, The Living Torah Museum, and Congregation Liozna. The breach of contract claim is based upon the original owners' contention that they entered into a binding contract with the Rabbi Deutsch and the Museum that provided for limited placement of the Ark (in the Museum) pursuant to certain terms and conditions, which the Museum breached by consigning the Ark to the Auctioneer, resulting in reversion of the Ark back to the original owners. The promissory estoppel claim is alleged on alternative grounds, even if it is later determined that no contract exists between the parties. The original owner also requests that the court issue an order identifying them as the rightful owners of the Ark. The issue of ownership of the Ark between the original owners, Rabbi Hyman Rubin and Congregation Yeshurin, and Rabbi Deutsch, The Living Torah Museum and Congregation Liozna, remains outstanding in the New York County case.

Rabbi Deutsch and Congregation Liozna commenced this action on April 16, 2021, asserting claims for breach of contract, replevin, and conversion against the Auctioneer. The Living Torah Museum, the entity that allegedly entered into a Consignment Agreement with the Auctioneers, is not a named party herein. In the First Cause of Action, the plaintiffs seek an order directing the Auctioneer to return the Ark to the Museum. The Second Cause of Action seeks the recovery of compensatory and consequential damages, plus attorney fees, on breach of contract grounds. In the Third Cause of Action, plaintiffs pray for compensatory and consequential damages equal to the value of the Ark, based upon the Museum's loss of use of the Ark and the defendants' alleged conversion of the Ark. Plaintiffs simultaneously filed an emergency application

with the Complaint, wherein they requested an order of seizure pursuant to CPLR § 7102, and, on an interim basis, an order enjoining the Auctioneers from removing the Ark from the State of New York, transferring, selling, pledging, assigning, or otherwise disposing of the Ark, or permitting the Ark to become subject to a security interest or lien pending the hearing of their application.

The Auctioneers submitted written opposition to the plaintiff's emergency application for injunctive relief and filed a pre-Answer motion to dismiss. The Auctioneer contends that the plaintiffs cannot establish that they are likely to succeed on the merits, that they will suffer irreparable harm, or that a balancing of the equities weigh in their favor. In support of the motion to dismiss, defendants argue that the instant matter is subject to dismissal pursuant to CPLR § 3211 (a)(1), (3), (4), (7), (8) and (10). The Auctioneer contends that plaintiffs failed to serve a copy of the Summons and Verified Complaint upon defendants, or establish that the Board of Congregation Anshei Liozna authorized the filing of the instant action.

Additionally, the Auctioneer posits that the instant matter is duplicative of the New York County case, which is also the venue designated in the Consignment Agreement. The Auctioneer argues that plaintiffs also failed to name a necessary party, including the Veto Holder and original owners of the Ark, Rabbi Hyman Rubin. The Auctioneers further argue that plaintiffs have requested the wrong relief herein, since the Consignment Agreement, annexed at plaintiffs' Exhibit 2 (NYSCEF Docket No. 7), provides that the defendants (the Auctioneers) are entitled to contractual and statutory liens.

The court must first address the threshold issue of whether there exists personal jurisdiction over the Auctioneer. It is understood that a complaint may be subject to dismissal for want of jurisdiction in cases where a defendant was improperly served, or not served at all (CPLR § 3211 (a)(8)). The burden of proving jurisdiction is upon the party who asserts it, and that party must show, by the complaint and supporting affidavits, that it satisfied the essential requirements of the personal jurisdiction statute (*Saratoga Harness Racing Assn., Inc. v. Moss*, 26 AD2d 486, 490 [2d Dept 1966]). The court will not find personal jurisdiction based on conclusory and unsubstantiated assertions (*Spectra Products, Inc. v. Indian River Citrus Specialties, Inc.*, 144 AD2d 832, 833 [2d Dept 1988]; *Lamarr v. Klein*, 35 AD2d 248, 250 [2d Dept 1970]). A plaintiff's papers in opposition to a motion based upon improper service shall contain a copy of the proof of service, whether or not previously filed (see CPLR § 3211(e)).

In this case, plaintiffs failed to file an affidavit of service contemporaneous with the filing of the Summons and Complaint, or in opposition to the Auctioneer's motion to dismiss. The affidavit of service, at NYSCEF Docket No. 14, is insufficient, because it merely provides that the Order to Show Cause was served upon the defendants. There is no showing that the Summons and Verified Complaint were served. Therefore, the instant matter is subject to dismissal for want of jurisdiction pursuant to CPLR § 3211(a)(8).

Even if the court's jurisdiction over defendant-Auctioneer was properly invoked, the court finds that the instant matter is subject to dismissal on other grounds. Plaintiffs,

Congregation Anshei Liozna and Rabbi Saul Shimon Deutsch, are without a color of right, legal capacity, or standing, to enforce the terms of the Consignment Agreement against the Auctioneer, because they are not parties to such Agreement. The partially endorsed, Consignment Agreement identifies “The Living Torah Museum” as the “Seller” of the Ark; there is no reference to Rabbi Deutsch or Congregation Anshei Liozna. Inasmuch as plaintiffs lack capacity to sue the Auctioneer, they have also failed to state causes of action against the Auctioneer. Any right or obligation derived from the Consignment Agreement belongs to the contracting party, The Living Torah Museum, which is also contractually obligated to bring any action against the Auctioneer in a New York County court. It also logically follows that the plaintiffs’ failure to include The Living Torah Museum as a plaintiff herein is fatal, since the instant litigation cannot justly proceed in its absence.

The plaintiffs equity-based claims for replevin and conversion, and their emergency application for an order of seizure, fails muster on the first prong for injunctive relief. For an order of seizure, the plaintiffs are required to demonstrate a likelihood of success on their underlying cause of action for replevin and the absence of a valid defense against such claim (see CPLR § 7102[c] and [d]; *Siemens Med. Solutions USA, Inc. v. Magnetic Resonance Imaging Assoc. of Queens, P.C.*, 100 AD3d 620, 621 [2d Dept 2012; see also *TCF Equip. Fin., Inc. v. Interdimensional Interiors, Inc.*, 109 AD3d 898, 899 [2d Dept 2013]; *Americredit Fin. Servs., Inc. v. Decoteau*, 103 AD3d 761, 762 [2d Dept 2013]). In this case, the plaintiffs cannot meet either prong for an

order of seizure, because their present right to possession of the Ark versus Rabbi Hyman Rubin's and Congregation Yeshurin's right to possession of the Ark is precisely the issue being litigated in the New York County case. For essentially the same reason, the plaintiffs' conversion claim against the Auctioneer would fail, because plaintiffs are unable to show legal ownership of the Ark or that they have an immediate superior right to possession of the Ark.

In light of the foregoing, the court need not reach the parties' remaining contentions.

Accordingly, it is hereby

ORDERED that the Order to Show Cause (Motion Seq. 1) of plaintiffs, Congregation Anshei Liozna and Rabbi Saul Shimon Deutsch, is denied in its entirety, all stays in this case, if any, are hereby lifted, and it is further

ORDERED that the motion of defendants, Barlan Enterprises LTD d/b/a Guernsey's and Arlan Ettinger (Motion Seq. 2) is hereby granted, case dismissed

This constitutes the decision and order of the court.

ENTER,



HON. INGRID JOSEPH, J. S. C.
Hon. Ingrid Joseph
Supreme Court Justice

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