

Aicon Contemporary v Dutta

2023 NY Slip Op 34416(U)

December 14, 2023

Supreme Court, New York County

Docket Number: Index No. 650500/2023

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ARLENE P. BLUTH **PART** **14**

Justice

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AICON CONTEMPORARY,

Plaintiff,

- v -

PRAJIT DUTTA, HARRY HUTCHISON, AICON ART LLC

Defendant.

INDEX NO. 650500/2023
MOTION DATE N/A
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 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, 90, 91, 92-96

were read on this motion to/for SUMMARY JUDGMENT.

Plaintiff’s motion for summary judgment on its claim for replevin, on liability with respect to its claim for conversion, and for sanctions is denied.

Background

Plaintiff is an art gallery in Manhattan. It claims that it received a piece of artwork by S.H. Raza entitled “Germination” on consignment from the artwork’s owner. Plaintiff alleges that it had a consignment agreement with the owner in anticipation of a possible resale. It contends that although defendants have no interest in the work at all, they have taken the artwork and refused to return it to plaintiff. Plaintiff brings three causes of action for replevin, for conversion and for tortious interference with contract.

The managing member of plaintiff, Projjal Dutta, explains that his brother is defendant Prajit Dutta and that his brother is the managing member of defendant Aicon Art, LLC (“Aicon Art”). Projjal insists that he and Prajit formerly operated plaintiff together but that they had a

falling out in 2019 and each brother runs separate entities (NYSCEF Doc. No. 12 at 1-2). Projjal points out that defendant Hutchinson is an employee or colleague of defendant Aicon Art.

According to Projjal, Mr. Hutchinson believes that the work of art in question is not authentic but argues that does not justify defendants' refusal to return the artwork. Projjal alleges that defendant removed the artwork from the gallery on October 27, 2022.

Prajit submits an affidavit in opposition in which he claims that plaintiff owes Aicon Art a substantial amount of money relating to another dispute and that Aicon Art was permitted to take the artwork "pursuant to an unwritten agreement between [plaintiff] and [Aicon Art] whereby each had the right to take possession of property in which the other had an interest . . . as security for and/or to settle unsatisfied obligations between them" (NYSCEF Doc. No. 28, ¶ 15). Prajit emphasizes that he was not involved with taking or retaining the artwork.

He claims that because plaintiff owed Aicon Art more than \$340,000, plaintiff consented and approved to the transfer of the artwork to Aicon Art. Prajit points to three other examples where artwork has changed hands between plaintiff and Aicon Art to resolve inter-company debts. And Prajit claims that the work is fake.

Defendant Hutchinson offers an affidavit (that is not notarized) in which he contends he did not take the artwork but agrees with Prajit's argument that Aicon Art was entitled to retain the artwork.

Defendant also offers an affidavit from Gregory Demeter (the managing member of a private investigation firm), who claims he spoke with the true owner of the artwork and that this person (a college professor) allegedly had no idea about this lawsuit or that Aicon Art now has the artwork.

The Parties' Legal Arguments

Plaintiff moves for summary judgment on its conversion and replevin claims. It contends that defendants stole the painting. It emphasizes that defendant admits that it has the painting and that the issue of whether or not the painting is fake doesn't matter. Plaintiff also argues that defendants and their attorneys should be sanctioned for offering defenses in this case.

Defendants argue that taking possession of the artwork, even consigned artwork in which a customer had an interest, is permitted under the terms of the parties' "unwritten" agreement. They observe that this practice helped prevent endless litigation about various debts between the parties. They also urge the Court not to let plaintiff traffic fake artwork and that the sale of fake artwork would harm defendants because both plaintiff and Aicon Art have "Aicon" in their names.

Defendants also argue that discovery is incomplete and that plaintiff has refused to let defendants depose Projjal. They insist that sanctions are not appropriate as their defenses were based on limited facts and evidence—they emphasize that discovery has not occurred.

In reply,¹ plaintiff claims that the value and the authenticity of the artwork is irrelevant. It also argues that defendants' justification defense is frivolous and merits the imposition of sanctions. It contends that the Court cannot issue a ruling about imaginary facts. Plaintiff insists that defendants have no right to dispute the legality of a contract to which they are strangers.

The Court denies the motion as premature. "A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment. A party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated" (*Rutherford v*

¹ Plaintiff filed its reply papers under the wrong sequence number but the Court will consider them (NYSCEF Doc. Nos. 92-96).

Brooklyn Navy Yard Dev. Corp., 174 AD3d 932, 933 [2d Dept 2019] [internal quotations and citations omitted]).

Here, defendant Prajit explains in paragraph 17 of his affidavit that there is a course of conduct in which these two competing entities (plaintiff and Aicon Art) take each other's property to secure payment or settlement of debts. He also provides a few examples of where this has purportedly occurred in the past. Those allegations, combined with the fact that plaintiff did not submit an affidavit in reply to utterly refute these assertions, compels the Court to deny the motion as premature.

Simply put, there has not yet been a preliminary conference in this case (the instant motion was made before one was requested) and the Court is unable to conclude as a matter of law that defendants' claims are wholly without merit. The Court recognizes that plaintiff views defendants' version as imaginary and outlandish. But the Court, at this early stage of the case, cannot simply reject Prajit's affidavit because plaintiff believes it contains untruths. Discovery is required to explore whether this alleged "unwritten" agreement between plaintiff and Aicon Art actually exists and, if so, the parameters thereof.

The Court observes that plaintiff is correct that defendants' concerns about possible reputational damage relating to the authenticity of the artwork is without merit. That the two brothers had a falling out and decided to maintain their two companies with similar names does not mean that defendant Prajit has acquired some interest or say in how plaintiff runs its business.

However, that does not mean that the value and authenticity (which are inextricably intertwined) have no relevance in this case. The Court observes that plaintiff has alleged a conversion cause of action in which it seeks \$750,000 in damages. Presumably, the calculation


of damages for conversion will necessarily include an appraisal of the work and its value in order to determine these damages. There is no question that the value depends, in large part, on the authenticity of the artwork.

Accordingly, it is hereby

ORDERED that plaintiff’s motion for summary judgment is denied as premature.

Conference: February 29, 2024 at 10:30 a.m. By February 22, 2024, the parties are directed to upload 1) a discovery stipulation signed by all parties, 2) a stipulation of partial agreement about discovery that identifies the areas in dispute or 3) letters explaining why no agreement about discovery could be reached. Based on these submissions the Court will assess whether or not an in-person conference is necessary. The failure to upload anything will result in an adjournment of the conference.

The Court also observes that the parties uploaded a confidentiality order to be so ordered by the Court (NYSCEF Doc. No. 26). The Court declines to so-order that request as there is no reason, in this Court’s view, to restrict access to anything. This is a straightforward dispute about the possession of a piece of art; that does not set forth a basis for a confidentiality order. The parties chose to litigate this case in court rather than exploring alternative venues for dispute resolution, such as arbitration, where records are not typically open for public review.

<p><u>12/14/2023</u> DATE</p>			 <hr/> ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART	<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