

Samuels v Gordon
2015 NY Slip Op 31359(U)
June 29, 2015
Supreme Court, Kings County
Docket Number: 508095/2014
Judge: Bert A. Bunyan
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At an IAS Term, Part 8 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29th day of June, 2015.

P R E S E N T:

HON. BERT A. BUNYAN,

Justice.

-----X
MIMI SAMUELS,
MECHEL HANDLER,
DEBRA BASSAN,
DINAH PINCZOWER,
LEO SIEGMAN as Administrator for the Estate of RACHEL SIEGMAN,
EDWARD COHN, Individually and as Administrator for the Estate of
STEVEN DEARAKIE,

PLAINTIFFS.

- against -

SHAYA GORDON, MICHELLE RAE GORDON,
DEBORAH LEA GORDON-COEN, Individually and as Executors of
the Estate of SCHABSE GORDON, and
JOHN DOES "1" THROUGH "10,"

Defendants.

-----X
The following e-filed papers read herein:

DECISION AND ORDER

Index No. 508095/14

Mot. Seq. No. 1

NYSCEF Doc. No.

Notice of Motion/Supporting Affirmations (Affidavits)

Annexed with Exhibits and Memorandum of Law

Affirmation (Affidavits) in Opposition Annexed with Exhibits

Plaintiffs' Memorandum of Law in Opposition

Reply Memorandum of Law

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In this action for breach of a bailment agreement, defendants Shaya Gordon, Michelle Rae Gordon, Deborah Lea Gordon-Coen, individually and as executors of the estate of Schabse Gordon, deceased (hereafter, collectively, defendants), move in Seq. No. 1 for an order, pursuant to CPLR 3211 (a) (1), (5), and (7), dismissing the complaint in its entirety. For the reasons stated below, the motion is granted in part and denied in part.

Background

The complaint alleges that in 2003 defendants' predecessor bailee, Schabse Gordon (hereafter, Gordon), accepted a valuable oil-on-canvas painting from plaintiffs' predecessor bailor, Steven (Shalom) DeArakie (hereafter, DeArakie), for the purpose of appraising and safeguarding it pending a determination as to its value and potential sale, but never returned it. A written acknowledgment, dated Dec. 1, 2003, evidences Gordon's receipt of the painting, the present location of which appears to be unknown. The painting, known as "Women at Arles," is believed to be by Claude Monet. It allegedly depicts women washing clothing in a river. The record contains no photograph of the painting.

The complaint, as amplified by plaintiffs' submissions in opposition to the motion, alleges that Gordon died testate in Sept. 2004. Gordon left behind his wife Fredda Gordon (hereafter, Fredda) and his son Shaya Gordon (hereafter, Shaya). At Gordon's death, his estate allegedly took possession of the painting.

The complaint further alleges that DeArakie died intestate in Oct. 2004. Plaintiff Edward Cohn (hereafter, Cohn) was awarded letters of administration for DeArakie's estate in Dec. 2005. In the same month, Cohn commenced a Surrogate's Court proceeding against Fredda for information as to the whereabouts of the painting (*see Matter of Edward Cohn as Administrator of the Estate of Steven DeArakie, a/k/a, Shalom DeArakie, Deceased, to Discover Property and Examine Fredda Gordon*, Sur Ct, NY County, File No. 2986/05 [hereafter, the Surrogate's Court proceeding]). At her pretrial deposition conducted in that

proceeding in June 2008, Fredda testified that (1) she used to have the painting in her home, (2) she no longer had the painting in her home for the preceding few years, (3) her son Shaya might have taken the painting out of her home, and (4) she did not know of its current whereabouts.

The complaint next alleges that, about ten years later, in May 2014, one of plaintiffs attempted to contact defendants to demand the return of the painting and that in Aug. 2014, plaintiffs sent a formal written demand for the return of the painting to defendants. To date, however, defendants have not returned the painting. According to the complaint, the painting has been either in the possession of the Gordon estate or one of Gordon's children, or the Gordon estate's attorney. Plaintiffs commenced this action in Sept. 2014.

The complaint asserts six causes of action alleging conversion, "common-law" replevin,¹ breach of fiduciary duty, promissory estoppel, declaratory judgment, and injunctive relief. As stated, defendants have moved for an order, pursuant to CPLR 3211 (a) (1), (5) and (7), to dismiss all causes of action as barred by the documentary evidence, as being untimely, and/or for failure to state a cause of action.

Standards of Review

"Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). For evidence submitted under a CPLR 3211 (a) (1)

¹ So designated by the Court to distinguish it from the cause of action under CPLR article 71 for recovery of chattel.

motion to qualify as documentary, it must be “unambiguous, authentic, and undeniable” (*Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 997 [2d Dept 2010]). “Neither affidavits, deposition testimony, nor letters are considered ‘documentary evidence’ within the intendment of CPLR 3211 (a) (1)” (*id.*; see also *Fontanetta v Doe*, 73 AD3d 78, 84-86 [2d Dept 2010]).

“In moving to dismiss a cause of action pursuant to CPLR 3211 (a) (5) as barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, *prima facie*, that the time within which to commence the action has expired” (*A.F. Rockland Plumbing Sup Corp. v Hudson Shore Assoc. L.P.*, 96 AD3d 885, 886 [2d Dept 2012]). “The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations has been tolled or was otherwise inapplicable, or whether the action was actually commenced within the period propounded by the defendant” (*QK Healthcare, Inc. v InSource, Inc.*, 108 AD3d 56, 65 [2d Dept 2013]).

“In assessing a motion under CPLR 3211 (a) (7), . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint” (*id.*). A court is also permitted to consider evidentiary material submitted by a defendant in support of a motion under CPLR 3211 (a) (7) (see CPLR 3211 [c]; *Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]). If the court considers evidentiary material, the criterion then becomes “whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). However, defense

affidavits will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that the plaintiff has no cause of action (*see Sokol*, 74AD3d at 740). Thus, a motion to dismiss pursuant to CPLR 3211 (a) (7) must be denied “unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Discussion

Conversion and Replevin (the First and Second Causes of Action, Respectively)

As stated, the late DeArakie entrusted the painting to the late Gordon for the special purpose of appraising and safeguarding it pending a determination as to its value and potential sale. Gordon’s possession of the painting was that of a bailee and his obligation to DeArakie is defined and measured by the law of bailments (*see Wikiert v City of New York*, 128 AD3d 128, 132 [2d Dept 2015]). The bailment agreement, as evidenced by the written receipt, was not for a definite term. “In a chattel bailment of indefinite duration, the Statute of Limitations [on the conversion and replevin claims] 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” (*Martin v Briggs*, 235 AD2d 192, 198 [1st Dept 1997]; *see also Berman v Goldsmith*, 141 AD2d 487 [2d Dept 1988]). Here, according to the complaint, plaintiffs demanded a return of the painting in Aug. 2014 and commenced this action a mere one month after their demand; thus, their claims for conversion and replevin appear to be timely.²

² Unlike conversion, replevin is strictly a possessory action, and plaintiff, to recover, must show a possessory right recognized by law. Plaintiff must be the owner of the property or lawfully entitled to its possession. Where, as here, the claim is of wrongful detention, it is for plaintiff to plead and prove facts (continued...)

Nevertheless, the record on the motion to dismiss discloses issues of fact that cannot be resolved at this time. These issues are (1) which statute of limitations applies to the conversion/replevin claims, (2) when it began to run, and (3) whether it was tolled. Although not raised by the parties, two different statutes of limitations might apply to this case: either a six-year statute of limitations governing contractual or quasi-contractual bailments (*see* CPLR 231 [2]; *Baratta v Kozlowski*, 94 AD2d 454, 463 [2d Dept 1983]) or a three-year statute of limitations applicable to bailments arising out of a tort (*see* CPLR 214 [3]; *Solomon R. Guggenheim Found. v Lubell*, 77 NY2d 311, 317 [1991]; *see generally Wikier*, 128 AD3d at 136-138).

There is also an issue of fact as to when the statute of limitations on the conversion/replevin claims began to run. Defendants' contention that the bailment ended on Gordon's death cannot be resolved on the current record. The letters, dated Sept. 7 and 15, 2009, from plaintiff Mechel Handler to defendant Shaya demanding the return of the painting do not qualify as documentary evidence within the meaning of CPLR 3211 (a) (1) (*see Attias v Costiera*, 120 AD3d 1281, 1283 [2d Dept 2014]). Likewise, Fredda's deposition testimony, Cohn's affidavit, and Shaya's affirmation – all filed in the Surrogate's Court proceeding – do not constitute documentary evidence under CPLR 3211 (a) (1). The record, thus, is devoid of documentary evidence conclusively establishing when the bailment ended and, consequently, when the statute of limitations began to run.

². (...continued)
 showing that the detention is wrongful (*see Hofferan v Simmons*, 290 NY 449, 455-456 [1943]). The complaint here adequately pleads a claim of replevin based on wrongful detention. Contrary to defendants' contention, the claim of replevin is not limited to stolen property (*see* NY Jur 2d, Conversion and Action for Recovery of Chattel §§ 89 et seq.).

Lastly, the Court cannot determine, at this stage of litigation, whether the doctrine of equitable estoppel bars defendants' reliance on the statute of limitations as a defense. Relatedly, there is an issue of fact whether plaintiffs' claims are barred by the doctrine of laches, which arguably could apply if plaintiffs unreasonably delayed demanding the return of the painting.

In sum, plaintiffs' claims for conversion and replevin are not barred by the documentary evidence; there are issues of facts precluding dismissal of these claims on the grounds of the statute of limitations; and these claims are adequately pleaded in the complaint. Therefore, the branch of defendants' motion for an order, pursuant to CPLR 3211 (a) (1), (5), and (7), for dismissal of plaintiffs' conversion and replevin claims (the first and second causes of action, respectively) is denied.

Breach of Fiduciary Duty (the Third Cause of Action)

The cause of action for breach of a fiduciary duty is grounded on the complaint's allegations (in ¶ 39) that (1) "Gordon had a reputation in the Jewish community as someone who helped people in financial need;" (2) DeArakie's "friend, Martin Cohen, reassured [DeArakie] of same"; and (3) DeArakie "reasonably placed his trust and confidence in Gordon, relying on him to safeguard the [painting] and return it to [DeArakie]." The complaint further alleges (in ¶ 40) that "a[s] a result of his promise to appraise and safeguard the [painting] and to return it to [DeArakie], Gordon and . . . defendants owed [DeArakie] and [DeArakie's] children the duty of a fiduciary, including the duty [1] to

refrain from converting the [painting] for their own use, [2] not to engage in activities detrimental to the safe return of the [painting], [3] to prevent loss or damage to the [painting], and [4] not to misappropriate the [painting].” The complaint concludes (in ¶ 41) that “defendants have breached their fiduciary duties to [DeArakie] in multiple respects by refusing to return the [painting] to its rightful owner.”

“The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant’s misconduct” (*Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777 [2d Dept 2010]). “A fiduciary relationship ‘exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation’” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005] [quoting Restatement (Second) of Torts § 874, Comment *a*]). “It exists only when a person reposes a high level of confidence and reliance in another, who thereby exercises control and dominance over him” (*People v Coventry First LLC*, 13 NY3d 108, 115 [2009], *rearg denied* 13 NY3d 758 [2009]). For this reason, “[w]here a cause of action is based upon . . . breach of trust . . ., the circumstances constituting the wrong shall be stated in detail” (CPLR 3016 [b]).

Here, plaintiffs’ cause of action for breach of fiduciary duty is legally deficient. Plaintiffs fail to allege with requisite specificity facts that would indicate the existence of a fiduciary relationship initially between Gordon and DeArakie and subsequently between Gordon’s estate and/or his children and plaintiffs. At best, plaintiffs allege that Gordon was

a well-known philanthropist in the Jewish community and a “friend of friend” who agreed to assist DeArakie with his financial woes. Such allegations do not give rise to a fiduciary relationship (*compare Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 57 [1st Dept 1988] [“A fiduciary relationship, whether formal or informal, . . . is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another . . . (and) might be found to exist, in appropriate circumstances, *between close friends or even where confidence is based upon prior business dealings.*”] [internal quotation marks and citations omitted; emphasis added]). Nothing that plaintiffs allege indicates the existence of a fiduciary relationship between Shaya and Gordon’s other children on the one hand and plaintiffs on the other hand. Accordingly, plaintiffs’ cause of action for breach of fiduciary duty is dismissed, pursuant to CPLR 3211 (a) (7), for failure to state a claim.

Contrary to plaintiffs’ contention, defendants’ alleged status as bailees and successor bailees does not, in and of itself, imply a fiduciary duty (*see* Restatement [Second] of Trusts § 5 [explaining that ordinarily “(a) bailment is not a trust”]). As a purely commercial relationship and a purely commercial transaction, the bailment here did not give rise to a fiduciary relationship (*see Van Valkenburgh, Nooger & Neville, Inc. v Hayden Publ. Co.*, 33 AD2d 766 [1st Dept 1969], *affd* 30 NY2d 34 [1972], *rearg denied* 30 NY2d 880 [1972], *cert denied* 409 US 875 [1972]).

Promissory Estoppel (the Fourth Cause of Action)

“The elements of a cause of action based upon promissory estoppel are a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise” (*Schwartz v Miltz*, 77

AD3d 723, 724 [2d Dept 2010] [internal quotation marks omitted], *lv denied* 16 NY3d 701 [2011]). Here, the complaint fails to allege facts demonstrating the “reasonable and foreseeable reliance” element of the promissory estoppel claim. According to the complaint, Gordon was not a close friend of DeArakie and had no prior dealings with him apart from taking from him the painting and several other items of personal property. Moreover, DeArakie provided no consideration to Gordon for the latter’s involvement with the painting. Accordingly, there was no basis for DeArakie to rely on Gordon’s alleged representations concerning the painting. Thus, the promissory estoppel cause of action is dismissed, pursuant to CPLR 3211 (a) (7), for failure to state a claim.

Declaratory Judgment (the Fifth Cause of Action)

A “cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action” (*BGW Dev. Corp. v Mount Kisco Lodge No. 1552*, 247 AD2d 565, 568 [2d Dept 1998] [internal quotation marks omitted], *lv denied* 92 NY2d 813 [1998]). Since it appears, at least at this stage of litigation, that plaintiffs have an adequate alternative remedy in the form of a cause of action alleging conversion and replevin, their cause of action for declaratory judgment is dismissed as redundant (*see Alizio v Feldman*, 82 AD3d 804, 805 [2d Dept 2011]).

Injunctive Relief (the Sixth Cause of Action)

Lastly, the complaint seeks (in ¶ 58) a preliminary and permanent injunction precluding defendants from denying plaintiffs access to the painting or, in the alternative, from denying plaintiffs the profits from the sale of the painting. The record is silent as to who currently holds the painting and whether the painting has been sold to a third party. As the pre-discovery record on the motion to dismiss is necessarily undeveloped, and the

painting, by definition, is unique, dismissal of plaintiffs' cause of action for injunctive relief is inappropriate at this time.

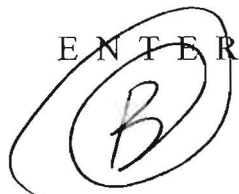
Conclusion

Defendants' motion to dismiss is granted to the extent that plaintiffs' claims sounding in breach of a fiduciary duty, promissory estoppel, and declaratory judgment (the third, fourth, and fifth causes of action, respectively) are dismissed. Defendants' motion to dismiss is denied with respect to plaintiffs' claims sounding in conversion, replevin, and injunction (the first, second, and sixth causes of actions, respectively).

Plaintiffs' counsel shall serve a copy of this decision and order with notice of entry on defense counsel and shall file an affidavit of said service with the County Clerk.

Defendants shall serve an answer to the remainder of the complaint (*i.e.*, the conversion, replevin, and injunction claims in the first, second, and sixth causes of action, respectively) within 20 days from the date of service of this decision and order with notice of entry on their counsel.

This constitutes the decision and order of the Court.

ENTER,

 J. S. C.

HON. BERT A. BUNYAN
 JUSTICE N.Y.S. SUPREME COURT

FILED
 KINGS COUNTY CLERK
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