Regal Jewelry & Gift Shop, LLC v BLCE LLC
2021 NY Slip Op 32691(U)
December 16, 2021
Supreme Court, New York County
Docket Number: Index No. 154757/2020
Judge: Phillip Hom
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PHILLIP HOM **PART** **02M**

Justice

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REGAL JEWELRY AND GIFT SHOP, LLC,

Plaintiff,

- v -

BLCE LLC D/B/A NEW YORK LOAN COMPANY, DBS DIAMONDS INC.,BIJAN & CO. INC

Defendant.

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INDEX NO. 154757/2020

MOTION DATE June 11, 2021

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 43, 50, 53, 55, 57

were read on this motion to/for DISMISSAL .

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 44, 45, 46, 47, 48, 49, 51, 58

were read on this motion to/for DISMISS .

In the interest of justice and judicial economy, Motions Sequence Numbers 1 and 2 are considered together for the purpose of a decision.

Background

Plaintiff Regal Jewelry and Gift Shop, LLC ("Regal") brings this action to recover misappropriated jewelry. Defendants BLCE, LLC d/b/a New York Loan Company ("BLCE") and DBS Diamonds Inc. ("DBS") (Motion Sequence Number 001) move to dismiss the Complaint under CPLR 3211 (a) (1), (3), and (7) on the grounds of failure to state a cause of action, lack of standing, and defense based on documentary evidence. Defendants BLCE and DBS also request an award of attorneys' fees, sanctions and costs on the basis that the complaint is frivolous, under 22NYCRR § 130 1.1.

Defendant Bijan & Co. Inc. ("Bijan") (Motion Sequence Number 2) similarly moves under CPLR § 3211(a)(1)(3) and (7) on the grounds of failure to state a cause of action, lack of standing, and defense based on documentary evidence attached to the Complaint. Bijan also moves for an award of attorneys' fees, sanctions and costs alleging the action constitutes frivolous conduct under NYCRR §130-1.1

The Complaint alleges that in November 2017, Regal agreed to sell a five-piece emerald and diamond set and an 18-karat gold diamond necklace to Lloyd Klein and Jocelyn Wildenstein, an engaged couple. The price for the set was $250,000 and for the necklace $18,000. Klein paid for the jewelry with four postdated checks which were dishonored (NYSCEF Doc. No. 26 (checks) and Doc. No. 30 ¶¶15 and 20) (Complaint in Wildenstein Bankruptcy Adversary proceeding). Approximately one week after receiving the jewelry from Regal, Klein and Wildenstein pawned it to BLCE as collateral for a loan of $70,000 paid to Klein and/or Wildenstein (NYSCEF Doc. Nos. 17 and 18 (pledge tickets)). BLCE states that it specializes in collateral loans on luxury jewelry (NYSCEF Doc. No 16 (affidavit of Jordan Tabach-Bank, CEO)).

Regal tried unsuccessfully to obtain payment for the jewelry or the return of the jewelry from Wildenstein and Klein. On March 20, 2018, an involuntary petition for bankruptcy under Chapter 7 was filed against Wildenstein. On May 17, the bankruptcy was converted into a voluntary case under Chapter 11 (unless otherwise stated, all these events took place in 2018). When Klein/Wildenstein failed to redeem the jewelry, BLCE offered it for sale to third parties (*Id.* ¶12). A June 28 receipt shows a sale receipt from BCLE to DBS for $100,000 (NYYSCEF Doc. No. 21). On June 29, Wildenstein's bankruptcy attorney notified BLCE that the jewelry was the property of her bankruptcy estate and subject to the automatic stay (NYSCEF Doc. No.

34). On July 20, DBS sold the jewelry to Bijan for $126,000. Bijan currently has the jewelry in its possession.

On August 13, Regal filed an adversary complaint in Wildenstein's bankruptcy. The facts alleged in the instant Complaint have been elucidated by the adversary complaint and by a 2021 "Decision after Trial" rendered by the bankruptcy court (*Matter of Wildenstein*, 2021 WL 1132289, at *6-7 [Bankr SDNY Mar. 24, 2021, Case No. 18-10766 (MEW)]).

Regal's adversary proceeding seeks $268,000, the amount that Klein and Wildenstein agreed to pay Regal. The adversary complaint alleges that Wildenstein paid for the jewelry with four post-dated checks dated from January though April, naming Regal as payee. Each check was in the amount of $62,000. The adversary complaint further alleges that, in January, Regal deposited the earliest dated check. The check did not clear and Regal was advised that there were no funds in Wildenstein's account. The bankruptcy decision alleges these same facts.

The bankruptcy trial was resolved in favor of Regal. The court held that Wildenstein's $268,000 debt to Regal, which Wildenstein admitted to owing, was exempt from discharge in her bankruptcy (*Wildenstein,* 2021 WL 1132289~~,~~ at *6-7). The bankruptcy decision determined the following: Regal claimed that it was notified for the first time on June 29, 2018 that an unidentified party had possession of the jewelry. In response to this claim, Wildenstein's counsel filed a letter in the bankruptcy proceeding revealing that BLCE was in possession of the jewels (*Id.* at *4). "Regal then learned (upon contacting BLCE) that BLCE had already sold the Jewelry pursuant to the terms of the pawn transaction" (*Id.*).

The Judge determined that Wildenstein did not obtain the jewelry though larceny, embezzlement, or actual fraud, but pursuant to a "purchase transaction" (*Id.* at *5-6), involving "false pretenses" and "outright lies" (*id.* at *7). In the section, "Stipulated Facts," the decision

notes that "Wildenstein admits that she knew, on the day the checks were issued, that [her] account did not then hold sufficient funds to cover the checks" (*Id.* at 1). Wildenstein deliberately and falsely led Regal to believe that she wanted the jewelry for her own use (*id.* at *7). "The evidence shows, and I so find, that Wildenstein actually wanted to obtain the Jewelry from [Regal] in November 2017 so that Wildenstein and Klein could use the Jewelry as collateral for short-term, high-interest loans from a pawn broker. Wildenstein did not disclose that fact to [Regal]" (*id.*). The entire proceeds of the pawnbroker's loans were paid to Wildenstein (*id.* at *3).

The first cause of action in the Complaint sounds in conversion, the second cause of action seeks replevin against Bijan, and the third cause of action seeks a declaratory judgment declaring and adjudging that Regal owns the jewelry (NYSCEF DOC. No. 1).

Defendants argue that since Regal transferred title to the jewelry according to a purchase transaction, it ceased being the owner of the jewels when Klein/Wildenstein received them and that Regal consequently has no standing to maintain this action to recover the jewels or receive money for them. Defendants argue that they are good faith or bona fide purchasers for value.

Motion to Dismiss

In determining a motion to dismiss under CPLR §3211 (a) (7), the court gives the complaint a liberal construction, accepts as true the facts alleged there, and only asks whether the facts, as alleged, fit within any cognizable legal theory (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 120-121 [1st Dept 2002]).

A motion to dismiss for lack of standing is made pursuant to CPLR §3211 (a) (3). "Standing to sue requires an interest in the claim at issue in the lawsuit that the law will

recognize as a sufficient predicate for determining the issue at the litigant's request" (*Caprer v Nussbaum*, 36 AD3d 176, 182 [2d Dept 2006]).

Under CPLR §3211 (a) (1), a party may move to dismiss on the ground that "a defense is founded upon documentary evidence." Such a motion to dismiss may be granted "where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.,* 98 NY2d 314, 326 [2002]).

Judicial records, including judgments and orders, qualify as documentary evidence (*Amsterdam Hospitality. Group LLC v Marshall-Alan Assoc., Inc.,* 120 AD3d 431, 432-433 [1st Dept 2014]) and courts may take judicial notice of records in other actions (*Matter of Newton v McFarlane*, 174 AD3d 67, 77 [2d Dept 2019]; *Caffrey v North Arrow Abstract & Settlement Servs., Inc.*, 160 AD3d 121, 126-127 [2d Dept 2018]). Pleadings in another lawsuit constitute informal judicial admissions, which are admissible as evidence, but are not conclusive against the party (*Cramer v Kuhns,* 213 AD2d 131, 138 [3d Dept 1995]). Only if the evidence is unrebutted and unexplained can statements in those records be grounds for dismissal (*Koslowski v Koslowski*, 245 AD2d 266, 268 [2d Dept 1997]; *Walsh v Pyramid Co. of Onondaga,* 228 AD2d 259, 260 [1st Dept 1996]).

Letters and emails may also constitute documentary evidence, (*Amsterdam,* 120 AD3d at 432, 433; *see Langer v Dadabhoy,* 44 AD3d 425, 426 [1st Dept 2007]). Here, the documentary evidence consists of the records from the bankruptcy case, emails and other records about BLCE's sale to DBS, and Wildenstein's aforementioned bankruptcy attorney's letter to BLCE. Regal does not object to or rebut any of them.

Title to goods passes when the goods are delivered to the buyer unless otherwise agreed (*Atlas Auto Rental Corp. v Weisberg*, 54 Misc 2d 168, 170 [Civ Ct, NY County 1967]; *see Kamakazi Music Corp. v Robbins Music Corp.*, 534 F Supp 57, 67 [SDNY 1981]; UCC 2-401 [2]). A transaction of purchase takes place when the seller delivers the goods intending for the buyer to become the owner of the goods (*Zaretsky v William Goldberg Diamond Corp*., 820 F3d 513, 525 [2d Cir 2016]; *Hoffman v Alpern,* 193 Misc 695, 696 [City Ct, NY County 1948]).

When goods have been delivered under a transaction of purchase, the purchaser obtains title even though the delivery was in exchange for a check which is later dishonored (UCC 2-403 [1] [b]) or postdated (UCC 2-511, official comment 6). The purchaser of property by a dishonored check obtains voidable title, meaning that the purchaser, despite not paying for the goods, has the ability to transfer good title to the goods to a good faith purchaser for value (2 Hawkland UCC Series § 2-403:3 [Westlaw]; 1 White, Summers, & Hillman, Uniform Commercial Code § 4:33 [Westlaw]). Obtaining goods by dishonest means does not prevent a buyer from obtaining voidable title and the power to transfer good title to a good faith or bona fide purchaser for value (*Kaminsky v Karmin,* 187 AD2d 488, 489 [2d Dept 1992]; *Alexander v Spanierman Gallery, LLC,* 2008 WL 9737492, at *2 [Sup Ct, NY County Sept. 22, 2008, Index No. 105535/2007, Shafer, J.]; *Atlas,* 54 Misc 2d at 170; 3A Anderson UCC § 2-403:47 [Westlaw 3d ed]).

Whatever rights a purchaser obtains can in turn be transferred to another purchaser (2 Hawkland UCC Series § 2-403:3 [Westlaw]). "After property has passed into the hands of a bona fide purchaser, every subsequent purchaser stands in the shoes of such bona fide purchaser and is entitled to the same protection as the bona fide purchaser, irrespective of notice, unless such purchaser was a former purchaser, with notice, of the same property prior to its sale to the bona

fide purchaser" (*Goodwin v Harrison,* 231 SC 243, 250 [Sup Ct, SC 1957]; quoted in *Galin v Hamada*, 2016 WL 2733132, *2, 2016 US Dist LEXIS 62071, *4 [SDNY May 10, 2016, 15-CV-6992 (JMF)]).

The facts show that Regal transferred the jewels pursuant to a purchase transaction. Although the checks given for the jewelry were dishonored, Wildenstein/Klein obtained voidable title and were able to pass good title to a good faith purchaser for value. That person, in turn, could pass good title to another purchaser. Regal argues in opposition to the motions to dismiss that Klein/Wildenstein stole the jewels. A thief's title is void and it cannot pass good title even to a bona fide purchaser for value (*Candela v Port Motors*, 208 AD2d 486, 486-487 [2d Dept 1994]; *see -Bakalar v Vavra*, 619 F3d 136, 140 [2d Cir 2010]). The alleged facts and the bankruptcy court decision refute the claim that the jewels were stolen. That is, they were not "stolen" in a fashion that would prevent Wildenstein/Klein from transferring good title to a good faith purchaser for value.

Good faith purchasers are not liable for conversion to the original owner (*Tavoulareas v Steven Kessler Motor Cars*, 259 AD2d 262, 263 [1st Dept 1999]). The seller's reclamation right is barred if the goods have been sold to a good-faith purchaser for value (4A Part I Anderson UCC § 2-702:56 [3d ed Westlaw]). Regal further argues that BLCE is not a good faith purchaser because it had notice of Regal's prior claim. Regal does not allege that BLCE did not give value. For BLCE to qualify as a good faith purchaser for value, it must have acted with honesty in fact and in accord with reasonable commercial standards of fair dealing in the trade (UCC 2-103 [1] [b]). A good faith purchaser must not have notice that another party has or could have a superior claim to the goods (*Auto Rental*, 54 Misc 2d at 172; *Hoffman,* 193 Misc at 696; *see Buy This, Inc. v MCI Worldcom Communs., Inc.*, 209 F Supp 2d 334, 343 [SD NY 2002]).

As to notice, Regal alleges that "BLCE undertook little to no investigation regarding whether Klein was in fact the 'owner or is otherwise authorized to pledge the Jewelry'" (NYSCEF Doc. No. 1, para. 14). Regal alleges that on June 29, Wildenstein's bankruptcy counsel notified BLCE that the jewelry might be the property of Wildenstein's bankruptcy estate and that it was subject to ownership claims by Regal. On July 20, 2018, after receiving word of Regal's claims to the Jewelry, DBS sold the Jewelry to Bijan. Regal makes these statements upon information and belief.

A person has "notice" of a fact when he/she has actual knowledge of it, has received a notice of it, or "from all the facts and circumstances known to him at the time in question he has reason to know that it exists" (UCC 1–202 [a]). A person notifies or gives notice to another "by taking such steps as may be reasonably required to inform the other person in ordinary course, whether or not the other person actually comes to know of it" (UCC 1-202 [d]).

Regal fails to allege that a Defendant had notice of another claim to the goods at the time that the jewelry was pawned or before BLCE sold the jewelry to DBS. Regal does not allege anything tending to show that BLCE or another Defendant had notice of any circumstances that should have alerted it to the sellers' defective title or to another party's possible claim, which would place the Defendant under a duty of inquiry. As for the June 29 letter by Wildenstein's bankruptcy attorney to BLCE, it did not mention Regal or any other party having claim to the jewelry, aside from the debtor. The letter does not show that BLCE was given notice of Regal's claim.

BLCE's documentary evidence, consisting of emails and records of wire transfers, does not conclusively establish a defense as a matter of law. The documents do not show that BLCE

sold the jewelry to DBS before BLCE received notice of Wildenstein's bankruptcy case or Regal's claim.

Plaintiff requests leave to amend in the event that the Court finds the motions meritorious. The request is denied because Plaintiff gives no idea of how the defects in the complaint would be addressed (*Cusack v Greenberg Traurig, LLP*, 109 AD3d 747, 749 [1st Dept 2013]). Neither the complaint nor Regal's affidavit contain facts which could be the basis for relief. Moreover, Regal has failed to cross move for any affirmative relief as required under CPLR § 2215.

Sanctions

22 NYCRR 130 -1.1 states in relevant part:

(a) The court, in its discretion, may award to another party or attorney in a civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part.

(c) For purposes of this Part, conduct is frivolous if:

(1) It is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) It is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) It asserts material factual statements that are false.

The Court in its discretion finds that Regal's filing of the Complaint does not rise to the level of a "frivolous claim" under 22 NYCRR 130-1.1. Accordingly, the branch of Defendants BLCE and DBS' motion seeking sanctions, attorneys' fees and costs are denied. Similarly, the branch of Bijan's motion seeking sanctions, attorneys' fees and costs is similarly denied.

Conclusion

It is ORDERED that Motion Sequence Number 1 by Defendants BLCE and DBS is granted to the extent of dismissing the Complaint under CPLR §3211. However the branch of the motion seeking sanctions, attorneys' fees and costs is denied.

It is further ORDERED that Motion Sequence Number 2 by Defendant Bijan is granted to the extent of dismissing the Complaint under CPLR §3211. However, it is further ORDERED that the branch of the motion seeking sanctions, attorneys' fees and costs is denied.

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12/16/2021	PHILLIP HOM, J.S.C.
DATE	

CHECK ONE:	X	**CASE DISPOSED**			**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	X	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**	**REFERENCE**