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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Justice

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11/22/11
oc

Index Number : 112192/2007

TONY SHAFRAZI GALLERY, INC.

vs.

CHRISTIE'S INC.

SEQUENCE NUMBER : 007

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4
Replying Affidavits	

FILED

NOV 23 2011

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the accompanying memorandum decision.

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Dated: 11/22/11

JUSTICE SHIRLEY WERNER KORNREICH

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 54

----------x

TONY SHAFRAZI GALLERY INC. and GUIDO ORSI,

Plaintiffs,

-against-

Index No. 112192/07

CHRISTIE'S INC. Formerly known as CHRISTIE'S, MANSON & WOODS INTERNATIONAL, INC., JOHN DOE 1, and JOHN DOES 2-10,

Defendants.

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Kornreich, J.:

Defendant Christie's Inc. (Christie's) moves for summary judgment dismissing the two remaining fraud claims in plaintiff Guido Orsi's First Amended Complaint.

This action arises out of the sale of a painting, presented by Christie's at auction as an original Jean-Michel Basquiat painting (the Painting) and sold to plaintiff Tony Shafrazi Gallery Inc. (Shafrazi)[1] in 1990 for $242,000.00. Shafrazi subsequently sold the Painting to plaintiff Guido Orsi in 1991 for $185,000.00. In 2006, Orsi was loaning the Painting to a gallery for an exhibition in Milan, and sought a certificate of authenticity for the Painting from the Authentication Committee of the Estate of Jean-Michel Basquiat (the Authentication Committee). The Authentication Committee informed Orsi that the Painting was not created by Jean-Michel Basquiat, but was a counterfeit. Orsi subsequently discovered that Gerard Basquiat, Jean-Michel's father, and John Cheim, the director of a gallery representing the estate, had previously viewed the Painting, purportedly at Christie's request, several days before the 1990

[1] All claims by plaintiff Shafrazi have been dismissed on previous motions. Only plaintiff Guido Orsi has claims still pending against Christie's Inc.

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auction, and determined that the Painting was "not right." Orsi commenced an action in Italy against Shafrazi, but later decided to jointly pursue claims with Shafrazi against Christie's. The only claims remaining in the complaint are Orsi's claims for fraud and fraudulent inducement, alleging that Christie's knew, or was reckless, in misrepresenting that the Painting was an authentic Jean-Michel Basquiat painting, seeking damages in excess of $2 million, the alleged current value of an authentic Basquiat painting, and punitive damages of over $5 million.

Christie's moves for summary judgment, asserting that the undisputed facts in this case show that Christie's did not know the Painting was inauthentic, that it did not act with intent to defraud, and that Orsi did not rely upon any representation by Christie's in deciding to purchase the Painting. It argues that after Gerard Basquiat inspected the Painting and before it went to auction, he failed to express his concerns about it to Christie's. Thus, it asserts that because there is nothing in the record that Christie's had any doubts about the provenance or authenticity of the Painting, there is no basis for finding knowledge or intent to defraud. As to Orsi's reliance, Christie's argues that Orsi admitted at his deposition that he did not rely upon Christie's representations in deciding to purchase the Painting.

Orsi opposes, asserting that Gerard Basquiat testified at his deposition that he and John Cheim were invited by Christie's to visit its premises to authenticate the Painting, and that he told a Christie's employee that the Painting was not "right." This testimony, along with John Cheim's testimony that he accompanied Gerard and agreed with his assessment, Orsi argues, is enough to raise a triable issue as to knowledge or recklessness by Christie's in offering the Painting for auction as an authentic Jean-Michel Basquiat painting. Orsi also urges that Christie's fraudulent misrepresentation as to the authenticity and provenance of the Painting in

the catalogue was viewed, read, and discussed by him with his art adviser, Giorgio Bassi, prior to the conclusion of the transaction to purchase the Painting, and, therefore, he relied upon it.

FACTS

The following facts are taken from the parties' Statement of Material Facts, and the deposition testimony of the various witnesses. In August 1988, Jean-Michel Basquiat, an artist, died, and his father Gerard Basquiat (GB), became the administrator of his son's estate (Defendant's Statement of Material Facts, ¶¶ 1-2; Plaintiff's Response to Defendant's Rule 19-a Statement, ¶¶ 1-2). GB retained Christie's to catalogue and appraise Basquiat's artwork in the estate (Defendant's Statement of Material Facts, ¶ 4).

Tony Shafrazi opened the Tony Shafrazi Gallery in 1979. He was a personal friend of Jean-Michel Basquiat and the Gallery had previously conducted various exhibitions involving Basquiat paintings and drawings from 1983 to 1989 (*id.*, ¶¶ 12-17).

On December 14, 1989, Christie's entered into a consignment agreement with Carlo Diaz in connection with a painting referred to in the schedule annexed to the agreement as an untitled work by Basquiat (the Painting), which was to be offered for sale at Christie's Contemporary Art auction in February 1990 (*id.*, ¶ 11 and Exhibit J to Affirmation of Joseph A. Patella in Support). The lots offered for sale at the auction were available for public viewing at Christie's Park Avenue location on February 17, 18, 20, 21, and 22 (Defendant's Statement of Material Facts, ¶ 26; *see also* Exhibit S to Patella Affirm.). The Painting was offered for sale by Christie's on the first day of a two-day sale on February 23 and 24, 1990 (the Auction). The Auction catalogue identified the Painting as "Lot 176 JEAN MICHEL BASQUIAT," indicated that it was "[U]ntitled," and "signed and dated 1982 on the reverse– acrylic and colored oilsticks on

canvas–unframed 49 3/4 x 50 ½ in. (126.3 x 128.3cm.)" (Exhibit S to Patella Affirm. in Support). It further indicated "PROVENANCE Acquired directly from the artist" (*id.*). Prior to the Auction, Shafrazi received the catalogue, viewed the Painting in the catalogue, and determined to place a bid on the Painting at the Auction (Defendant's Statement of Material Facts, ¶¶ 23-24; Deposition of Tony Shafrazi, dated September 14, 2010, at 105-111). At the Auction, Shafrazi successfully bid on the Painting, purchasing it for $220,000, plus a 10% commission, for a total price of $242,000 (Defendant's Statement of Material Facts, ¶ 27; Shafrazi Dep. at 127).

In February 1991, Orsi visited the Shafrazi Gallery, saw the Painting and decided he wanted to buy it (Deposition of Guido Orsi, dated April 16, 2010, at 15-16). He immediately spoke to Mr. Shafrazi to discuss the Painting, and negotiate the price (*id.* at 16). When Orsi was requesting a discount on the price, Mr. Shafrazi showed Orsi the Christie's catalogue, the provenance of the piece and the price Shafrazi paid for it (*id.* at 18, 21-22; *see also* Shafrazi Dep. at 199-200). Orsi's colleague Giorgio Bassi later negotiated and concluded the purchase with Shafrazi on Orsi's behalf, and Orsi purchased the Painting for around $185,000 (Defendant's Statement of Material Facts, ¶ 29; Orsi Dep. at 27; *see also* Shafrazi Dep. at 199).

In 1994, GB formed the Authentication Committee (Defendant's Statement of Material Facts, ¶ 33; *see also* Deposition of Gerard Basquiat, dated January 13, 2010, at 159-160). In 1997, the Painting was included in an exhibition in Rome, entitled "American Graffiti" (Defendant's Statement of Material Facts, ¶ 34; Exhibit Y to Patella Affirm.). In 1999, Mr. Shafrazi published a book, entitled "Basquiat," which contained over 200 works by Basquiat, and included the Painting (Defendant's Statement of Material Facts, ¶¶ 36-37; *see* Exhibit Z to

Patella Affirm.).

In 2006, Italian curator Gianni Mercurio contacted a friend of Orsi to request that Orsi loan the Painting, as well as another Basquiat work that he owned, for a Basquiat exhibition that Mercurio was organizing in Milan (Defendant's Statement of Material Facts, ¶ 40; Orsi Dep. at 58-60). Mercurio discovered that neither work had a certificate of authenticity and requested that Orsi obtain such certificates. Orsi obtained the assistance of Mr. Shafrazi, who submitted applications for the two works to the Authentication Committee (Defendant's Statement of Material Facts, ¶¶ 41-42; Orsi Dep. at 60-61). By letter dated October 5, 2006, the Authentication Committee stated its opinion that the Painting was not a work created by Basquiat (Defendant's Statement of Material Facts, ¶ 43; *see also* Exhibit AA to Patella Affirm., Opinion Letter).

In moving for summary judgment, Christie's urges that the evidence clearly and indisputably shows that it had no knowledge that the Painting was not an authentic Basquiat. It asserts that Orsi's claims of knowledge and recklessness rest on a visit GB and John Cheim, the director of the Robert Miller Gallery, together made to Christie's East, its warehouse location, before the Auction to view four works by Basquiat, including the Painting. Christie's argues that, even assuming that Christie's requested that they make this visit, Cheim never communicated his opinion that the Painting was "not right" to anyone at Christie's. In addition, Christie's asserts that while GB claims that he then went to Christie's Park Avenue location to inform them that the Painting was "not right," he spoke only to a man that he never met before and could not identify, and this was despite the fact that he had an existing relationship with a number of Christie's employees, in connection with his son's estate, including employees in the

Contemporary Art Department. GB did not tell the man that the Painting was a counterfeit, nor did he ask that it be withdrawn from the Auction or even examined further. Christie's argues that it is undisputed that GB took no other action in connection with the Painting. Thus, it urges that there is no basis in fact to show that it knew the Painting was not authentic, and or that it acted with any intent to defraud.

In opposition, Orsi asserts that there are disputed issues of fact as to whether Christie's knew, or was at least reckless with regard to, whether the Painting was authentic. Orsi contends that conflicting deposition testimony on key issues is apparent. He urges that GB's testimony demonstrates that Christie's knew that the Painting was a fake, that Christie's was reckless in accepting the consignor's representation without performing any verification process at all, and that GB and Cheim inspected the Painting at Christie's request and at Christie's premises. He also argues that he relied on Christie's representation in the catalogue prior to purchasing the Painting.

DISCUSSION

The defendant Christie's motion for summary judgment is granted, and the complaint is dismissed.

On a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering evidence to show the absence of any material issues of fact (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510 [1st Dept 2010]). Once such a showing is made the burden shifts to the opposing party to lay bare its proof and present evidentiary facts sufficient to raise genuine

triable issues of fact (*Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, *cert denied* 434 US 969 [1977]; *Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d at 510; *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). Such facts must be in admissible form, and "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court's function is only to determine whether any genuine issues of fact exist, not to determine the issue (*Sheehan v Gong*, 2 AD3d 166, 168 [1st Dept 2003]).

To establish a fraud claim, a plaintiff must demonstrate a misrepresentation of a material existing fact, knowledge by defendant of the falsity, intent to defraud, justifiable reliance and injury (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Demry v Wind*, 82 AD3d 670, 671 [1st Dept 2011]; *Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]). The element of intent to defraud is established either with facts demonstrating that the defendant had a motive and an opportunity to commit fraud or facts constituting strong circumstantial evidence of conscious misbehavior or recklessness (*Muscalli Factory for Gold & Jewelry v JPMorgan Chase Bank, N.A.*, 261 FRD 13, 19 [SD NY 2009], *affd* 382 Fed Appx 107 [2d Cir 2010] [applying New York law]; *see Ittleson v Lombardi*, 193 AD2d 374, 376 [1st Dept 1993]).

Here, defendant Christie's presents proof that it had no knowledge that the Painting was not authentic at the time of the Auction and that it had no intent to defraud. It submits the testimony of Alison Gerstell, a former Christie's employee who signed the consignment agreement for the Painting on Christie's behalf. She testified that, while she did not recall the transaction from over 20 years ago, Christie's practice at that time was to obtain the relevant

information about the art work from the consignor and then verify that information through outside sources, such as library research, review catalogues raisonne, review books written on the artist, and seek out the authorities on the artist (Deposition of Alison Gerstell, dated May 11, 2010 at 14-15, 95; *see also* Exhibit L to Defendant's Motion, Gerstell's Handwritten Records of Consignment of Painting). Her testimony is supported by the testimony of Susan Dunne, who also worked in Christie's Contemporary Art Department at the relevant time, and who testified that Christie's was not in the business of authenticating works of art, but would "exhaust the research process prior to a sale," including consulting an internationally recognized expert, consulting a catalogue raisonne, library research, research upon viewing the labels on the back of the painting, and looking at prior exhibition catalogues (Exhibit A to Reply Affirmation of Joseph A. Patella, Deposition of Susan Dunne at 10, 11, 65-66). There is no evidence that Christie's strayed from this practice. The Painting was then put on display to the public and to art enthusiasts for almost a week, and there is no record of any concerns raised about its authenticity.

Christie's also presents John Cheim's deposition testimony in which he admitted that he never communicated his opinion about the Painting to anyone at Christie's and that after he viewed it with GB, he just went back to the Robert Miller Gallery (Cheim Dep. at 107, 109-112). Christie's points to GB's testimony that he spoke only to an unidentified person, even though he had a relationship with other Christie's employees; he told this unidentified person that the Painting was "not right," not that it was a fake or should be removed from the Auction (GB Dep. at 126-129, 131-133, 136). GB stated "I never spoke to anyone at Christie's regarding this work" (*id.* at 135). Christie's relies on the undisputed fact that GB took no further action with regard to

the Painting. Finally, Christie's emphasizes that Shafrazi had extensive dealings with Basquiat works and purchased this Painting. He included it in a book he published containing a comprehensive collection of Basquiat works and members of the Authentication Committee contributed articles to the book, no one raising any issues with respect to the Painting until 2006. This proof is sufficient to satisfy Christie's burden to show that it had no knowledge or intent to defraud.

The burden then shifted to Orsi to demonstrate a genuine triable issue of material fact. Orsi, however, has failed to meet his burden. Orsi primarily relies upon GB's testimony with regard to knowledge and intent to defraud. He asserts in his brief in opposition that GB "testified in exceeding clarity about the details of who and what he advised to a [Christie's] employee in [Christie's] Contemporary Art department - that the Painting is not by JMB [Basquiat]" (Plaintiff's Memorandum in Opposition, at 14). However, both GB and Cheim testified that while they were accompanied by a Christie's employee to view the Painting, along with several other Basquiat works, at Christie's East, they did not say anything to that employee about the Painting (Cheim Dep. at 114; GB Dep. at 103) . In response to detailed questions about his subsequent visit to Christie's Park Avenue, GB could not identify or even describe the person with whom he spoke, except to state that he was fortyish and blond, "maybe 5'8 or 5'9 maybe" (GB Dep at 126-127, 130). GB testified that he did not know the man's name, the man was just wearing a business suit with no Christie's emblem, GB did not know the man's title, and the man did not say to GB that he was from Christie's Contemporary Art Department (GB Dep. at 130-131). Moreover, GB testified that he told the man that the Painting was in his personal opinion "not right," and that the man in response "was kind of – not upset, but he was a little bit, you

know, teed off. He said yeah, right, right, right, right. Have a good day, Mr. Basquiat" (GB Dep. at 129). When asked if he told this unidentified Christie's employee that the Painting was a fake, GB responded clearly and unequivocally "No"and asserted that he "Never" used that word (*id.* at 131). When questioned further if he ever told anyone at Christie's that he thought it was a fake, again, GB clearly asserted, "Never" (*id.*). He attested that he did not tell the man that the Painting was not authentic (*id.*). GB stated that he did not tell anyone at Christie's that he thought it was a counterfeit and did not ask the man or Christie's to withdraw the Painting from the Auction (*id.* at 132-133). When asked about whether he told other Christie's employees, including Andrea Krahmer, Martha Baer, Frank de Biasi, Patricia Hambrecht, with whom he had significant contact before in connection with appraising his son's estate and selling some of the paintings, some of whom worked in the Contemporary Art Department, GB again answered "No" (*id.* at 134-135). It is undisputed that GB took no further action in connection with the Painting. This testimony is insufficient to raise a genuine issue as to Christie's intent to defraud and to its knowledge.

Orsi's reliance upon Cheim's testimony to raise a fact issue on knowledge and intent also is unavailing. Cheim clearly testified that while he accompanied GB to Christie's East, he did not go with him to Christie's Park Avenue, nor did he speak with anyone from Christie's about his visit (Cheim Dep. at 107, 109-112). Cheim attested that he did not say anything about the Painting to the Christie's employee that accompanied them to the viewing (*id.* at 114). In addition, Cheim did not testify that Christie's at any point told him they doubted the authenticity or provenance of the Painting, and, in fact, admitted that his understanding of why he was there came exclusively from what GB told him (*see* Cheim Dep. at 72, 108). His testimony does not

support Orsi's assertions of Christie's knowledge or intent.

This testimony and the record as a whole are insufficient to demonstrate a genuine issue of fact that Christie's knew that the Painting was not authentic, or that it intended to defraud Orsi (*see Telmark, Inc. v Mills*, 199 AD2d 579 [3d Dept 1993] [summary judgment granted because the record as a whole fails to demonstrate that the party knowingly made a false representation with the intent to deceive]; *see also Marcus v Lindsley F. Kimball Research Institute of New York Blood Ctr.*, 24 AD3d 187 [1st Dept 2005] [fraud claim regarding inaccuracy of defendant's paternity report dismissed where no showing that defendant knew report it issued was inaccurate and deliberately concealed that circumstance from plaintiff]; *Colavito v New York Organ Donor Network, Inc.*, 438 F3d 214, 222 [2d Cir], *certified question on other ground answered by* 8 NY3d 43 [2006] [applying New York law]). Under the proof presented, the trier of fact would have to assume that the anonymous and unidentified person with whom GB spoke, over 20 years ago, worked for Christie's, had some authority, and conveyed what GB told him to a person with authority at Christie's, to show that Christie's had knowledge and intent. This proof, at most, creates only a shadowy semblance of an issue, insufficient on a summary judgment motion.

To the extent that Orsi argues that because GB and Cheim were asked to come look at the Painting, Christie's should have followed up and called GB to ask whether the Painting was authentic, this argument is rejected. Orsi has to prove knowledge and intent to defraud. Even under a recklessness standard, this argument does not suffice. Assertions that Christie's "should have followed up," or "should have known" that the Painting was not authentic, which, while they might support a claim for negligence, are inadequate to sustain a fraud claim (*see Monaco v New York Univ. Med. Ctr.*, 213 AD2d 167, 169 [1st Dept], *lv dismissed in part, denied in part* 86

NY2d 882 [1995]; *see also Marine Midland Bank v John E. Russo Produce Co.*, 50 NY2d 31, 44 [1980] [mere negligent failure to acquire knowledge of a falsehood is insufficient to demonstrate intent to defraud]; *Abrahami v UPC Constr. Co.*, 224 AD2d 231, 234 [1st Dept 1996]). Accordingly, it is

ORDERED that the defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

FILED

NOV 23 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: November 22, 2011

ENTER:

J.S.C.