

Blue Art Ltd. v Zwirner
2016 NY Slip Op 32196(U)
October 26, 2016
Supreme Court, New York County
Docket Number: 653810/2016
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK

X

BLUE ART LIMITED,

Plaintiff,

-against-

DAVID ZWIRNER and DAVID ZWIRNER, INC.,

Defendants.

X

INDEX NO. 653810/2016

DECISION & ORDER

MOTION SEQ. NO. 002

OSTRAGER, J:

Before the Court is the defendants' pre-answer motion to dismiss plaintiff's amended complaint pursuant to CPLR 3211(a)(1) and (7), and for expenses pursuant to New York Arts and Cultural Affairs Law (ACAL) § 15.15(4). The plaintiff is Blue Art Limited ("Blue Art"), an art dealer. The defendants are David Zwirner, Inc., an art gallery (hereinafter the "Gallery"), and David Zwirner, owner of the Gallery.

Blue Art purchased a Jeff Koons sculpture entitled *Gazing Ball (Centaur and Lapith Maiden)* (the "Sculpture"), and identified as "Edition 2 of 3, 1 AP,"¹ pursuant to a Purchase Agreement dated June 24, 2014 (Am. Compl., ¶23-26) (Bishop Affirmation, Exh. D). The *Gazing Ball* Series was exhibited at the Gallery in May and June of 2013 (¶ 16). Blue Art paid \$2,000,000 for the Sculpture in a series of payments prior to June 2015 (¶ 53). The Agreement did not specify a delivery date. In an email dated August 4, 2016 (approximately two weeks after the complaint was filed), a Gallery representative informed Blue Art that the Sculpture is "complete, approved, and ready for shipment" (Bishop Aff., Exh. L).

¹"AP" stands for "Artist's Proof" (Am. Compl., ¶ 4).

A subsequent email from the Gallery to Blue Art dated August 13, 2016 provided Blue Art with certain information with respect to the completed Sculpture, including its dimensions, year of fabrication, and how many editions the Gallery claimed had been fabricated as of that date (Am. Compl., Exh. B).

Blue Art now seeks to rescind the sale and/or recover damages. In its amended complaint, Blue Art asserts the following causes of action: (1) violation of ACAL Article 15, (2) breach of warranty, (3) breach of contract, (4) fraudulent inducement/fraudulent concealment (against defendant David Zwirner, Inc.), (5) fraudulent inducement/fraudulent concealment (against defendant David Zwirner), and (6) promissory estoppel. Blue Art seeks to recover compensatory damages in the amount of \$2,000,000, treble damages in the amount of \$6,000,000 under ACAL § 15.15(3)(a), and costs and disbursements associated with this action.

Analysis

On a pre-answer motion to dismiss pursuant to CPLR 3211(a)(1) and (7), the Court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. 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, 87 (1994) (citations omitted). Applying that standard here, for the following reasons, the motion to dismiss by the defendants is granted in part and denied in part.

I. Breach of Contract and Breach of Warranty

A. Time for Delivery

Blue Art alleges in its amended complaint that between December 2014 and June 2015, defendants made a series of oral representations that Sculpture No. 2 in the Series was being produced and would be delivered within a year of the execution of the Agreement, *i.e.* by June

2015 (¶ 35, 158-161). Blue Art further alleges it relied on these representations which post-date the execution of the June 24, 2014 Purchase Agreement but not the payments for the Sculpture that were made prior to June 2015. The defendants do not dispute making such oral promises. Instead, they argue that the UCC § 2-309(1) requires delivery within a “reasonable time” when a contract is silent on the delivery date. Defendants further argue that Blue Art waived its right to a one-year delivery through its acquiescence in the delay. *Ring 57 Corp. v. Litt*, 28 AD2d 548 (2d Dept 1967) (“Defendant, by her acquiescence in the series of delays and her continued willingness to give plaintiff an ‘opportunity’ to perform, waived default, if any, on plaintiff’s part”). At oral argument, defendants’ counsel stated without any evidentiary support that a 2-year wait period is not uncommon for Jeff Koons’ artwork.²

Time is never of the essence in an agreement which explicitly or impliedly provides for performance within a reasonable time. *Shipsview Corp. v Beeche Systems Corp.*, 1996 WL 590910 (N.D.N.Y.), citing *John F. Trainor Co. v G. Amsinck & Co.*, 236 NY 392, 395 (1923). Nor is time of the essence in an agreement where the parties have waived time as an essential element of the contract. *Shipsview Corp. supra*, citing *Taylor v Goelet*, 208 NY 253, 259 (1913). However, what constitutes a reasonable time is dependent upon “the nature, purpose and circumstances” of performance. *Id.*; see also *Zev v Merman*, 73 NY2d 781 (1988). Furthermore, contractual rights may be waived only if they are “knowingly, voluntarily and intentionally abandoned.” *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 (2006), citing *Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184 (1982).

² See transcript of oral argument held on October 19, 2016 at 31-32.

It is undisputed that more than two years have passed since Blue Art purchased the Sculpture. It is also undisputed that the Sculpture has not yet been delivered to Blue Art. Liberally construing the allegations in the amended complaint and affording the plaintiff every favorable inference, as the Court must do on a pre-answer motion to dismiss for failure to state a claim, the Court finds that plaintiff's breach of contract and breach of express warranty claims are actionable as plaintiff's claims that it made payments pursuant to oral representations that were not honored has not been controverted. Additionally, whether a two-year wait period is "reasonable" under the circumstances, and whether the purchaser knowingly and intentionally "waived" its right to a one-year delivery are issues of fact which cannot be adjudicated in a pre-answer motion to dismiss. The breach of contract and breach of warranty claims are also bolstered by the factual allegations discussed below concerning the alleged mislabeling of the Sculpture identified as "Edition 2 of 3, 1AP."

B. The Casts

Blue Art alleges that prior to and at the time of the sale, defendants expressly represented that the Sculpture would be the second sculpture cast from an edition of three sculptures, plus one artist's proof (Am. Compl., ¶ 102). Plaintiff alleges that what defendants have offered to deliver to Blue Art is the fourth cast. Blue Art alleges that the Gallery willfully mislabeled the second cast as "No. 3 of 3" and allowed Sotheby's to attempt to sell it at public auction in 2015. Blue Art also claims, albeit without any proof, that another sculpture was fabricated in 2015 and sold to a third-party. Blue Art alleges that the sculpture conveyed to Sotheby's was the true "No. 2 of 3," and when Sotheby's failed to sell it at the auction, the value of the work was greatly undermined. Blue Art argues that the unsuccessful auction sale, coupled with softening in the art market and the existence of additional casts, negatively impacted the value of the Sculpture at issue.

The defendants dispute these allegations and claim that a fourth cast was never produced. Defendants assert that the Gallery's 2013 exhibition displayed a prototype and that the Gallery has offered to deliver to Blue Art Sculpture No. 2 of 3, as per the parties' Agreement. As for the Sotheby's sculpture, defendants assert it was a charitable donation by Mr. Koons for the benefit of the Los Angeles Museum of Contemporary Art. In support of this claim, defendants proffered a catalogue entry from the 2015 auction stating it was for the benefit of the Museum (Bishop Aff., Exh. F).

Accepting the plaintiff's allegations as true, as the Court must on a pre-answer motion to dismiss, the allegations of willful mislabeling of sculptures state claims upon which relief can be granted under plaintiff's breach of contract and warranty claims. Moreover, the parties' conflicting claims with respect to sequencing of the casts clearly pose material issues of fact which the Court will need to resolve by testimony or documentary evidence. This issue is not ripe for adjudication at the pleading stage, especially when both parties offered as exhibits various articles, website and catalogue entries, and emails that call into doubt whether Blue Art was offered Sculpture No. 2 of 3.

C. Dimensional Discrepancies

Blue Art alleges that defendants promised that the completed Sculpture, once fabricated, would conform to the dimensional specifications contained in the Agreement (¶ 102). Blue Art asserts that the completed Sculpture displays different dimensions. The Sculpture's dimensions are 97 ¼ by 96 ½ by 28 ½ inches in the Agreement and 98 ¼ by 89 ¼ by 31 ½ inches in defendants' August 13, 2016 email. The defendants argue that the dimensional discrepancies are *de minimis* and, given that Blue Art was apprised of such discrepancies by an email four months earlier and did not previously object, Blue Art is not entitled to rescission based on such "immaterial" deviations.

As plaintiff correctly points out, a buyer of goods is entitled to a “perfect tender” under UCC § 2-601 and may reject goods if they fail to conform to the contract in *any* respect. Furthermore, the failure to make a perfect tender of unique and valuable artwork would not only potentially negatively impact the value of the purchased artwork but would also impact the purchaser’s ability to re-sell the artwork for a profit at a future date. Therefore, this aspect of the claim survives dismissal.

D. Rescission

Rescission of a contract is justified when a breach is so material and substantial that the very essence of the contract is affected and the object of the parties’ agreement is defeated. *See Affiliated Hosp. Prod., Inc. v Merdel Game Mfg. Co.*, 513 F.2d 1183, 1186 (2d Cir. 1975); *see also Faden Bayes Corp. v Ford Motor Co.*, 259 AD2d 352 (1st Dept 1999). Further, the right to rescind and seek restitution generally exists as an alternative remedy where there has been repudiation or a material breach of contract. *See Parker v. Hoppe*, 257 NY 333, 342 (1931).

It is clear that Blue Art agreed to pay \$2 million for Sculpture No. 2 of 3 in Jeff Koons’s limited edition series displayed at the Gallery in 2013. Blue Art’s allegations that the real No. 2 was improperly labeled and unsuccessfully sold at a public auction, which allegedly undermined the value of the Sculpture, goes to the heart of the contract between the parties. The fact that the Sotheby’s sculpture was ready to be auctioned in mid-2015 and labeled as “No. 3 of 3”, a year before Blue Art’s long-awaited “No. 2 of 3” was completed and available for delivery, bolsters Blue Art’s claim for breach of contract, breach of express warranty, and its asserted right to rescind the Agreement. Therefore, this aspect of the claim survives dismissal.

II. The ACAL Violation

Next, Blue Art alleges that the Gallery violated ACAL Article 15 by failing to provide certain written disclosures in writing in the time frame required by the statute.

ACAL §15.01(1) provides that:

An art merchant shall not sell or consign a multiple in, into or from this state unless a *written instrument* is furnished to the purchaser or consignee, *at his request, or in any event prior to a sale or consignment*, which sets forth as to each multiple the descriptive information required by this article for the appropriate time period. *If a prospective purchaser so requests, the information shall be transmitted to him prior to the payment or placing of an order for a multiple. If payment is made by a purchaser prior to delivery of such an art multiple, this information shall be supplied at the time of or prior to delivery.* (Emphasis added).

ACAL § 15.10(1)(a)-(g) provides in pertinent part that:

The following information shall be supplied as indicated in a written instrument as to each multiple produced, fabricated or carved, on or after January first, nineteen hundred ninety-one:

- (a) Artist. State the name of the artist.
- (b) Title. State the title of the sculpture.
- (c) Foundry. State the name, if known, of the foundry which or person who produced, fabricated or carved the sculpture.
- (d) Medium. Describe the medium or process used in producing the multiple. If an established term, in accordance with the usage of the trade, cannot be employed accurately to describe the medium or process, a brief, clear description shall be made.
- (e) Dimensions. State the dimensions of the sculpture.
- (f) Time produced. State the year the sculpture was cast, fabricated or carved.
- (g) Number cast. State the number of sculpture casts, according to the best information available, produced or fabricated or carved as of the date of the sale.

Blue Art argues that the first and second sentences of ACAL § 15.01(1) required the Gallery to provide the written disclosures required by ACAL § 15.10(1)(a)-(g) at the time of sale (i.e. in the 2014 Purchase Agreement), or when Blue Art specifically requested such information by email (*see* Cahill Aff., Exh. 4). Blue Art has alleged in its amended complaint that the Gallery knowingly provided false information concerning the Sculpture by failing to correctly disclose the dimensions of the sculpture (¶ 90), whether and how the sculpture and the edition is numbered (¶ 93), the size of the sculpture series, and the size of any prior editions of the sculpture (¶ 94). Based on these allegations, Blue Art claims it is entitled to a refund, as well as treble damages under ACAL § 15.15(3)(a) (¶ 96-98).

The Gallery argues that the third sentence of ACAL § 15.01(1) controls because Blue Art paid for the Sculpture in advance. Since the Sculpture has not yet been delivered, the Gallery contends the time for making the required disclosures has not yet run out. In addition, defendants argue that the disclosures required by ACAL § 15.10 were provided to Blue Art in the Gallery's August 13, 2016 email. Defendants argue that Blue Art's claim for treble damages under ACAL should therefore be stricken.

The parties have presented competing interpretations of ACAL §15.01(1) as to the timing of the required statutory disclosures by art merchants under ACAL Article 15. The statute at issue was designed to protect consumers from fraud and deceptive practices in the sale of art multiples and reproductions.³ If we follow the defendants' logic to conclusion, a purchaser who spends millions of dollars for a valuable artwork would potentially have to wait until the minute before the artwork is delivered to receive information concerning the artwork. In addition, information pertaining to the artist, the foundry, and so forth is not only necessary to properly value artwork sold in multiples, but could also turn out to be erroneous, or misleading, or both. At that point, an art purchaser is without recourse. As then-Attorney General Robert Abrams stated at the public hearing:

Misleading appeals have been made to the public about an object's unique qualities or its investment potential... The extent of an artist's personal involvement in producing the work has been exaggerated in many cases. Laws currently in effect are largely inadequate to remedy these abuses and to secure the public's protection against future fraudulent practices... The Attorney General's study bill requires written disclosure of artistic information which is pertinent in determining the value of a print and creates express warranties as to those items of information... it is much broader in scope than past legislative proposals... stringent enforcement powers are provided (*id.*).

³ *Deceptive Practices in the Sale of Art Multiples and Reproductions*, The Office of the Attorney General, Nov. 12, 1980 (Cahill aff, ¶ 2, Exh. 1).

On a pre-answer motion to dismiss, the plaintiff's ACAL Article 15 violation is actionable, and the defendants failed to establish that dismissal of this claim is warranted as a matter of law.

III. The Fraud Claims

As for the plaintiff's fourth and fifth causes of action for fraudulent inducement/ fraudulent concealment against Zwirner and the Gallery, the Court finds these claims duplicative of the claims that remain in the case. To state a claim of fraudulent inducement, "there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury." *Wyle Inc. v ITT Corp.*, 130 AD3d 438, 438-39 (1st Dept 2015), quoting *Go Smile, Inc. v Levine*. 81 AD3d 77, 81 (1st Dept 2010), *lv dismissed*, 17 NY3d 782 (2011).

The defendants agreed to deliver the Sculpture to Blue Art pursuant to the 2014 Purchase Agreement. The defendants' alleged post-contract oral representations did not induce Blue Art into the contract, nor create meaningful obligations that are separate and apart from the defendants' pre-existing contractual obligations. Moreover, Blue Art's claims of breach of contract, breach of warranty, and ACAL Article 15 violations potentially provide Blue Art with the right to rescind the contract, recover the \$2 million it paid for the Sculpture, and potentially recover treble damages under the ACAL. Therefore, the fraud claims asserted against the Gallery and Zwirner would add nothing to this action and are dismissed.

IV. Promissory Estoppel

Blue Art's sixth cause of action for promissory estoppel is dismissed. The elements of a promissory estoppel claim are: (a) a promise that is sufficiently clear and unambiguous; (b) reasonable reliance on the promise; and (c) injury caused by the reliance. *MallinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 841-42 (1st Dept 2011), *lv. denied*. 21

NY3d 853 (2013). Further, a quasi-contract claim such as promissory estoppel is not viable where the conduct underlying the claim is governed by a contract. *Schroeder v Pinterest, Inc.*, 133 AD3d 12, 33 (1st Dept 2015). As previously explained, the defendants' alleged post-contract representations are based on the defendants' promises to perform under the Agreement, and this cause of action is therefore dismissed as duplicative.

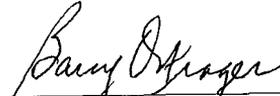
Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is granted in part, and the fourth, fifth, and sixth causes of action of the amended complaint are severed and dismissed, and the motion is otherwise denied; and it is further

ORDERED that defendants are directed to serve an answer to the remaining causes of action in the amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 341, 60 Centre Street, on November 29, 2016 at 9:30 a.m.

Dated: October 26, 2016



BARRY R. OSTRAGER J.S.C.
JSC