

Nares v M & W Waterproofing

2001 NY Slip Op 30037(U)

November 15, 2001

Supreme Court, New York County

Docket Number: 0012211/1999

Judge: Marilyn Shafer

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

PRESENT: MARILYN SHAFER
J.S.C.
Justice

PART 36

Nares J etc
M J N Waterproofing
etc

INDEX NO. 12211-99
MOTION DATE _____
MOTION SEQ. NO. 03
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is granted on default
and the Court issues the attached
Amended Decision reflecting a
change in the decretal paragraphs

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 11/15/01

MARILYN SHAFER
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36
.....-X

JAMES NARES and PAUL KASMIN GALLERY,

Plaintiff,

Index No.: 122111/99

AMENDED DECISION

-against-

M & W WATERPROOFING and NTJ ASSOCIATES,

Defendants.

.....-X
MARILYN SHAFER, J. :

For the purpose of convenience, Motions Nos. 001 and 002 shall be consolidated.

Defendant NTJ Associates ("NTJ") moves for leave to amend its answer (mot. seq. no. 001). Defendants move for summary judgment dismissing plaintiff Paul Kasmin Gallery ("Gallery"). Plaintiffs cross-move for an order limiting the evidence which will be admissible at trial (mot. seq. no. 002).

This is a negligence action. Plaintiff James Nares ("Nares") is a professional artist who maintains a studio at 526 West 26th Street, New York, New York. The complaint alleges that defendant M & W Waterproofing ("M & W") was contracted by NTJ to perform certain maintenance work upon the exterior of 526 West 26th Street. On October 2, 1999, M & W and/or its agents and employees were engaged in maintenance and caused sparks and/or bursts of flames to enter Nares' studio through an open window. As a result, a fire occurred in Nares' studio. One result of the fire was the activation of the sprinkler system., Subsequently, plaintiffs

allege that 2,149 original works on paper created by Nares were destroyed, fifteen oil paintings and six photographic prints created by Nares were destroyed, and twenty-one original oil paintings created by Nares were severely damaged. The destruction of the artwork was allegedly due to the negligence of defendants.

NTJ seeks leave to amend its answer to include the affirmative defense of fraud. NTJ relies on the affidavit of Martin Mullin, a consultant in the fine arts field. Mullen states that he attended the February 21, 2001 discovery and inspection of the damaged works which are the subject of this action. He observed what was claimed to be 67 separate works of art. He claims that the 67 pieces of art work are in reality only 2 pieces of art and that plaintiffs are committing fraud by claiming that the 2 pieces of art are 67 pieces of art.

Plaintiffs oppose the motion, arguing that the proposed amendment has no basis in fact and is insufficiently pleaded. Plaintiffs assert that another expert hired by NTJ, Steven Leon, had inspected the damaged artwork in April 2000, and did not come up with the same conclusions that Mullen came up with. Plaintiffs contend that since the amendment is being sought by NTJ after the close of discovery, there is no opportunity to depose Mullen and to probe the accuracy of his statements. Such an examination would enable plaintiffs to move to strike the defense. Plaintiffs claim that they are prejudiced by an amendment of the pleading at this

time. Plaintiffs also claim that NTJ has not alleged justifiable reliance on its part and therefore, there was no fraud.

An action or counterclaim based on fraud must allege, with particularity, each of the elements of fraud. See, CPLR 3016; Desideri v D.M.F.R. Group (USA) Co., 230 AD2d 503 (1st Dept 1997). This is something NTJ has not done, having failed to allege justifiable reliance or damages. However, NTJ is not attempting to make a claim for fraud, but to use its expert testimony to dispute the amount of damages to which plaintiff may be entitled. Therefore, while there is no basis to allow amendment to allege fraud, NTJ will be permitted to use its expert testimony at trial. The motion to amend is denied.

Defendants move for summary judgment dismissing Gallery **as an** improper and unnecessary party to this action. The location of the alleged fire was not a leasehold or other property of Gallery. Defendants argue that Gallery had no possessory or consigned ownership of any of Nares' property while that property was in the possession and control of Nares. Thus, defendants state that Gallery has no legal or beneficiary interest in Nares' property.

Plaintiffs cross-move, based on defendants' motion dismissing the claims of Gallery, for an order in limine that no evidence, expert or factual, concerning the terms of any sale or the allocation of any sales proceeds between Nares **and** any **art** dealer will be admissible at the trial.

In their memorandum, plaintiffs contend that Gallery is a co-plaintiff because of the ruling in Swain v 383 West Broadway Corp., 216 AD2d 38 (1st Dept 1995). In that case, artworks were destroyed when a steam pipe burst in a storage area of defendant's building. After a trial, plaintiff, the artist, was awarded the full fair market value of the irreparably damaged works. On appeal, the Appellate court ruled, contrary to all existing authority, that because plaintiff typically received only a portion of the proceeds from sales of his works, he was only damaged to the same proportional extent. The party obtaining the other share of sales proceeds would be entitled to the balance of the fair-market value. In this case, Gallery is the exclusive sales agent for the artwork of Nares and, pursuant to an agreement with Nares, Gallery receives a percentage of the sales price of every art work of Nares that is sold. Deposition testimony of Nares provides this information. If Swain is applicable to this case, then due to an ongoing fee-splitting arrangement between plaintiffs, the injury to the parties is measured by the percentage that each would receive if the work were sold.

Plaintiffs acknowledge that since Swain, the Appellate Division, First Department appears to have taken a different approach in Indemnity Insurance Co. of North America v Art Students League, 225 AD2d 398 (1st Dept 1996). In that case, the owner of a painting received the full fair market value of the stolen work,

defeating the argument that the gallery where the work was consigned was entitled to its contractual share of the value of the work. The court held that the gallery only had a conditional interest in the painting that was contingent on the sale of said painting. Since there was no sale, the gallery was not entitled to share of the fair market value.

Plaintiffs argue that if Swain is the law, then Gallery is the proper party to recover that share. Otherwise, Nares is entitled to 100% of the fair market value for his destroyed artworks, and Gallery is not a necessary party to that claim, If Gallery is not a necessary party, plaintiffs contend that any evidence of a relationship between Nares and Gallery for a division of sales proceeds would be inadmissible at the trial.

The usual measure of damages for the complete destruction or the loss of personal property, where such property has a market value, is its reasonable market value immediately before destruction, less its salvage value. Aurnou v Craig, 184 AD2d 1048(4th Dept 1992). Here, the court will not apply Swain to this case. Based on testimony by Nares, Gallery had only a conditional interest in the artwork and would earn a commission only if the sale of artwork was consummated. This did not occur. A commission agreed upon for the sale of artwork is not binding if the item is destroyed as compared to being sold. See, Indemnity Insurance Company of North America, supra.

Nares is entitled to the full market value of his destroyed artwork and Gallery is not a necessary party to this action.

Accordingly, it is

ORDERED, that NTJ's motion for leave to amend its Answer is denied; and it is further,

ORDERED, that the defendant NTJ's motion for summary judgment is granted and the complaint is severed and dismissed as to plaintiff PAUL KASMIN GALLERY, and the Clerk is directed to enter judgment in favor of Defendant accordingly, and it is further,

ORDERED, that the remainder of the action shall continue, and it is further,

ORDERED, that the plaintiff's cross motion in limine is granted, in light of the above decision and any evidence of a relationship between Nares and the Paul Kasmin Gallery for a division of sales proceeds shall be inadmissible at trial.

DATED:
11/15/01

ENTER :
MARILYN SHAFER
J.S.C.

J.S.C.