

Sands & Co., Inc. v Christie's Inc.

2005 NY Slip Op 30510(U)

February 25, 2005

Supreme Court, New York County

Docket Number: 0600268/2004

Judge: Charles E. Ramos

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

PRESENT: Charles Edward Ramos
Justice

PART 53

0600268/2004

SANDS AND COMPANY, INC.,
vs
CHRISTIE'S INC.

INDEX NO. _____

MOTION DATE _____

SEQ 4

MOTION SEQ. NO. _____

DISMISS ACTION

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

FILED


FEB 28 2005

NEW YORK
COUNTY CLERK'S OFFICE

is decided in accordance with
accompanying memoranda decision and order.

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

Dated: 2/25/05



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

CHARLES E. RAMOS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X
SANDS & COMPANY, INC.,

Plaintiff,

Index No. 600268/04

-against-

CHRISTIE'S INC. and "JOHN DOE,"

Defendants.

-----X

FILED
FEB 28 2005
NEW YORK
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Charles Edward Ramos, J.S.C.:

In motion sequence 004, defendant Christie's Inc. (Christie's) moves, pursuant to CPLR 3211 (a) (7), to dismiss the complaint for failure to state a cause of action.¹

Background

For a complete background, the court refers to its earlier decision, dated May 28, 2004 (see footnote 1).

Analysis

Christie's moves to dismiss the complaint pursuant to CPLR 3211(a) (7) for failure to state a cause of action. Under CPLR 3211(a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail." *Guggenheimer v Ginzburg*, 43 NY2d 268, 274 (1977). Thus, Christie's must

¹ The motion papers contain at Exhibit 2 to the affirmation of Michael E. Salzman, dated August 24, 2004 and as Exhibit B to the affirmation of Barry I. Levy, dated September 17, 2004, what purport to be copies of this Court's decision dated May 28, 2004. They are not accurate copies of this Court's decision. They are error filled documents obtained from the Internet. This Court has not proofread said exhibits, but has relied on the Court's copy of its decision for accuracy.

convince the court that the plaintiff does not have a claim. In its complaint, plaintiff Sands & Company, Inc. (Sands) alleges that Christie's breached an agreement to sell plaintiff a certain Andy Warhol painting, allegedly in the possession of a person identified only as John Doe. "The elements essential to pleading a breach of contract claim are: (1) the making of an agreement, (2) due performance by plaintiff, (3) breach thereof by defendant, and (4) causing damage to the plaintiff." *Stratton Group, Ltd. v Sprayregen*, 458 F Supp 1216, 1217 (SD NY 1978).

The complaint states that, on December 19, 2003, Nicholas Sands, President of Sands & Company, contacted Christie's by telephone seeking to purchase a painting from Andy Warhol's 1981 "Mickey Mouse" series (the Painting). Robert Manley, an employee and specialist in the Christie's Postwar Art Department, informed Sands that Christie's had been offered such a painting, and it was available for sale in the million dollar price range. See Complaint ¶ 4. The complaint further states that, on December 22, 2003, Manley sent an e-mail to Sands offering the Painting at a "firm price" of \$660,000 (December 22nd e-mail), and, on January 4, 2004, Sands sent an e-mail to Manley accepting the offer with a proviso that he be permitted to inspect the Painting (January 4th e-mail). See Complaint ¶¶ 8 & 9.

Christie's argues that the complaint must be dismissed because the facts alleged fail to establish the formation of an agreement, an essential element in pleading a breach of contract claim. Christie's asserts that the January 4th e-mail was a

[*4]
conditional acceptance which added a new term to the original offer, and thus, a contract was not formed.

Documents attached to a complaint may be considered by the Court. See *Jacobs v Haber*, 133 AD2d 739 (2nd Dept 1987). Accordingly, the court looks to the plaintiff's attached January 4th e-mail which states "your offer is accepted at \$660,000 pending my firsthand confirmation that the painting is in good condition, and also is signed." See Complaint, Exhibit B.

"It is a fundamental principle of contract law that a valid acceptance must comply with the terms of the offer [citation omitted], and, if qualified with conditions, it is equivalent to a rejection and counteroffer." *Roer v Cross County Medical Center Corp.*, 83 AD2d 861 (2nd Dept 1981). Here, plaintiff added a condition to its acceptance allowing the plaintiff to reject the Painting if it was not in good condition and/or signed. Thus, by adding this condition, an agreement was not formed. The plaintiff's e-mail fails to demonstrate an unambiguous and unequivocal acceptance of the offer made. See *King v King*, 208 AD2d 1143 (3rd Dept 1994).

In response to Christie's argument, plaintiff submits the Affidavit of Carol M. Penn² (Penn Affidavit), to remedy any defects in the complaint. The Penn Affidavit purports to demonstrate that a valid and binding contract existed based on

²Ms. Penn is the President of Carol M. Penn Fine Art, which actively buys and sells works of art. Ms. Penn is also a member of the Appraisers Association of America, specializing in the appraisal of 20th Century paintings, sculpture, and works of art on paper.

the trade usage doctrine pursuant to the New York Uniform Commercial Code § 1-205³. Ms. Penn states that it is standard industry practice, and is "generally acknowledged within the fine art trade that: (1) a direct inspection or 'firsthand' viewing of a work always accompanies a dealer's 'acceptance' of it, even if the dealer has not specifically requested such a viewing (to which he always and in any case entitled); and (2) a request for said inspection is normal and customary, and it has no bearing whatsoever (assuming the work is in good condition) upon the validity of the dealer's contract." Penn Affidavit ¶ 11.

However, although courts have held that evidence of trade usage or of a prior course of dealing may be used to supplement the express terms of a contract, trade usage cannot be used to create a contract, as the plaintiff is attempting to do here. Further, the Penn Affidavit contains statements, such as "a request for said inspection is normal and customary, and it has no bearing whatsoever (assuming the work is in good condition) upon the validity of the dealer's contract," that are legal conclusions and such conclusions are ones left to the courts.

Plaintiff alternatively argues that the request for an inspection of the Painting was an additional term pursuant to the

³ The New York Uniform Commercial Code § 1-205 (2) provides "a usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court."

[*6]
New York Uniform Commercial Code § 2-207 and, thus, Manley's post acceptance actions, such as attempting to arrange an inspection, are evidence that a binding agreement existed between the parties.

The New York Uniform Commercial Code § 2-207 provides, in part:

"(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms....(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act."

The language of the January 4th e-mail clearly conditioned plaintiff's acceptance by attaching an additional term. Thus, the e-mail does not operate as an acceptance because acceptance was made conditional on assent to the additional term.

Plaintiff also relies on Manley's post-acceptance actions as evidence of a binding contract. After receiving plaintiff's January 4th e-mail, on January 5th 2003, Manley sent an e-mail to plaintiff stating "I'm working on it." However, the mere fact that Manley was working on setting up an inspection is not enough to create an acceptance by conduct. There is no evidence that would prove that the seller had agreed to the inspection, which agreement was a critical term to this purported contract. Courts have found conduct sufficient to establish a contract in

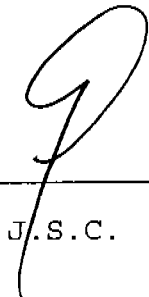
situations where both parties' engaged in undisputed actions over a period of months, and also, where there was full performance of agreed terms. See also *Otis Elevator Co. v George A. Fuller Co.*, 172 AD2d 732 (2nd Dept 1991); *Lorbrook Corp. v G & T Industries*, 162 AD2d 69 (3rd Dept 1990); *Hornell Brewing Co., Inc. v Spry*, 174 Misc 2d 451 (Sup Ct, NY County, 1997). In light of the aforementioned cases, Manley's statement "I'm working on it" is not sufficient conduct to create a contract.

Accordingly, it is,

ORDERED that defendant Christie's motion to dismiss plaintiff's complaint pursuant to CPLR 3211 (a) (7) is granted and the complaint is dismissed with costs and disbursements to be taxed by the Clerk of the Court; and it is further

ORDERED, that the Clerk is hereby directed to enter judgment accordingly.

Dated: February 25, 2005



 J.S.C.

CHARLES E. RAMOS

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.

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