

Mandarin Trading Ltd. v Wildenstein

2007 NY Slip Op 33092(U)

September 4, 2007

Supreme Court, New York County

Docket Number: 0602648/2006

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN
Justice

PART 12

Mandarin Pradey Ltd

INDEX NO. 602648/04

- v -

Jay Wildenstein and
Wildenstein & Co

MOTION DATE _____

MOTION SEQ. NO. 001

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 decided for
AT Pradey

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

FILED
OCT 01 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/4/07

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
EMILY JANE GOODMAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----x
MANDARIN TRADING LTD.,

Plaintiff,

-against-

Index No.: 602648/06

GUY WILDENSTEIN and
WILDENSTEIN & CO., INC.,

Defendants.

-----x

EMILY JANE GOODMAN, J.S.C.:

FILED
OCT 01 2007
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Mandarin Trading Ltd. commenced this action against defendants Guy Wildenstein and his company Wildenstein & Co., Inc., for having purportedly appraised and sold to plaintiff a painting by Paul Gauguin, entitled *Paysage Aux Trois Arbres* (the Painting), at millions of dollars above its value, without disclosing defendants' prior ownership interest in the Painting.

The complaint against defendants alleges various causes of action, including fraudulent or negligent misrepresentation and omission, breach of contract, breach of the implied covenant of good faith and fair dealing, as well as unjust enrichment. Plaintiff also seeks to rescind the transaction and obtain an award of damages. In response, defendants move for an order dismissing the complaint, pursuant to CPLR 3211 (a) (1) upon documentary evidence, and 3211 (a) (7) for failure to state a claim.

For the reasons set forth herein, defendants' motion for



dismissal is granted.

Background

Plaintiff is a Bahamian company that wanted to buy and sell fine art for a profit. According to the complaint, in July of 2000, plaintiff's parent, Phoenix Capital Reserve Fund, was informed by Mr. Amir Cohen (Cohen), a non-party to this action, that the then owner of the Painting was seeking to sell the Painting, and that he could arrange a transaction for a success fee, the amount of which would be based on the resale price that plaintiff would receive in a subsequent auction of the Painting. Plaintiff was interested in buying, and requested Cohen to procure an appraisal of the Painting. Cohen recommended defendant Guy Wildenstein, who is the president of Wildenstein & Co., and is purportedly a renowned expert on Gauguin paintings.

On July 28, 2000, Wildenstein provided a written appraisal of the Painting (Appraisal) to Mr. Michel Reymondin (Reymondin), a non-party to this action whose relationship to plaintiff and the transaction at issue is not disclosed in the complaint. Wildenstein's appraisal was that the Painting was worth \$15 to \$17 million, and that it was part of Mrs. Arthur Lehman's collection. The Appraisal stated that the Painting was, at one time, sold by defendants' firm, but did not also state that the Painting was once owned by defendants. The complaint alleges

that plaintiff received the Appraisal on or about August 12, 2000, but does not state how it obtained the Appraisal from Reymondin. A copy of the Appraisal, in certified English translation and French original, is attached as Exhibit B to defendants' motion to dismiss the complaint.

The complaint also alleges that in early August 2000, Cohen met in Geneva with a director, Mr. Thomas Seydoux, of Christie's International S.A. (Christie's), to discuss the logistics for auctioning the Painting. On August 10, 2000, the director wrote a letter to an unidentified person (perhaps Cohen), and proposed to include the Painting in an auction to be held by Christie's in New York on November 8, 2000, with a reserve price of \$12 million (the Christie's Letter). In the Christie's Letter, the director estimated the value of the Painting at \$12 to \$16 million. A copy of the Christie's Letter, in certified English translation and French original, is attached as Exhibit C to defendants' motion to dismiss.

The complaint further alleges that, on August 16, 2000, Peintures Hermes S.A. (Peintures), a Swiss company apparently affiliated with or owned by defendants, sent an invoice for the Painting to Calypso Fine Art Ltd. (Calypso), a non-party to this action and an intermediary for the transaction. The provenance section of the invoice reflected that the Painting was once owned by defendants. On August 25, 2000, plaintiff wired \$11.3 million

[*5]

to Calypso, as the purchase price for the Painting. Also, the complaint alleges that, on or about August 29, 2000 Calypso paid Peinture \$9.5 million, and on or about August 30, 2000 Peintures allegedly paid \$8.8 million to Allez la France Ltd., a company owned by defendants.

On November 8, 2000, Christie's tried to sell the Painting at an auction in New York. The highest bid was \$9 million, which was below the \$12 million reserve. Thus, plaintiff alleges that it "has been forced to retain the Painting, receiving no return on its \$11.3 investment." Complaint, ¶ 25.

Almost six years after it purchased the Painting, plaintiff commenced the instant action, seeking to rescind the transaction and damages against defendants, for, among other things, fraud, misrepresentation, breach of contract and unjust enrichment.

Discussion

In considering a CPLR 3211 motion to dismiss, the court is to determine whether plaintiff's pleadings state a cause of action. "The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law [internal quotation marks omitted]." *Richbell Info. Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 289 (1st Dept 2003), quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 (2002). The pleadings are to be afforded a

"liberal construction," and the court is to "accord plaintiffs the benefit of every possible favorable inference." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994).

On the other hand, while factual allegations contained in a complaint should be accorded a "favorable inference," bare legal conclusions and inherently incredible facts are not entitled to preferential consideration. *Sud v Sud*, 211 AD2d 423, 424 (1st Dept 1995). Moreover, "[w]hen the moving party [seeks dismissal and] offers evidentiary material, the court is required to determine whether the proponent of the [complaint] has a cause of action, not whether [he or] she has stated one". *Asgahar v Tringali Realty, Inc.*, 18 AD3d 408, 409 (2nd Dept 2005).

Fraudulent Misrepresentation or Omission Claim

In the complaint, plaintiff alleges that defendants failed or omitted to disclose their prior ownership interest in the Painting, fraudulently misrepresented the Painting's value by appraising it at a much higher price, and induced plaintiff's reasonable reliance on the appraisal, thus causing plaintiff to suffer monetary losses by overpaying for the Painting.

Under New York law, to state a claim for fraud, a plaintiff must demonstrate: (1) misrepresentation of a material fact made by defendant; (2) defendant knew of its falsity and intended to defraud plaintiff; (3) plaintiff's justifiable reliance on such misrepresentation; and (4) resulting damages to plaintiff. See

Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 421 (1996);
Richmond Shop Smart, Inc. v Kenbar Development Center, LLC, 32
AD3d 423, 424 (2d Dept 2006). Furthermore, under CPLR 3016 (b),
when a claim is based upon fraud or misrepresentation, "the
circumstances constituting the wrong shall be stated in detail."
The courts have held that "[e]ach of the foregoing elements [for
an alleged fraud claim] must be supported by factual allegations
containing the details constituting the wrong sufficient to
satisfy CPLR 3016 (b)." *Cohen v Houseconnect Realty Corp.*, 289
AD2d 277, 278 (2d Dept 1001) (citations omitted).

Defendants argue that there was no misrepresentation or
fraud because the Appraisal simply stated Wildenstein's opinion
as to the value of the Painting, citing *Jacobs v Lewis* (261 AD2d
127, 127-128 [1st Dept 1999]) ("alleged misrepresentations
amounted to no more than opinions and puffery ... and in either
case were not actionable as fraud"), and *Chase Investments Ltd. v
Kent* (256 AD2d 298, 299 [2nd Dept 1998]) ("a representation of
opinion or a prediction of something which is hoped or expected
to occur in the future will not sustain an action for fraud
[internal quotation marks and citations omitted]"). Plaintiff
contends, however, that when a professional (such as Wildenstein,
an expert on Gauguin paintings) expresses an opinion with
knowledge of its falsity, the opinion may be actionable as fraud
or misrepresentation. Plaintiff relies on, among others, the

following cases to support its contention: *Rodin Properties-Shore Mall, N.V. v Ullman* (264 AD2d 367 [1st Dept 1999]), and *Kimmell v Schaefer* (224 AD2d 217 [1st Dept 1996]), *affd* 89 NY2d 257 (1996).

Plaintiff's reliance on these cases is misplaced. In *Rodin*, the defendant was a real property appraiser who was sued by the plaintiffs, lenders to certain borrowers, in connection with the appraisal report provided by the defendant to the borrowers. The suit alleged, among other things, that defendant committed fraud by grossly exaggerating the cash flow of the borrowers' assets, to induce plaintiffs in lending money to the borrowers. In reversing the lower court's dismissal of the fraud claim, the appellate court pointed out that the agreement between the borrowers and the defendant contained an "expressed acknowledgment that the appraisal report was intended to assist [the borrowers] in obtaining financing and that the report could be submitted to prospective lenders." *Rodin*, 264 AD2d at 367. In this case, however, the Appraisal was given to Mr. Reymondin, a non-party whose relation to plaintiff is not disclosed in the complaint. The Appraisal contains no acknowledgment that it was intended to assist plaintiff in buying the Painting. Instead, in the Appraisal, defendant stated only his familiarity with the Painting and his opinion regarding its value, and noted that his opinion was given in response to Reymondin's request. Hence, *Rodin* is inapplicable to the facts of this case.

The *Kimmell* case is also inapplicable. There, the defendant was the chairman and chief financial officer of a company, and he approached plaintiffs and offered to sell them an investment in the company, using statements he knew were misrepresentations of the company. In denying defendant's assertion that he could not be held liable for the mere delivery of an opinion, the court held that expressions of opinion could be actionable if they were misrepresentations of material facts, particularly where they were made by a defendant with superior knowledge.

The record of this case, however, does not reflect that defendants ever met plaintiff or had knowledge of plaintiff. Also, there is no indication that the Appraisal was made for plaintiff's benefit, or that defendants had any knowledge that plaintiff would rely on the Appraisal. Thus, the complaint fails to establish a fraudulent misrepresentation claim. See *Garelick v Carmel*, 141 AD2d 501, 502 (2nd Dept 1988) (complaint dismissed because it failed to set forth factual allegations of misrepresentation by defendants to plaintiff).

With respect to plaintiff's allegation that defendants fraudulently omitted to disclose their prior ownership interest in the Painting, the law is clear that a cause of action for "fraudulent concealment [or omission] requires, in addition to the four foregoing elements [for fraudulent misrepresentation], an allegation that defendant had a duty to disclose material

information and that it failed to do so." *P.T. Bank Central Asia v ABN AMRO Bank*, 301 AD2d 373, 376 (1st Dept 2003); *Strasser v Prudential Securities, Inc.*, 218 AD2d 526, 527 (1st Dept 1995). See also *Travelers Indemn. Co. Of Illinois v CDL Hotels USA, Inc.*, 322 F Supp 2d 482, 499 (SD NY 2004) ("[w]hen dealing with a claim of fraud based on material omissions, it is settled that a duty to disclose arises only when one party has information that the other party is entitled to know because of a fiduciary or other similar relation of trust and confidence between them").

The complaint does not allege that defendants owed any fiduciary duty or relation of trust and confidence to plaintiff. The complaint merely alleges that, "[b]y virtue of their status as world renowned art experts, defendants had a duty to, inter alia, (i) disclose their ownership interest in the Painting; and (ii) appraise the Painting at its actual value." Complaint, ¶ 27. However, "[a]llegations of superior knowledge or expertise in the art field are per se insufficient to establish the existence of a fiduciary relationship." *Granat v Center Art Galleries-Hawaii, Inc.*, 1993 WL 403977, at *6 (SD NY Oct. 6, 1993), citing *Mechigian v Art Capital Corp.*, 612 F Supp 1421, 1431 (SD NY 1985) (mere expertise in a particular field does not create fiduciary relations between the parties). Because the record does not show that defendants owed a fiduciary duty to plaintiff, the alleged fraudulent omission or concealment claim cannot be sustained.

Yet, plaintiff argues that such claim may nonetheless be sustained under the so-called "special facts" doctrine. Under that doctrine, a plaintiff must prove that "(1) one party has superior knowledge of certain information; (2) the information is not readily available to the other party; and (3) the first party knows that the second party is acting on the basis of mistaken knowledge." *Travelers*, 322 F Supp 2d at 499. Plaintiff asserts that the complaint states a claim of fraudulent omission under the doctrine because it alleges: (i) defendants are experts in Gauguin paintings; (ii) defendants were once owners of the Painting but concealed the ownership information; and (iii) "upon information and belief, Defendants knew that an appraisal coming from them would be relied upon by the purchaser of the Painting." Complaint, ¶ 32.

Such argument is unpersuasive. Even though pleadings should be afforded favorable inferences in the context of a motion to dismiss, the complaint does not satisfy the third prong of the special facts doctrine because the allegation, based "upon information and belief" that defendants "knew" that the Appraisal would be relied on by the purchaser of the Painting, is simply a conclusory claim or statement unsupported by factual evidence. As such, the bald allegation is not entitled to preferential consideration. *Sud*, 211 AD3d at 424 (bare legal conclusions and inherently incredible allegations are not entitled to favorable

inference). The claim of fraudulent omission cannot withstand scrutiny, even if it is based upon the specific facts doctrine, as now asserted by plaintiff, and thus must be dismissed.

Negligent Misrepresentation or Omission Claim

In its complaint, plaintiff also alleges the alternative claim of negligent misrepresentation or omission. In New York, "before a party may recover in tort for pecuniary loss sustained as a result of another's negligent misrepresentations, there must be a showing that there was either actual privity of contract between the parties or a relationship so close as to approach that of privity." *Parrott v Coopers & Lybrand, LLP*, 95 NY2d 479, 483 (2000) (internal quotation marks and citations omitted). Before liability on such claim may attach, a plaintiff must show "(1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance." *Id.* at 484 (citations omitted). Moreover, as noted above in the context of a fraudulent misrepresentation claim, in order to establish a negligent misrepresentation claim in a commercial context, it must be shown that the defendant possessed unique or specialized expertise, or be in a special position of trust and confidence with the plaintiff. See e.g., *Kimmell v Schaefer*, 89 NY2d 257

(1996); *Sergeants Benevolent Ass'n Annuity Fund v Renck*, 19 AD3d 107 (1st Dept 2005).

As discussed, defendants were not in a special position of trust and confidence with plaintiff, and their expertise and knowledge in fine arts did not per se create a fiduciary relation with plaintiff. Moreover, there is no contract of privity between the parties, as plaintiff does not allege the existence of an actual written or oral contract with defendants that governed the sale and purchase of the Painting.¹ Plaintiff has failed to establish the elements required for a negligent misrepresentation claim, as enunciated by the Court of Appeals in *Parrott*: (1) defendants' "awareness" that the Appraisal would be used by plaintiff in purchasing the Painting; (2) reasonable reliance on the Appraisal by plaintiff, as a "known party" to defendants; and (3) defendants' "conduct" evincing their understanding of that reliance.

With respect to the first and second elements, the complaint alleges that "upon information and belief, Defendants knew that an appraisal coming from them would be reasonably relied upon by the purchaser of the Painting." Complaint, ¶ 49. As explained above, such allegation constitutes general conclusory statements unsupported by evidence. With respect to the third element, the

¹ Plaintiff's assertion that it is a third party beneficiary with respect to its breach of contract claim against defendants will be discussed below.

complaint is devoid of any allegation as to defendants' conduct evincing their understanding of plaintiff's reliance. Because the alleged negligent misrepresentation claim fails to establish the required elements, it must be dismissed.

Plaintiff's alleged negligent omission claim should also be dismissed as lacking merit, for the same reasons stated above in connection with the dismissal of the fraudulent omission claim.

Breach of Contract Claim

Plaintiff alleges that it is a third party beneficiary of a purported contract between Mr. Michel Reymondin and defendants. Plaintiff has not stated or described the terms of that contract, nor the consideration, but only generally alleges that the contract was for the provision of an appraisal of the Painting by defendants, and that plaintiff "should be allowed to seek and obtain discovery regarding the details surrounding the provision of the appraisal." Plaintiff's Brief, p. 12, fn. 6. Relying on, among others, *the Rodin case, supra*, plaintiff argues that it may maintain a breach of contract claim as a third party beneficiary, even though its name and identity was not revealed in the contract. Plaintiff's Brief, p. 12.

Plaintiff's arguments are without merit. As discussed, the complaint not only fails to disclose plaintiff's relation with Reymondin, but also fails to identify the specific provision of the contract that defendants allegedly breached. Such failure

constitutes a sufficient basis to dismiss the breach of contract claim. See *767 Third Avenue LLC v Greble & Finger LLP*, 8 AD3d 75, 75 (1st Dept 2004) ("Plaintiff's failure to identify any portion of the lease allegedly breached was fatal to its cause of action for breach of contract"); *American-European Art Assocs., Inc. v Trend Galleries, Inc.*, 227 AD2d 170, 170 (1st Dept 1996) (dismissal of breach of contract claim for failure to demonstrate the existence of a contract reflecting the terms and conditions of purported agreement). Although plaintiff is not required to attach to the complaint a copy of the contract or plead its terms verbatim, it is still "required to plead the provisions of the contract upon which the claim is based." *Griffin Brothers, Inc. v Yatto*, 68 AD2d 1009, 1009 (3d Dept 1979).

Moreover, as discussed above, *Rodin* is inapplicable because the facts in that case are clearly distinguishable. There, the court found that the defendant knew that its appraisal report was intended to assist the borrowers in obtaining financing from the lenders, and that the report would be submitted by the borrowers to the lenders for consideration. Finding that the defendant had grossly exaggerated the borrowers' cash flow, the court sustained the lenders' breach of third-party beneficiary contract claim against defendant. *Rodin*, 264 AD2d at 367. Here, the Appraisal not only did not mention the purpose for which it was intended (other than stating Wildenstein's opinion as to the value of the

Painting), it also did not contain any acknowledgment regarding plaintiff's existence or its relation with Reymondin, if any. Hence, plaintiff's breach of contract claim must be dismissed. Further, any argument that plaintiff should be allowed to obtain discovery of the details to support its breach of contract claim is equally without merit, because granting such relief would be tantamount to permitting a "fishing expedition." *Cohen v City of New York*, 183 AD2d 436, 437 (1st Dept 1992).

Breach of Implied Covenant of Good Faith and Fair Dealing Claim

In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance. *511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 (2002). However, there is no breach of an implied duty of good faith and fair dealing, in the absence of a valid and binding contract from which such a duty would arise. *American-European Art Assocs.*, *supra*, 227 AD2D at 171; *Travelers*, *supra*, 322 F Supp 2d at 493 (disposal of breach of contract claim also disposed of breach of good faith and fair dealing claim), citing *Fasolino Foods Co. v Banca Nazionale del Lavoro*, 961 F2d 1052, 1056 (2d Cir 1992).

In this case, because plaintiff's breach of contract claim has been dismissed, as discussed above, its breach of the implied good faith and fair dealing claim must also be dismissed.

Unjust Enrichment Claim

In its complaint, plaintiff alleges that defendants were

unjustly enriched by selling and receiving more money from plaintiff than the Painting was actually worth, and that defendants profited by appraising the Painting at an inflated price without revealing ownership interest. Complaint, ¶¶ 66-68. Specifically, plaintiff alleges that equity and good conscience require that defendants "be forced to pay Mandarin the difference in the value in what the Painting was worth at the time it was sold to Mandarin and Defendants' appraised value." *Id.*, ¶ 68.

In response, defendants contend that the unjust enrichment claim is without merit, because the complaint alleges that the highest bid for the Painting at the Christie's auction was \$9 million, a price greater than the \$8.8 million defendants allegedly received. Thus, defendants contend that they could not have been unjustly enriched, since they received less money than what the Painting could have been sold for at auction. Plaintiff rejects that argument by asserting that defendants received at least \$9.5 million through Peintures, Wildenstein's company, and "upon information and belief," received the full \$11.3 million price for the Painting, and, should be allowed to conduct discovery. Plaintiff's Brief, p. 15, fn. 7.

Defendants also contend that the unjust enrichment claim must be dismissed, because there is no privity between plaintiff and defendants, a required element of the claim. In support thereof, defendants rely on the following cases, among others:

Sperry v Crompton Corp. (26 AD3d 488 [2nd Dept 2006]), *affd* ___ NY3d ___, 2007 WL 527726 (2007); *Metropolitan Elect. Mfg. Co. v Herbert Constr. Co., Inc.* (183 AD2d 758 [2nd Dept 1992]).

While privity is a required element for an unjust enrichment claim in the Second Department, the law in the First Department appears contrary, at least in some instances. *Cox v Microsoft Corp.*, 8 AD3d 39, 40 (1st Dept 2004) (unjust enrichment claim stated by indirect purchasers of Microsoft products based on plaintiffs' allegations that Microsoft artificially inflated prices by entering into secret agreements with computer manufactures and distributors to inhibit competition). In *Sperry*, the Second Department specifically noted that it declined to follow the First Department. *Sperry*, 26 AD3d at 489 ("We decline to follow the decision of the Appellate Division, First Department, in *Cox*"). This court, however, must apply the law of the First Department, but, in any event, need not address this issue further.

The Court of Appeals has stated that "[t]he essential inquiry in any action for unjust enrichment ... is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." *Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 (1972). Further, in considering an unjust enrichment claim, "courts will look to see if a benefit has been conferred on the defendant under mistake of

fact or law ... and whether the defendant's conduct was tortious or fraudulent." *Id.* at 421. The court must decide whether the facts as alleged bring the case within the legal definition of unjust enrichment (*see Donemar, Inc. v Molloy*, 252 NY 360 [1916]), as the jury determines only whether the facts are as claimed (*see Shapira v United Medical Serv., Inc.*, 15 NY2d 200 [1965]).

The cause of action for unjust enrichment is dismissed because plaintiff has not demonstrated that equity and good conscience entitle plaintiff to the relief sought, or that defendants' conduct was tortious or fraudulent, as it relates to plaintiff. Plaintiff alleges that equity and good conscience require that defendants "be forced to pay Mandarin the difference in the value in what the Painting was worth at the time it was sold to Mandarin and Defendants' appraised value." *Complaint*, ¶ 68 (emphasis added). However, plaintiff's causes of action for fraudulent misrepresentation, negligent misrepresentation and fraud, all failed to state a claim because, under the facts alleged, plaintiff was not entitled to rely on the Appraisal. Even if defendants received a benefit from plaintiff, plaintiff has not shown that enrichment was unjust, especially because plaintiff could have, but did not, obtain its own appraisal from defendants. Plaintiff's unjust enrichment claim cannot be a back door to recovery based upon reliance on the Appraisal, when

plaintiff was not entitled to rely upon the Appraisal in the first place.

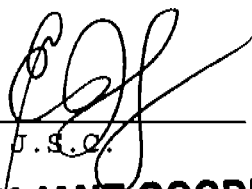
Accordingly, it is

ORDERED that defendants' motion to dismiss is granted, and the Clerk of the Court is directed to enter judgment in favor of defendants dismissing the complaint in its entirety.

This Constitutes the Decision and Order of the Court.

Dated: September 4, 2007

ENTER:



 J.S.C.
EMILY JANE GOODMAN

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