

Tony Shafrazi Gallery Inc. v Christie's Inc.

2008 NY Slip Op 33092(U)

November 7, 2008

Supreme Court, New York County

Docket Number: 112192/07

Judge: Herman Cahn

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

PRESENT: Cahn _____

PART 49

Justice

Index Number : 112192/2007

TONY SHAFRAZI GALLERY, INC.

vs

CHRISTIE'S INC.

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

Is 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

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCORDANCE MEMORANDUM
DECISION IN MOTION SEQUENCE.....**

FILED
NOV 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/7/08 _____

Alex Cahn _____
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 49

-----X
TONY SHAFRAZI GALLERY INC., and
GUIDO ORSI,

Plaintiffs,

-against-

Index No. 112192/07

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

Defendants.

-----X

FILED
NOV 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

HERMAN CAHN, J:

Defendant Christie's Inc., formerly known as Christie, Manson & Woods International, Inc., (Christie's) moves to dismiss the complaint, CPLR 3211 (a) (7), or, in the alternative, to strike plaintiffs' demand for consequential and punitive damages.

Plaintiffs allege that in 1990, plaintiff Tony Shafrazi Gallery, Inc. purchased a painting from Christie's, a well known auction house, which Christie's authenticated as an original Jean-Michel Basquiat painting (the Painting), but which Christie's knew was a counterfeit. The fraud was not discovered by the ultimate purchaser of the Painting until 2006. Plaintiffs allege that they have been damaged in the amount of \$2,000,000, which is the current value of an authentic Basquiat painting.

BACKGROUND

Plaintiffs allege that Tony Shafrazi purchased the Painting from Christie's, for \$242,000. Shafrazi displayed the painting at his art gallery (both the individual and the gallery are hereinafter referred to as "Shafrazi"), in an exhibition with other paintings by Basquiat. One year

later, in March 1991, plaintiff Guido Orsi purchased the Painting from Shafrazi for \$185,000.

In 2006, Orsi submitted the painting for display in an exhibition in Milan, Italy. The Painting was rejected, and as a consequence, Orsi brought the Painting to the attention of the Authentication Committee of the Estate of Jean-Michel Basquiat (the Basquiat Committee), which advised him that the Painting was a counterfeit.

Plaintiffs learned that two members of the Basquiat Committee had previously viewed the Painting, at Christie's request, several days prior to the 1990 auction. At that time, they had determined that the Painting was "not right" and requested that Christie's withdraw it from the auction. Christie's refused, and represented the Painting in its catalogue as an authentic Jean-Michel Basquiat.

Plaintiffs allege that Christie's auction catalogue, which is sold and distributed in conjunction with its auctions, warrants the provenance of the artworks it sells. Specifically, the catalogue states the following:

Limited Warranty

Christie's warrants the authenticity of authorship on the terms and conditions and to the extent set forth herein **any article described in headings printed in UPPER CASE TYPE in this catalogue (as such description may be amended by any saleroom notice or announcement) which is unqualifiedly stated to be the work of a named author or authorship is authentic and not counterfeit . . .**

(Hartley Aff., Ex. E) (emphasis added).

The catalogue printed in conjunction with the Christie's Contemporary Art Auction of February 23, 1990, contained a picture of the Painting and described it as follows:

176 JEAN MICHEL BASQUIAT

Untitled

signed and dated 1982 on the reverse-acrylic and colored
oilsticks on canvas-unframed
49¾ x 50½ in. (126.3 x 128.3 cm)

PROVENANCE

Acquired directly from the artist

\$150,000 - 200,000.

(Compl. ¶ 12). At the time of the auction, the auctioneer repeated the misrepresentations.

After having been advised that the Painting was a counterfeit, Orsi commenced an action against Shafrazi in Italy, captioned Guido Orzi v Galleria Tony Shafrazi, Milano Tribunal Index No. 3904/07. Orsi thereafter decided not to pursue his claims against Shafrazi because the two agreed to jointly sue Christie's and the consignor of the painting to Christie's, John Doe 1.

Plaintiffs plead causes of action for: fraud (first cause of action), fraudulent inducement (second cause of action), negligent misrepresentation (third cause of action), deceptive business practices under General Business Law (GBL) § 349 (fourth cause of action), breach of contract (fifth cause of action), and breach of express or implied warranty (sixth cause of action).

Christie's now moves to dismiss the complaint on the grounds that: (1) plaintiffs have failed to state a cause of action with respect to the claims for fraud and fraudulent inducement; and (2) the claims based upon GBL § 349, breach of contract and breach of warranty, are untimely. In the alternative, if any causes of action survive the motion, the demands for consequential and exemplary damages should be stricken.

DISCUSSION

The Fraud Claims:

As to plaintiffs' first and second causes of action for fraud and fraudulent inducement, respectively, Christie's contends that Shafrazi did not suffer damages as a result of Christie's alleged misrepresentation and has, therefore, failed to allege an essential element of a cause of action for fraud. Christie's reasons that, since Shafrazi was able to sell the Painting to Orsi as a genuine Basquait, he has no claim for damages against Christie's. As to Orsi's claim of fraud, Christie's alleges that no misrepresentation was made to him.

As a general rule, the measure of damages for fraud is limited to "indemnity for the actual pecuniary loss sustained as the direct result of the wrong' or what is known as the 'out-of-pocket' rule" (Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 421 [1996] quoting Reno v Bull, 226 NY 546, 553 [1919]). In addition, consequential damages are allowed. Those are losses proximately caused by reliance upon the misrepresentation (Hotaling v A.B. Leach & Co., 247 NY 842 [1928]).

However, with regard to a sale of goods transactions, the Uniform Commercial Code (UCC), § 2-721, provides as follows:

Remedies for material misrepresentation or fraud include all remedies available under this Article for non-fraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

The Official Comment to this section indicates that the section is intended to correct the situation by which remedies for fraud have been more circumscribed than the more

modern and mercantile remedies for breach of warranty. The remedies for fraud are extended by this section to coincide with those for non-fraudulent breach (Official Comment, McKinney's Cons Laws of NY, Book 38 UCC § 2-721).

A non-fraudulent breach includes breach of warranty. Under New York law, “[b]reach of warranty damages are usually measured by the ‘benefit of the bargain’ rule” (Clearview Concrete Prods. Corp. v S. Charles Gherardi, Inc., 88 AD2d 461, 469 [2d Dept 1982]; Bennett v U.S. Trust Co. of New York, 770 F2d 308, 316 [2d Cir 1985], cert denied 474 US 1059 [1986]). “Loss of the ‘bargain’ may include loss of profits that would have resulted from the transaction had there been no breach of warranty” (Clearview Concrete Prods. Corp., 88 AD2d at 469).

As to Orsi's claim for damages for fraud, plaintiffs allege that when Shafrazi sold the Painting, he described it as “Purchased from Christie's Contemporary Art, Friday February 23, 1990 Lot 176.” Plaintiffs have submitted affidavits to the effect that art purchasers rely on the expertise of a prestigious auction house such as Christie's, which they term a “market maker,” and that when Christie's provides a warranty concerning the authenticity, or provenance of a painting, the custom and practice of the art industry is that the provenance of the work of art has been firmly and permanently established. Plaintiffs allege that Orsi purchased the Painting, relying on Christie's representations (Compl, ¶ 20).

If, as plaintiffs allege, Christie's fraudulently misrepresented the Painting's provenance, and published that misrepresentation in its catalogue, which Christie's could reasonably anticipate would be relied upon by bidders at its auction, as well as subsequent

purchasers, it may be liable to those who relied upon its misrepresentation (see e.g., Hasbro Bradley, Inc. v Coopers & Lybrand, 121 AD2d 870 [1st Dept 1986]). At this stage of the proceedings, plaintiffs have sufficiently alleged fraud as to Orsi, inasmuch as Christie's is alleged to have published its catalogue containing a fraudulent misrepresentation as to the authenticity of the Painting, and that Orsi relied upon that misrepresentation.

Further, if plaintiffs prevail on their claim of fraud, they may be entitled to punitive damages. Whether Christie's conduct was so reprehensible as to warrant such damages is a question for the trier of fact, to be determined at trial (AT&T Info. Sys., v McLean Bus. Servs., 175 AD2d 652 [4th Dept 1991]).

The cause of action brought by Shafrazi is stricken. In view of the fact that Orsi is apparently not seeking rescission or other reliefs as to Shafrazi, it has indeed not sustained actionable damages. Therefore, the branch of the motion to dismiss these causes of action as to Shafrazi, is granted.

The Remaining Claims:

Plaintiffs' claim for negligent misrepresentation (the third cause of action) is barred by the six-year statute set forth in CPLR 213 (1) (Epsie v Murphy, 35 AD3d 346, 347-48 [2d Dept 2006]; Fandy Corp v Lung-Fong Chen, 262 AD2d 352, 352-53 [2d Dept 1999]). A claim for negligent misrepresentation accrues at the time of reliance on the alleged misrepresentation (Fandy, 262 AD2d at 353). Therefore, Shafrazi's claim accrued on February 23, 1990, when he acquired the Painting, and Orsi's claim accrued on March 13, 1991, when he acquired the Painting. More than six years have passed

since those claims accrued and they are, therefore, time barred.

Similarly, plaintiffs' claims for deceptive and misleading business practices under GBL § 349 (fourth cause of action), are governed by the three-year statute of limitations set forth in CPLR 214 (2) (Gaidon v Guardian Life Ins. Co. of Am., 96 NY2d 201 [2001]). A claim under GBL § 349 begins to run when the injury is suffered (id.). The limitations period for this claim accrued in 1990 and is, therefore, also time barred.

Plaintiffs' claims for breach of contract and breach of warranty (the fifth and sixth cause of action, respectively) are governed by UCC § 2-725 (1) which provides for a four year statute of limitations for contracts of sale. Pursuant to UCC § 2-725 (2), a breach of contract claim, and any warranty thereunder, occurs when tender of delivery is made, which in this case would be 1990. Plaintiffs claim for breach of warranty is, therefore, time-barred. Moreover, the First Department has held that a contract for the sale of a painting does not fall within the future performance exception of the limitations statute, absent any express warranty of future performance in the invoice of sale (Hanover Sq. Antiques, Ltd. v Insalaco, 16 AD3d 258 [1st Dept 2005]; see also Rosen v Spanierman, 894 F2d 28 [2d Cir 1990]).

Accordingly, it is

ORDERED that the motion by Christie's Inc. to dismiss, is granted to the extent that plaintiffs' third, fourth, fifth and sixth causes of action are severed and dismissed; and it is further

ORDERED that the motion is granted as to the first and second cases of action

[*9]
pleaded by Shafrazi, and said causes of action as pleaded by Shafrazi are severed and dismissed; and it is further

ORDERED that the remainder of the action shall continue.

Dated: November 7, 2008

ENTER:

James Cole

J.S.C.

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