

Katznelson v Rosenberg & Kaufman Fine Art

2009 NY Slip Op 30805(U)

April 7, 2009

Supreme Court, New York County

Docket Number: 114112/2007

Judge: Edward H. Lehner

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: EDWARD H. LEHNER
Index Number : 114112/2007

PART 19

KATZNELSON, VADIM
vs
ROSENBERG + KAUFMAN FINE ART

Sequence Number : 001
COMPEL DISCLOSURE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

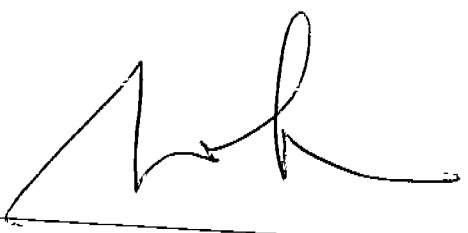
_____ motion is decided in accordance
with accompanying memorandum decision

FILED

APR 10 2009

CLERK'S OFFICE

Dated: APR 07 2009



J.S.C.

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

PLEASE TO RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

ANNEXED ON 4/10/2009

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

-----x
KATZNELSON, VADIM,

Plaintiff,

-against-

ROSENBERG + KAUFMAN FINE ART,

Defendant.
-----x

Index No.: 114112/2007

FILED
APR 10 2009
COUNTY CLERK'S OFFICE
NEW YORK

EDWARD H. LEHNER, J.:

Plaintiff Vadim Katznelson moves, pursuant to CPLR 3124 and 3126, for an order compelling defendant to comply with plaintiff's first document request and interrogatories dated February 6, 2008. Plaintiff also requests that the court preclude defendant from producing evidence at trial about matters which it has failed to provide discovery, unless defendant supplements its responses to the discovery requests within thirty days. Defendant maintains that it is in full compliance with plaintiff's document and interrogatory demands.

From 2001 until September of 2006, plaintiff and defendant entered into consignment agreements in which defendant was to market and sell plaintiff's original works of art. Plaintiff alleges that the terms for each of the consignment agreements were the same in that plaintiff would set the sale price for each painting, that defendant would have the right to discount the price of the paintings by a maximum of 15% in order to facilitate the sale, and that upon the sale of each painting, defendant was to provide to plaintiff 50% of the sale price.

On September 15, 2006, plaintiff visited defendant and terminated all of the consignment agreements with defendant and demanded that all of his works be returned. Plaintiff sent a first

[* 3]
letter to defendant on November 21, 2006 seeking information regarding the whereabouts of the works as well as information as to whom the pieces were sold.

Following almost a year of correspondence regarding the return of his paintings, plaintiff filed a complaint on October 19, 2007 demanding the return of four paintings, or demanding judgment for the costs of the paintings, as well as an accounting of the purchase price of all of the paintings sold by defendant. Defendant filed an answer with affirmative defenses and a counterclaim on December 17, 2007, seeking damages of no less than \$40,000.

Subsequently, plaintiff and defendant served discovery demands on each other. Plaintiff contends that defendant's responses to the discovery demands were incomplete with invalid objections, and that a motion to compel became necessary to obtain the requested discovery.

CPLR 3101 (a) provides for the full disclosure of all information that is material and necessary to the defense or prosecution of an action. "The words, 'material and necessary', are, in our view, to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 (1968).

Plaintiff contends that defendant did not comply with several of his document demands. Document demand no. 2 seeks all documents reflecting communications concerning himself and/or his artwork among the defendant, its agents, employees or others acting on defendant's behalf. Although defendant indicates that documents have been produced in response to this request, counsel for plaintiff affirms that no such documents were provided. Therefore, as such communications are relevant to the litigation, to the extent that any of the requested

communications have not been disclosed, defendant is ordered to supply same to plaintiff or provide an affidavit which explains why such documents cannot be produced.

Demand no. 3 requests all documents concerning communications among the defendant, and potential or actual purchasers of plaintiff's artwork. Plaintiff contends that a June 25, 2002 letter from Stephen Rosenberg, a principal of defendant, to a purchaser suggests that other communications with purchasers may exist beyond those which defendant provided (*LaRocco Affirm.*, ex.12). To the extent that any other such communications exist between defendant and purchasers regarding the sale of plaintiff's works which have not been produced, defendant must supply such documents. If no such documents exist, defendant must provide an affidavit to that effect.

Plaintiff also contends that defendant has not complied with demand no. 4 which seeks defendant's federal, state, and city tax filings for the years 2002 through 2006. In order for the disclosure of tax returns to take place, plaintiff must demonstrate "the 'strong showing of overriding necessity' to overcome the confidentiality of such information." *Editel, New York v Liberty Studios, Inc.*, 162 AD2d 345, 346 (1st Dept 1990), quoting *Matthews Indus. Piping Co. v Mobil Oil Corp.*, 114 AD2d 772 (1st Dept 1985); see also *A. Colish, Inc. v Abramson*, 150 AD2d 210, 211 (1st Dept 1989). While the disclosure of tax returns is disfavored due to their confidential and private nature, plaintiff maintains that he is seeking the tax returns because defendant has asserted a counterclaim of \$40,000, contending that plaintiff has breached the contract by failing to provide artwork to defendant for an art exhibition which took place in March and April of 2005.

Although plaintiff contends that he seeks the tax returns in order to determine if any

alleged damages were mitigated, such confidential information may not necessarily be helpful in specifically determining how many other paintings were sold or if the damages were in fact mitigated. Therefore, as plaintiff fails to meet his burden of demonstrating an overriding necessity for the tax returns, this request is denied.

Document demands no. 7 and 8 seek information concerning the delivery of artwork between plaintiff and defendant, while demand no. 12 seeks all documents concerning the sale of plaintiff's artwork. As such documents are relevant in determining the location of the artwork as well as any money defendant generated from any sales, such information must be produced. While defendant contends that it has responded to the requests, plaintiff maintains that such documents were not produced. To the extent that plaintiff has any such documents, plaintiff must produce same or provide an affidavit that it has no other documents in its possession.

Demand no. 13 seeks consignment agreements defendant entered into with artists other than plaintiff. Plaintiff contends that this request seeks information which will establish defendant's business practices with respect to the sale of an artists's work and may lead to further information. In plaintiff's response to defendant's first notice for discovery and inspection, plaintiff provided defendant with a document bearing the bates number VK 0148 which allegedly included the terms of the consignment agreement entered into between plaintiff and defendant. (LaRocco Affirm., ex. 6). Therefore, the need to see all other consignment agreements entered into by defendant appears to be unnecessary. Furthermore, plaintiff's assertion that request no. 13 will lead to further information is based upon speculation. Therefore, this request is denied.

Demand no. 26 seeks all documents concerning any art show and/or exhibitions organized by defendant, its agents, employees or others acting on defendant's behalf either at

* 6]
defendant's gallery or elsewhere during the years 2004 through 2007. Because the requested information is overbroad and is based upon speculation that the information will disclose how defendant mitigated its damages, such demand must be denied.

Plaintiff also maintains that there exists deficiencies in defendant's interrogatory responses. Plaintiff contends that although defendant responded to interrogatory 2 which requests the names and addresses of all individuals involved in the potential and/or actual sale of plaintiff's artwork, including third-party consultants, documents produced by defendant demonstrate that defendant has worked with other outside art consultants for the sale of plaintiff's artwork on at least two occasions. (*LaRocco Affirm.*, ex. 14). As such information is relevant, defendant must supply the plaintiff with the names and addresses of the third-party consultants which assisted in the sale of plaintiff's artwork.

Interrogatory 3 requests a complete list of plaintiff's artwork sold by defendant, its agents, employees, or others acting on its behalf, including the date of the sale, to whom it was sold, the listed price at the time of the sale, whether a discount was provided to the purchaser, the final sum received by defendant, the sum provided to plaintiff, and the date that payment to plaintiff was made. Although defendant objects to providing the names of some of the purchasers due to their unwillingness to be featured on plaintiff's website, plaintiff should be entitled to know who purchased his paintings and this information may assist in locating the whereabouts of the paintings. Therefore, defendants must provide complete responses to interrogatory 3.

Interrogatory 4 asks defendant to provide a list of every location in which defendant, its agents, employees or others acting on its behalf, keep and store artwork. Plaintiff's counsel affirms that plaintiff was told by one of the principals of defendant, Fran Kaufman, that some of

his work was being stored in an off-site storage facility. Plaintiff's counsel also affirms that defendant's other principal, Stephan Rosenberg, told plaintiff that his work was being kept at a storage facility separate from the gallery (LaRocco Affirm., ¶ 29). While defendant provided plaintiff with a location where it allegedly stored plaintiff's artwork, because the location of the paintings is important to this litigation, defendant must provide a list of all the locations where it stores artwork.

Finally, to the extent which defendant contends that this case should be removed to Civil Court pursuant to CPLR 325 (d) based upon the amount of plaintiff's damages being less than \$25,000, the Supreme Court generally cannot transfer a case which seeks equitable relief, such as an accounting. *See Bank of New York v Irwin Intl. Imports, Inc.*, 197 AD2d 462, 462 (1st Dept 1993) citing *Chung v Kim*, 170 AD2d 232 (1st Dept 1991). However, the First Department has held that in the absence of an existing partnership or other fiduciary relationship, a party is not entitled to an accounting. *See Simons v Ross*, 309 AD2d 667, 667 (1st Dept 2003). Here, as no confidential or fiduciary relationship has been proven to exist between the parties, and as the damages claimed are less than \$25,000, this case should be transferred to the Civil Court pursuant to CPLR 325 (d).

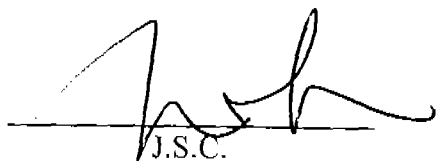
CONCLUSION and ORDER

Accordingly, it is ORDERED that the motion to compel is granted to the following extent; it is

ORDERED that defendant must respond to document demands no. 2, 3, 7, 8, and 12, or provide an affidavit if no such documents exist, within 30 days of service of a copy of this order; and it is further

ORDERED that document demands no. 4, 13 and 26 are denied; and it is further
ORDERED that defendant must respond to interrogatories 2, 3, and 4 within 30 days of
service of a copy of this order; and it is further
ORDERED, that this action is, pursuant to CPLR 325(d), removed from this court and
transferred to the Civil Court of the City of New York, County of New York.

Dated: April 7, 2009

ENTER: 
J.S.C.

FILED
APR 10 2009
CLERK'S OFFICE
COURT OF CLERKS OF THE SUPREME COURT
COUNTY OF NEW YORK

At an Individual Assignment Part 19 of the Supreme Court of the State of New York, held in and for the County of New York, at the courthouse thereof in the County of New York, City, and State of New York, on the APR 07 2009 of 20

PRESENT:

HON: EDWARD H. LEHNER
JUSTICE.

PRE-NOTE OF ISSUE

ORDER OF TRANSFER-325(d)

KATZ NELSON

vs.

County Clerk's

ROSENBERG + KAUFMAN FINE ART

Index No. 114112 19/20 07

It appearing that the Civil Court of the City of New York has jurisdiction of the parties to this action and pursuant to Rule 202.13(a) of the Uniform Civil Rules for the Supreme Court and the County Court, it is

ORDERED, that this cause bearing Index Number 114112/07 be, and it hereby is, removed from this court and transferred to the Civil Court of the City of New York, County of New York, and it is further

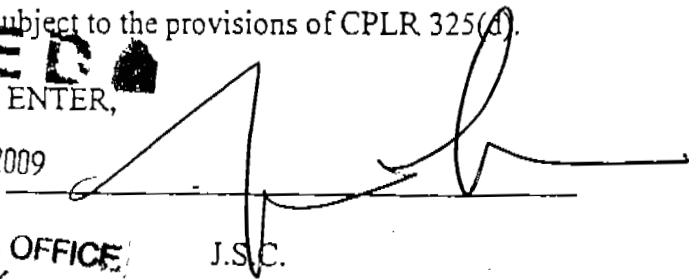
ORDERED, that the clerk of New York County shall transfer to the clerk of the Civil Court of the City of New York, County of New York, all papers in this action now in his possession, upon payment of his proper fees, if any, and the clerk of the Civil Court of the City of New York, County of New York, upon service of a certified copy of this order upon him and upon delivery of the papers of this action to him by the clerk of the County of New York, shall issue to this action a Civil Court Index Number without the payment of any additional fees, and it is further

ORDERED, that the above-entitled cause be, and it is hereby, transferred to said Court, to be heard, tried and determined as if originally brought therein but subject to the provisions of CPLR 325(d).

FILED
ENTER,

APR 10 2009

COUNTY CLERK'S OFFICE
NEW YORK


J.S.C.