

Tony Shafrazi Gallery, Inc. v Christie's Inc.

2009 NY Slip Op 31088(U)

April 14, 2009

Supreme Court, New York County

Docket Number: 112192/07

Judge: Shirley Werner Kornreich

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.

4mc

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH
Justice

PART 54m

Tony Shafrazi Gallery

INDEX NO. 112192107

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

- v -

Christie's Inc et al

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 in accordance with the annexed decision.

NYS SUPREME COURT
RECEIVED
APR 20 2009
MOTION SUPPORT OFFICE

FILED
APR 21 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 4/17/09

[Signature]
JUSTICE SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

M DAI

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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

Plaintiffs,

-against-

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

Defendants.
-----X

Index No. 112192/07

FILED
APR 21 2009
COUNTY CLERK'S OFFICE
NEW YORK

KORNREICH, SHIRLEY WERNER, J.:

Defendant Christie's Inc. (Christie's) moves to reargue its motion to dismiss the first amended complaint or, in the alternative strike the demand for consequential damages.

Background:

Christie's seeks reargument of the Court's November 7, 2008 decision and order. Familiarity with that decision is presumed.

Briefly, this case stems from the sale of a painting, authenticated as an original Jean-Michel Basquiat painting (the Painting), by Christie's to plaintiff Tony Shafrazi Gallery, Inc. (Shafrazi) in 1990 for \$242,000. Shafrazi sold the Painting to plaintiff Guido Orsi in 1991 for \$185,000. In 2006, Orsi submitted the Painting for display in an exhibition, and the Painting was rejected. 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. Thereafter, 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, had

determined that the Painting was “not right” and had requested that Christie’s withdraw it from the auction. Christie’s refused and represented the Painting in its catalogue for the auction as an authentic Jean-Michel Basquiat. Orsi originally commenced an action against Shafrazi in Italy,¹ but thereafter decided to jointly pursue claims with Shafrazi, against Christie’s. In the complaint, plaintiffs allege \$2,000,000 in damages, the current value of an authentic Basquiat painting.

Christie’s moved to dismiss the complaint or, in the alternative, to strike plaintiffs’ demand for consequential and punitive damages. The court granted the motion in part, dismissing plaintiffs’ claims for negligent misrepresentation, deceptive business practices, breach of contract and breach of express or implied warranty. 11/7/08 Decision at 7. The court also dismissed Shafrazi’s claims for fraud and fraudulent inducement, but sustained those claims as pleaded by Orsi. *Id.* at 7-8.

Reargument

Christie’s now moves to reargue its motion, seeking to have Orsi’s claims sounding in fraud dismissed. In the alternative, it seeks to strike the demand for consequential damages. Plaintiffs oppose Christie’s’ motion for reargument, contending that it is defective. They claim that Christie’s’ arguments “are basically a rehash of its arguments previously submitted,” except where a new argument is impermissibly raised regarding the timeliness of Orsi’s fraud claims. Opp Br at 1. Inasmuch as Christie’s argues that the court misapplied controlling law, the surviving claims will be addressed afresh. *Foley v Roche*, 68 AD2d 558, 567-68 (1st Dep’t 1979)(“motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts,

¹ *Guido Orzi v Galleria Tony Shafrazi*, Milano Tribunal Index No. 3904/07

or misapplied any controlling principle of law.”).

Fraud Claims

In the November 7, 2008 decision, the Court dismissed Shafrazi’s fraud and fraudulent inducement claims because Shafrazi, which was able to sell the painting to Orsi, was not damaged. As to Orsi, however, the Court found that he may ultimately be able to prove that he reasonably relied on Christie’s authentication, even though it was not made directly to him. As such, his fraud claims survived. Dismissal of these claims are now sought again in Christie’s motion for reargument.

Christie’s argues that it contracted with Shafrazi regarding the preclusion of liability. It notes that there was an express disclaimer in Christie’s catalogue that its warranty of authenticity did not extend to subsequent purchasers.² It contends that to permit Orsi’s fraud claims to proceed would be giving a third party more rights than those provided by the contract. This, however, is unavailing. The surviving fraud claims are distinct from the, now dismissed, breach of contract and warranty claims. Moreover, the survival of Orsi’s fraud claims does not give him more rights than Shafrazi. Shafrazi was merely unable to adequately plead damages, while Orsi successfully pleaded that essential element.

Christie’s further argues that it had never dealt with Orsi, it was unaware of Orsi’s purchase and there is no allegation that Orsi ever saw the Christie’s catalogue. However, “[l]ack of privity is not a viable defense to a fraud claim.” *Shafran, et al. v Kule*, 159 AD2d 263, 264

² The warranty in the auction catalogue provides that:

The benefits of this warranty are not assignable and shall be applicable only to the original buyer of the lot and not subsequent assigns, purchasers, heirs, owners or others who have or may acquire an interest therein.

Waltman Aff, Exh E.

[* 5]

(1st Dep't 1990). Moreover, it is alleged that the provenance of the Painting listed its sale to Shafrazi by Christie's.

The great jurist Cardozo noted that the "assault upon the citadel of privity is proceeding," in a case where the Court of Appeals held that liability for fraud could ensue where plaintiff had made several loans in reliance on the misrepresentations of accountant defendants. *Ultramares Corp. v Touche, et al.*, 255 NY 170, 180 (1931). As the Court of Appeals later held:

The world of merchandising is, in brief, no longer a world of direct contract; it is, rather, a world of advertising and, when representations expressed and disseminated . . . prove false, and the user or consumer is damaged by reason of his reliance on those representations, it is difficult to justify the [original seller's] denial of liability on the sole ground of technical privity. . . . Under these circumstances, it is highly unrealistic to limit a purchaser's protection to warranties made directly to him by his immediate seller. The protection he really needs is against the [one] whose published representations caused him to make the purchase. The policy of protecting the public from injury, physical or pecuniary, resulting from misrepresentations outweighs allegiance to an old and out-moded technical rule of law which, if observed, might be productive of great injustice. The [defendant] places his product upon the open market and, by advertising and labeling it, represents its quality to the public in such a way as to induce reliance upon his representations. He unquestionably intends and expects that the product will be purchased and used in reliance upon his express assurances of its quality and, in fact, it is so purchased and used. . . . [He] should not be permitted to avoid responsibility, when the expected use leads to injury and loss, by claiming that he made no contact directly with the user.

Randy Knightwear, Inc. v American Cyanamid Co., et al., 11 NY2d 5, 12-13 (1962) (where the original seller was a manufacturer). Indeed, almost fifty years ago, in a case brought for breach of express warranty, New York's highest court held that in dispensing "with the requirement of privity, we are doing nothing more or less than carrying out an historic and necessary function of the court to bring the law into harmony 'with modern-day needs and with concepts of justice and

6]

fair dealing.” *Id.* at 16 (internal citations omitted).

Christie’s argues that if the fraud claims against it from a third party are sustainable, such liability could stretch out in perpetuity. It asks where or, more precisely, *when* that would end. Could it be liable under a theory of fraud not only for decades but for hundreds of years? While not unmindful of the validity of this line of inquiry, that question is not currently before the Court. The nexus between Christie’s and Orsi is not only close, but also limited and finite. Christie’s may not have known of Orsi specifically, but he may be able to establish that it would or should have known that Shafrazi - - particularly as a gallery - - would resell the Painting to someone. “The element of fraudulent intent is satisfied if there is proof that the defendant intended or had reason to expect that the substance of the false statement would be communicated to the plaintiff. . . . This nexus is sufficiently close for purposes of establishing intent to deceive.” *Silivanch v Celebrity Cruises, Inc., et al.*, 171 F Supp 2d 241, 273 (SDNY 2001). That portion of the reargument motion seeking dismissal of Orsi’s fraud claims, thus, is denied.

Damages

The Court had found that Orsi may seek to recover consequential damages and, indeed, all remedies available for non-fraudulent breach, including damages seeking the benefit of the bargain and even punitive damages. 11/7/08 Decision at 4-6. Christie’s argues that Orsi’s claim for consequential and punitive damages should be stricken. Specifically, Christie’s contends that the conditions of the sale of the Painting to Shafrazi limited any recovery to rescission. The auction catalogue provided that:

[* 7]

The buyer's sole remedy under this warranty shall be the rescission of the sale and refund of the original purchase price paid for the article. This remedy shall be exclusive and is in lieu of any other remedy which might otherwise be available as a matter of law, and the seller and Christie's shall not be liable for any incidental or consequential damages.

Waltman Aff, Exh E. Christie's argues that, even if Orsi receives the benefit of its warranty to Shafrazi, he should not be exempt from the exclusion of consequential damages in that warranty. However, Orsi is not asserting the warranty rights given Shafrazi. The breach of warranty claims have been dismissed. Since this sales limitation was explicitly for remedies under the warranty, the limit is inapplicable.

Christie's also argues that fraud claims are inherently limited to out of pocket damages and cannot provide recovery for benefit of the bargain sums. It points to the common law and cites that damages "are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained . . . Under the out-of-pocket rule, there can be no recovery of profits which would have been realized in the absence of fraud." Mot Br at 15, *Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413, 421 (1996). Indeed, "[a]s for damages, the rule in this State is that all elements of profit are excluded from a computation of damages in an action grounded in fraud." *AFA Protective Sys., Inc. v American Tel. & Tel. Co.*, 57 NY2d 912, 914 (1982). Christie's argues that, as such, Orsi is limited to recover, if at all, only the price he paid for the Painting.

It further argues that the Court's reliance on UCC Section 2-721 was mistaken. It contends that this section is wholly inapplicable because Orsi had no contract with Christie's and, therefore, was not a party to whom the UCC remedies are available. Mot Br at 17-18. Section 2-721 provides that the

[* 8]

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.

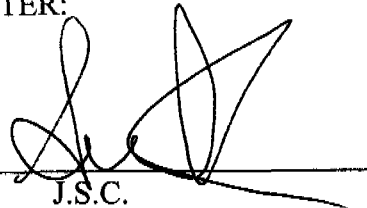
Plaintiffs responds that, not only is this a “hyper-technical” reading and that Christie’s cites no cases in support of this argument, but that a plain reading indicates that being a “party” (UCC 1-201(29), although required under other sections of the UCC, is not required under this section. Moreover, they argue that UCC Section 2-721, which became effective in 1964, supercedes case law limiting recovery to out of pocket losses. Opp Br at 18.

In this, plaintiffs are correct. As noted in the Court’s earlier decision, the Official Comment to the section indicates that it was intended to correct the traditional remedies available for fraud, and those remedies were therefore extended to coincide with those available for non-fraudulent breach. McKinney’s Con Laws of NY, UCC §2-721, Official Comment; 11/7/08 Decision at 4-5. Accordingly, it is

ORDERED that the portion of the motion seeking reargument is granted, and the motion seeking dismissal of the remaining fraud claims and limiting damages is denied.

Dated: April 14, 2009

ENTER:


J.S.C.

FILED
APR 21 2009
COUNTY CLERK'S OFFICE
NEW YORK