

**Christie's Inc. v Sherlock**

2009 NY Slip Op 32220(U)

July 14, 2009

Supreme Court, New York County

Docket Number: 602515/06

Judge: Eileen Bransten

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

-----X  
CHRISTIE'S INC.

Plaintiff,

-against-

JERRY SHERLOCK, NEW YORK FILM  
ACADEMY LTD. and GALLERY BEAUX  
ARTS, LLC

Defendant.  
-----X

Index No.602515/06

**NOTICE OF ENTRY  
OF ORDER**

**FILED**

SEP. 16 2009

NEW YORK  
COUNTY CLERK'S OFFICE

To: SEE ANNEXED SERVICE LIST

PLEASE TAKE NOTICE, that the annexed Decision and Order is a copy of a Decision and Order duly entered in the above-captioned action and filed in the office of the Clerk of the County of New York on the 17<sup>th</sup> day of July, 2009.

Dated: New York, New York  
July 21, 2009

Yours, etc.  
WASSER & RUSS, LLP

By:  \_\_\_\_\_

Adam H. Russ, Esq.  
Isaac Alony  
Attorneys for Plaintiff Christie's  
80 Maiden Lane, Suite 1502  
New York, NY 10038  
Tel: (212) 430-6040  
Fax: (212) 430-6041

SERVICE LIST

To: Joseph L. Clasen, Esq.  
Melissa Sullivan, Esq.  
ROBINSON & COLE, LLP  
Attorneys for Defendant Jerry Sherlock  
885 Third Avenue, Suite 2800  
New York, New York 10022  
(212) 451-2900

New York Film Academy Ltd.  
c/o Jerry Sherlock  
100 East 17<sup>th</sup> Street  
New York, New York 10003

Gallery Beaux Arts, LLC  
100 East 17<sup>th</sup> Street  
New York, New York 10003

New York Supreme Court  
60 Centre Street  
New York, NY 10007  
Attn: Clerk of the Court

New York Supreme Court  
60 Centre Street, Room 158  
New York, NY 10007  
Attn: Trial Support Office

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

EILEEN BRANSTEN

Index Number : 602515/2006

CHRISTIE'S INC.

VS.

SHERLOCK, JERRY

SEQUENCE NUMBER : 001

AMEND SUPPLEMENT PLEADINGS

J.S.C.

PART 3

INDEX NO. \_\_\_\_\_

MOTION DATE 1/8/09

MOTION SEQ. NO. 001

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 \_\_\_\_\_

Cross-Motion:  Yes  No

**FILED**

**Jul 17 2009**

NEW YORK  
COUNTY CLERK'S OFFICE

PAPERS NUMBERED \_\_\_\_\_

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

Upon the foregoing papers, it is ordered that this motion *is denied*

*in accordance with the attached*

*decision order.*

NYS SUPREME COURT  
RECEIVED

JUL 16 2009

IAS MOTION  
SUPPORT OFFICE

Dated: 7-14-09

*Eileen Bransten*

**EILEEN BRANSTEN** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

*MOAT*

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART THREE

-----X

CHRISTIE'S INC.,

Plaintiff,

-against-

JERRY SHERLOCK,

Defendant.

-----X

Bransten, J:

Index No. 602515/06  
Motion Date: 1/8/09  
Motion Seq. Nos.: 001 and 002

Motion sequence numbers 001 and 002 are consolidated for disposition.

In this breach of contract action, plaintiff Christie's Inc. ("Christie's") seeks to recover money damages resulting from the alleged failure of defendant Jerry Sherlock ("Sherlock") to pay for an Aristide Maillol sculpture, entitled *L'Action enchainée* ("Sculpture"). The complaint asserts one cause of action for breach of contract.

In motion sequence number 001, Christie's moves for leave to amend the complaint to add breach of contract causes of action against New York Film Academy Ltd. ("NY Film Academy") and Gallery Beaux Arts, LLC ("Gallery Beaux Arts").

In motion sequence number 002, Sherlock moves to compel the deposition of non-party Edward Dolman ("Dolman"), Christie's chief executive officer. Christie's cross-moves for a protective order denying the deposition.

### Background

#### The Complaint

The complaint alleges that Christie's held an auction on May 4, 2005 ("Auction"). According to Christie's, the Auction was governed by "Conditions of Sale" set forth in an auction catalogue, a copy of which is attached to Christie's complaint as Exhibit A. The first paragraph of the Conditions of Sale states that, "[b]y bidding at auction you agree to be bound by these terms."

Christie's Consignment Agreement states that "Christie's shall have no obligation to enforce payment by the buyer" (Sullivan Aff., Ex. 11). However, under paragraph 4 (f) of the Conditions of Sale, the buyer's failure to make payment in full entitled Christie's, in its "absolute discretion," to, among other things,

"exercise one or more of the following rights or remedies (in addition to asserting any other rights or remedies available ... at law):

...

"(ii) to hold the defaulting buyer liable for the total amount due and to commence legal proceedings for its recovery ... ;

"(iii) to cancel the sale;

"(iv) to resell the property publicly or privately on such terms as [Christie's] think[s] fit;

“(v) to pay the seller an amount up to the net proceeds payable in respect of the amount bid by the defaulting buyer ... .”

Paragraph 4 (i) also states that, “[i]f we resell the property under paragraph (iv) above, the defaulting buyer shall be liable for payment of any deficiency between the total amount originally due to us and the price obtained upon resale,” and that “[i]f we pay any amount to the seller under paragraph (v) above, the buyer acknowledges that Christie’s shall have all of the rights of the seller, however arising, to pursue the buyer for such amount.”

Sherlock was allegedly an existing client of Christie’s at the time of the Auction. He allegedly called Christie’s prior to the Auction and placed an absentee bid of up to \$1.5 million on the Sculpture. At the Auction, Sherlock’s absentee bid was recognized, with a “hammer price” of \$1.1 million (Complaint, ¶ 12).

Christie’s claims that, with the auctioneer’s acceptance of Sherlock’s absentee bid, the Conditions of Sale became binding upon Sherlock. Under the Conditions of Sale, in addition to the \$1.1 million hammer price, Sherlock was required to pay Christie’s a buyer’s premium of 20% of the hammer price up to \$200,000, plus 12% of any amount in excess of \$200,000, bringing the total amount of Sherlock’s purchase price for the Sculpture to \$1,248,000. The Conditions of Sale also required Sherlock to pay Christie’s within 7 days after the Auction.

Christie's claims that it invoiced Sherlock for the Sculpture, but that Sherlock failed to make payment. Christie's allegedly paid the consignor of the Sculpture the \$1.1 million hammer price, and thereafter notified Sherlock of its intention to reoffer the Sculpture at a May 2006 auction. When Sherlock failed to pay, the Sculpture was allegedly resold at the May 2006 auction for \$800,000 (consisting of a \$700,000 hammer price and a buyer's premium of \$100,000). In the complaint, Christie's seeks \$448,000 (the difference between Sherlock's contract price and the resale price), plus interest.

#### The Proposed Amended Complaint

Sherlock answered the complaint in September 2006, and the parties engaged in discovery. The proposed amended complaint ("Amended Complaint") seeks to add NY Film Academy and Gallery Beaux Arts based upon information obtained in discovery, primarily from Sherlock's deposition testimony. The Amended Complaint alleges that, when Sherlock placed his bid, he identified himself as being affiliated with NY Film Academy, of which Sherlock is the founder, president and director. Sherlock allegedly purchased art on behalf of NY Film Academy previously, and intended to display the Sculpture on the premises of the NY Film Academy.

Christie's alleges that, when Sherlock sought to place his absentee bid prior to the Auction, Christie's requested that he provide a bank account reference to demonstrate that

he had sufficient funds to cover his bid and serve as a source of payment. Sherlock provided a bank account number at J.P. Morgan Chase Bank, N.A., which belonged to the NY Film Academy. According to Christie's, Sherlock was an authorized signatory on this account at the time of his bid.

Christie's claims that, after receiving its invoice, Sherlock took the position that he placed the winning bid on behalf of Gallery Beaux Arts, a company allegedly formed in March 2005 and doing business as an art gallery on the premises of the NY Film Academy. Christie's avers that Sherlock never mentioned Gallery Beaux Arts when he placed the bid, and that Christie's had no knowledge of Gallery Beaux Arts at the time of Sherlock's bid.

According to Christie's, Gallery Beaux Arts is an undercapitalized corporate shell that is owned, controlled and dominated by Sherlock for personal use. Sherlock is allegedly the sole member, president, vice president, treasurer and secretary of Gallery Beaux Arts, which has minimal, if any, assets. Christie's claims that Gallery Beaux Arts has no headquarters, employees, offices, telephones or gallery space, and that Gallery Beaux Arts uses the facilities of the NY Film Academy and displays sculptures at this location. Christie's avers that Sherlock owns the sculptures that are displayed by Gallery Beaux Arts at the NY Film Academy.

Christie's maintains that Sherlock directed an employee of the NY Film Academy to perform work for Gallery Beaux Arts, and that this employee was compensated by the NY

Film Academy and by Sherlock personally. Christie's claims that Gallery Beaux Arts had not conducted business as an art gallery prior to the Auction, and that, at the time of Sherlock's bid, Gallery Beaux Arts did not maintain separate company books and records, did not have a New York State Certificate of Authority authorizing it to collect sales tax on items sold, and did not have a New York State Resale Certificate permitting it to claim tax exempt status for items purchased for resale.

The Amended Complaint states that, under paragraph 3 (c) of the Conditions of Sale, bidders accepted personal liability to pay the purchase price, including the buyer's premium, taxes and charges, "unless it has been explicitly agreed in writing with Christie's before the commencement of the sale that the bidder is acting as agent on behalf of an identified third party acceptable to Christie's, and that Christie's will only look to the principal for payment." According to Christie's, there was no written agreement between Christie's and Sherlock that Christie's would look only to a third party principal for payment.

The Amended Complaint asserts causes of action for breach of contract, pleaded in the alternative against Sherlock, against NY Film Academy as a disclosed principal, and against Gallery Beaux Arts as an undisclosed principal.

AnalysisLeave to Amend

Christie's seeks leave to amend the complaint. Sherlock argues that Christie's motion is unduly delayed and inexcusably untimely, and that granting leave to amend would cause undue prejudice to Sherlock, NY Film Academy and Gallery Beaux Arts. Sherlock also argues that the proposed amendments lack merit.

Under CPLR 3025 (b), leave to amend a pleading shall be freely granted "in the absence of prejudice or unfair surprise" (*Aetna Cas. and Sur. Co. v LFO Constr. Corp.*, 207 AD2d 274, 277 [1st Dept 1994]). "[L]eave to amend a complaint is not granted upon mere request without a proper showing. Rather, in determining whether to grant leave to amend, a court must examine the underlying merit of the causes of action asserted therein, since, to do otherwise would be wasteful of judiciary resources" (*Wieder v Skala*, 168 AD2d 355, 355 [1st Dept 1990]). However, "[o]nce a prima facie basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide the ground for a subsequent motion for summary judgment" (*Hospital for Joint Diseases Orthopaedic Inst. v James Katsikis Envtl. Contr., Inc.*, 173 AD2d 210, 210 [1st Dept 1991]). "In exercising its discretion, the court should consider how long the amending party was aware of the facts upon which the motion was predicated, whether a reasonable excuse for

the delay was offered, and whether prejudice resulted therefrom" (*Mohammed by Ahmad v City of New York*, 242 AD2d 321, 321 [2d Dept 1997]).

In addition to the proposed amended pleading, Christie's submits Sherlock's deposition testimony in support of its motion. Sherlock testified that he has been a director of the NY Film Academy for the last 15 years (Sherlock Dep., at 7-8). In connection with his bid on the Sculpture, Sherlock stated that he provided Christie's with NY Film Academy's bank account information (*id.* at 39-41; Amended Complaint, ¶¶ 17-19), and that he was authorized to write checks on this account (Sherlock Dep., at 103; Amended Complaint, ¶ 19). Sherlock stated that he had purchased art on behalf of the NY Film Academy prior to the Auction (Sherlock Dep., at 66, 97; Amended Complaint, ¶ 15), and Christie's alleges that, "[w]hen placing the bid, Sherlock identified himself as being affiliated with New York Film Academy" (Amended Complaint, ¶ 13). Christie's claims that, at the time of the bid, Sherlock was the founder, president and director of NY Film Academy (*id.*, ¶ 14), and that he intended to display the Sculpture on the premises of NY Film Academy (*id.*, ¶ 16).

Christie's new allegations, if proved, could show that Sherlock was acting as an agent of NY Film Academy when he placed the winning bid for the Sculpture (*see Indosuez Intl. Fin. B.V. v National Reserve Bank*, 98 NY2d 238, 245-46 [2002] [principal is liable for contracts entered into by agent acting with actual or apparent authority]; *Odell v 704*

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*Broadway Condominium*, 284 AD2d 52, 57 [1<sup>st</sup> Dept 2001] [“it will ordinarily be presumed that a president of a corporation has the power to make contracts pertaining to the business of the corporation and coming within the apparent scope of his authority”]). If Sherlock placed the bid on the Sculpture on behalf of NY Film Academy, NY Film Academy could be held liable under the Conditions of Sale (*Hessel v Christie's Inc.*, 399 F Supp 2d 506, 517 [SD NY 2005] [court was “likely to find that (Christie’s) Conditions of Sale appl(ied),” where “Conditions of Sale state that by bidding at auction the buyer agrees to be bound by its terms”]; *see also* UCC § 2-328 [2] [“sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner”]; *Matter of Premier Container Corp.*, 95 Misc 2d 859, 866 [Sup Ct, Queens County 1978] [“conditions of a public sale, announced by the auctioneer at the time and place of the sale, are binding on the purchaser, whether or not he knew or heard them”]). In addition, Christie’s new allegations could establish Sherlock’s liability under the Conditions of Sale, which provide that, in the absence of a written agreement to the contrary, “a bidder is accepting personal liability to pay the purchase price” (Conditions of Sale, ¶ 3 [c]).

With respect to Gallery Beaux Arts, Sherlock testified that this entity was incorporated in March 2005 (Sherlock Dep., at 68), that he personally funded Gallery Beaux Arts upon its formation (*id.* at 93), and that he is the only person who does work for Gallery Beaux Arts (*id.* at 66). Sherlock testified that he owns the artwork displayed at Gallery Beaux Arts’

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exhibition space (*id.* at 72), and that he informed Christie's that he was bidding on the Sculpture on behalf of Gallery Beaux Arts (*id.* at 22, 26, 33, 132). According to Sherlock, Gallery Beaux Arts shares exhibition space with NY Film Academy (*id.* at 69). The Amended Complaint alleges that, after the Auction, Christie's sent an invoice to Sherlock, but that Sherlock took the position that he had placed the winning bid on behalf of Gallery Beaux Arts, an entity that had insufficient funds to pay for the Sculpture. Thus, Sherlock's testimony and the allegations of the Amended Complaint also implicate Gallery Beaux Arts under the Conditions of Sale (UCC § 2-238 [2]; *Hessel*, 399 F Supp 2d at 517).

It is also possible that Christie's new allegations, if proved, could show that Gallery Beaux Arts is a shell company dominated by Sherlock, rendering Sherlock liable for Gallery Beaux Arts' failure to pay under principles of piercing the corporate veil (*Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135 [1993]; *see also Simplicity Pattern Co. v Miami Tru-Color Off-Set Serv.*, 210 AD2d 24 [1<sup>st</sup> Dept 1994] [applying piercing corporate veil to breach of contract]), as an agent for an undisclosed principal (*Nico Constr. Co. v Dorn*, 214 AD2d 355 [1<sup>st</sup> Dept 1995]), or under paragraph 3 (c) of the Conditions of Sale.

Moreover, Sherlock will not be prejudiced by the proposed amendment. "Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position, and these

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problems might have been avoided had the original pleading contained the proposed amendment" (*Valdes v Marbrose Realty, Inc.*, 289 AD2d 28, 29 [1<sup>st</sup> Dept 2001]).

Here, the fundamental nature of the allegations against Sherlock are consistent with the original complaint (*Pepe v Tannenbaum*, 262 AD2d 381, 382 [2d Dept 1999] [leave to amend should have been granted for lack of prejudice, where "the amendment [did] not change the fundamental nature of the allegations in the complaint"]). Sherlock was always in possession of the information that forms the basis of the proposed amendment, as it was his own deposition testimony that forms the primary basis for Christie's new allegations (*see Fonda v 157 East 74th Co.*, 158 AD2d 297, 298 [1<sup>st</sup> Dept 1990] [leave to amend granted based upon information obtained during discovery]). Moreover, the passage of time, without more, is insufficient to establish prejudice (*Edenwald Contr. Co. v City of N.Y.*, 60 NY2d 957, 959 [1983] ["(m)ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side"]).

Sherlock argues that Christie's should be estopped from asserting a claim against Gallery Beaux Arts. However, Sherlock fails to provide any legal support to substantiate this argument. For the foregoing reasons, the proposed amendment is not "palpably insufficient as a matter of law" (*Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475 [1<sup>st</sup> Dept 2003]). Accordingly, Christie's request for leave to amend is granted.

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Motion to Compel

Sherlock seeks an order compelling the deposition of Dolman, Christie's chief executive officer, arguing that Sherlock is entitled to know why Christie's chose not to exercise its right to cancel the sale, and why Dolman made the ultimate decision to pay the consignor, even though Christie's had no obligation to do so. Christie's opposes the motion to compel, and also cross-moves for a protective order against the deposition, arguing that Dolman need not be deposed because the decision to pay the consignor did not cause Christie's injury, but rather, that Christie's injury was caused by Sherlock's failure to complete the purchase of the Sculpture. According to Christie's, the conduct of Dolman is legally irrelevant.

CPLR 3101 (a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by: (1) a party, or the officer, director, member, agent or employee of a party ... ." Under CPLR 3103 (a), the court may "make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

"It is well established that a corporation has the right in the first instance to determine which of its representatives will appear for an examination before trial" (*Barone v Great Atl.*

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& *Pac. Tea Co.*, 260 AD2d 417, 417-18 [2d Dept 1999]). In *Barone*, the Court affirmed the denial of a motion to compel depositions, based upon the defendant's production of "two knowledgeable witnesses who testified with respect to the underlying incident," and the plaintiff's failure "to show that those witnesses had insufficient knowledge or were otherwise inadequate, and that the proposed witnesses possessed information which was material and necessary to the prosecution of the case" (*id.* at 418; *see also Defina v Brooklyn Union Gas Co.*, 217 AD2d 681, 682 [2d Dept 1995] ["party seeking to depose additional witnesses must make a detailed showing of the necessity for taking further depositions"]).

In support of his motion to compel, Sherlock submits an e-mail thread, dated June 24, 2005. The e-mail thread was initiated by non-party Dave Goodman, a Christie's employee, reporting on the status of the payment to the consignor of the Sculpture and recommending that Christie's pay the consignor the sale proceeds while pursuing another sale or payment from Sherlock (Sullivan Aff., Ex. 6). Marc Porter, allegedly president of Christie's Americas, responded to Goodman's e-mail, stating that he agreed with Goodman's recommendation. The e-mail was also sent to, among others, Dolman, who responded to Marc Porter's e-mail as follows: "[w]e should make the payment of proceeds to [the consignor]" (*id.*). Jennifer Zatorski, allegedly Christie's credit manager and/or a vice president, testified that Dolman made the business decision to pay the consignor (Zatorski Dep., Sullivan Aff., Ex. 7, at 45).

The e-mail thread was also sent to Guy Bennett, who claims that he was head of sales for Christie's at the time. Guy Bennett testified that "every senior member of [Christie's was] included on this e-mail" thread, including, among others, Dolman (Bennett Dep., Sullivan Aff., Ex. 8, at 80). Bennett responded to Dolman's e-mail by informing another Christie's employee to "notify the [consignor] client that the payment will be made shortly" (Sullivan Aff., Ex. 6). Bennett testified that, by the time he sent this e-mail message, it appeared that the decision had been made to make payment.

Sherlock claims that, on May 30, 2008, he sent a notice of deposition to Christie's counsel, seeking to take Dolman's deposition. By letter dated July 16, 2008, Christie's counsel objected to the notice of deposition, claiming that "Dolman has no knowledge of, and was not involved in, any matters which are relevant to this litigation," and that Sherlock's attempt to take Dolman's deposition "is a clear effort at harassment" (Sullivan Aff., Ex. 9). In lieu of Dolman, Christie's offered to produce, and ultimately did produce, Zatorski, who Christie's identified as its "Senior Vice-President, International Business Director for Impressionist, Modern and American Art & Deputy International Commercial Director" (*id.*). According to Sherlock, Zatorski was the individual who refused to re-invoice the Sculpture to Gallery Beaux Arts. Christie's also produced Arda Berberian, purportedly a junior business manager for business development, who Sherlock concedes spoke to him when he placed his absentee bid; and, as discussed above, Guy Bennett, who Sherlock

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concedes is the individual who oversaw the Impressionist and Modern Art Evening Sale at issue in this lawsuit.

Sherlock argues that Dolman's decision to pay the consignor goes to the heart of this lawsuit, because Christie's seeks recovery of the difference between the amount paid to the consignor and the resale price of the Sculpture. Specifically, Sherlock claims that the decision to pay the consignor forms the basis of Sherlock's fourth affirmative defense, which asserts that Christie's "claim is barred by its own culpable conduct, including its own breach of contract" (Sherlock's Answer, ¶ 34). It also purportedly relates to Sherlock's fifth affirmative defense, which maintains that Christie's "claim is barred by its inequitable conduct" (*id.*, ¶ 35). Citing *Dillon v U-A Columbia Cablevision of Westchester, Inc.*, Sherlock argues that Christie's payment may have been a voluntary one that bars Christie's claims (100 NY2d 525, 526 [2003] ["voluntary payment doctrine ... bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law"]). Sherlock maintains that Christie's was not legally obligated to pay the consignor and had unclean hands, and that Christie's failed to mitigate its damages. The essence of Sherlock's argument is that "[t]he question remains as to why Mr. Dolman decided not to cancel the sale and instead, to pay [the consignor]" (Sullivan Reply Aff., ¶ 3).

However, as a preliminary matter, Sherlock's motion to compel is based upon the fact that Christie's paid the consignor, resold the Sculpture, and now seeks to recover damages from Sherlock to make Christie's whole. Thus, implicit in Sherlock's argument is that Christie's *did* attempt to mitigate its damages.

Moreover, *Dillon* involved a cable subscriber who paid late charges to the defendant cable television company. The cable company's promotional materials allegedly "characterized the late fee as an administrative fee intended to be a reasonable estimate of its costs resulting from customers' late payments and nonpayments," but the plaintiff claimed that the fee "was an unlawful penalty bearing no relation to defendant's actual costs incurred in servicing such payments," and that she "would not have paid the fee had she known the true facts" (*Dillon*, 100 NY2d at 526). The plaintiff commenced a purported class action to recover the fee, and the Court of Appeals held that the voluntary payment doctrine barred her claim, because no fraud or mistake was alleged, as the "plaintiff knew she would be charged a \$5 late fee if she did not make timely payment" (*id.*). The Court determined that the "[a]lleged mischaracterization of a \$5 late fee as an administrative fee does not overcome application of the voluntary payment doctrine" (*id.*).

Here, conversely, there is no dispute between the payer (Christie's) and the payee (the consignor). Rather, Christie's paid a third party consignor and is not seeking a refund from that party. Nor does Sherlock explain how the payment to the consignor is relevant to

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Christie's breach of contract claim, whereby Christie's seeks the benefit of its bargain with Sherlock. Therefore, *Dillon* is distinguishable on its facts, and Sherlock fails to explain how the voluntary payment doctrine is applicable to this action.

In any event, whether or not Christie's was obligated to pay the consignor or cancel the sale is a question of contract interpretation. The fact that Christie's action seeks recovery of the difference between the amount paid to the consignor and the resale price of the Sculpture has nothing to do with the reasoning behind Christie's decision to pay the consignor. In other words, what is relevant about Dolman's conduct, if anything, is the fact of Christie's payment to the consignor (which, at this juncture, appears to be undisputed) and the legal consequences of that payment, not "the facts and circumstances surrounding [Dolman's] decision," as is argued by Sherlock (Sullivan Aff., ¶ 11).

Sherlock argues that "if Christie's canceled the sale as it has the right to do, Christie's would have sustained no damages" (Sullivan Reply Aff., ¶ 9). However, as a preliminary matter, while "the nonbreaching party is required to mitigate its own injuries" (*Clark Oil Trading Co. v J. Aron & Co.*, 256 AD2d 196, 199 [1<sup>st</sup> Dept 1998] [internal citation omitted]), the nonbreaching party is not required to mitigate "potential injury to the breaching party" (*id.*). In any event, this argument is pure speculation, and calls into question the interpretation of the parties' agreement in order to determine Christie's rights and obligations upon Sherlock's alleged default.

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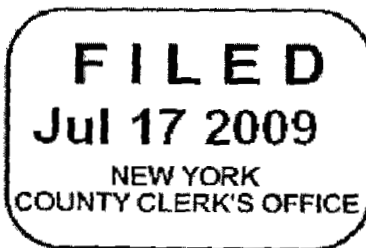
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The reasoning behind Christie's decision to pay the consignor is not material or necessary to proof of the claims or defenses here. Dolman's deposition is not needed at this juncture in the litigation (*Lopez v Huntington Autohaus Ltd.*, 150 AD2d 351, 352 [2d Dept 1989] ["demands which ... seek irrelevant information or are otherwise improper must be denied"]).

In any event, Sherlock fails to show that Dolman has firsthand knowledge of the Auction, the purported payment default by Sherlock, any facts concerning the resale of the Sculpture, or the calculation of the deficiency claim asserted against Sherlock. Christie's already produced several employees for examination, and Sherlock also fails to show that these witnesses had insufficient knowledge. Nor does he explain why further depositions are necessary. Therefore, Sherlock fails to provide a basis to compel Dolman's deposition (*Barone*, 260 AD2d 417, *supra*; *Defina*, 217 AD2d 681, *supra*; *see also Arendt v General Elec. Co.*, 270 AD2d 622, 622-23 [3d Dept 2000] [trial court's denial of plaintiff's motion to depose defendant's chief executive officer affirmed, where record revealed managers of defendant were already produced for deposition, and plaintiffs failed to establish that these managers lacked sufficient knowledge of the facts to produce "material and necessary" evidence and that "the chief executive officer actually possessed necessary and relevant information germane to their lawsuit such that he too should be produced"]). Accordingly, Sherlock's motion to compel is denied.

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Christie's fails to demonstrate its entitlement to a protective order, which is moot anyway in light of denial of the motion to compel.

Accordingly, it is

ORDERED that plaintiff's motion (motion sequence number 001) for leave to amend the complaint is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed filed and served upon defendant Jerry Sherlock upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that plaintiff shall file and serve a copy of this order, a supplemental summons and the amended complaint upon New York Film Academy, Ltd. and Gallery Beaux Arts, LLC in accordance with the requirements of the CPLR, and serve copies upon the Clerk of the Court and upon the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect the change in the caption herein; and it is further

ORDERED that the motion (motion sequence number 002) of defendant Jerry Sherlock to compel the deposition of Edward Dolman is denied, and the cross motion of Christie's, Inc. for a protective order is denied.

This constitutes the Decision and Order of the Court.

Dated: July 14, 2009

ENTER:



Hon. Eileen Bransten

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

PRESENT: EILEEN BHANSTEN  
J.S.C.

PART 3

Index Number : 602515/2006

CHRISTIE'S INC.

vs  
SHERLOCK, JERRY

Sequence Number : 002

COMPEL

INDEX NO. \_\_\_\_\_

MOTION DATE 1/8/09

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

*C*

\_\_\_\_\_ is motion to/for \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits

Answering Affidavits — Exhibits

Replying Affidavits

**FILED**  
**Jul 17 2009**  
NEW YORK  
COUNTY CLERK'S OFFICE

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the Decision and Order issued under motion sequence number 001.

NYS SUPREME COURT  
RECEIVED  
JUL 16 2009  
IAS MOTION  
SUPPORT OFFICE

Dated: 7-14-09

*Eileen Bhansten*  
**EILEEN BHANSTEN** J.S.C.

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

*MDAT*

