

**Ross Galleries, LLC v AJ Ross Auctions, LLC**

2010 NY Slip Op 30068(U)

January 11, 2010

Supreme Court, New York County

Docket Number: 600381/09

Judge: Barbara R. Kapnick

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

**BARBARA R. KAPNICK**

PART 39

Index Number: 600381/2009  
**ROSS GALLERIES LLC.**  
 vs.  
**AJ ROSS AUCTIONS LLC**  
 SEQUENCE NUMBER : 001  
 SUMMARY JUDGEMENT

INDEX NO. 600381/09  
 MOTION DATE \_\_\_\_\_  
 MOTION SEQ. NO. 001  
 MOTION CAL. NO. \_\_\_\_\_

his 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  
ACCOMPANYING MEMORANDUM DECISION**

Settle Order

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

Dated: 1/11/10

  
**BARBARA R. KAPNICK** J.S.C.  
 LSC

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IA PART 39

-----X

ROSS GALLERIES, LLC,

Plaintiff,

- against -

AJ ROSS AUCTIONS, LLC, APPLEJACK ART  
PARTNERS, INC. and JACK APPELMAN,

Defendants.

-----X

BARBARA R. KAPNICK, J.:

In this action, plaintiff Ross Galleries, LLC ("Ross Galleries") seeks to recover approximately \$1,427,025.00<sup>1</sup> plus interest, costs, and expenses resulting principally from the alleged default in payment of two promissory notes dated May 20, 2008 that defendant AJ Ross Auctions, LLC ("AJ Ross"), a wholly-owned subsidiary of defendant Applejack Art Partners, Inc. ("Applejack"), issued in connection with the purchase of the assets and business of Ross Galleries for \$1.6 million pursuant to an Asset Purchase Agreement.<sup>2</sup>

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<sup>1</sup> The Complaint seeks a somewhat lesser amount of approximately \$1,375,000.

<sup>2</sup> Ross Galleries was in the business of hosting live art auction fundraising events for a wide range of charitable institutions. At the time of the purchase, Applejack was already engaged in various art related businesses. Defendant Jack Appelman is the controlling shareholder of Applejack.

### Background

The first promissory note, a non-interest bearing note in the principal amount of \$607,507.00 (\$600,000 plus an adjustment for the additional inventory included at the closing) ("Original Note 1"), was given in consideration for Ross Galleries' art inventory. The amount due pursuant to Original Note 1 was to be paid in twelve monthly installments following the closing of the Asset Purchase Agreement. The amount of each monthly payment was to be determined based upon the amount of art sold during the preceding 30 days. AJ Ross was also required to deliver to Ross Galleries a schedule of the total art sales for each 30-day period.

The second note, given in consideration for substantially all of the other tangible and intangible assets of Ross Galleries, was in the principal amount of \$1,000,000.00 and provided for interest at a rate of 6% per annum ("Original Note 2") (together with Original Note 1, the "Original Notes").

In conjunction with the purchase, defendant Applejack allegedly entered into a Guaranty Agreement pursuant to which it agreed to guarantee all of AJ Ross's obligations under the Original Notes. Defendant Appelman also entered into a Guaranty Agreement under which he too agreed to guarantee all of AJ Ross's obligations under Original Note 1, and up to \$250,000 under Original Note 2.

Plaintiff claims that: (i) AJ Ross stopped making the required payments to Ross Galleries by early 2008, thereby defaulting on both the Original Notes; and (ii) AJ Ross failed to provide the required monthly schedules regarding sales of the art inventory, rendering it impossible to determine the precise amounts owed under Original Note 1.

After Ross Galleries sent AJ Ross numerous default notices and demand letters, the parties agreed to mediate their dispute. A mediation was thereafter held on May 6, 2008 pursuant to the dispute resolution provisions of the Original Notes. The mediation resulted in the execution of a Settlement Agreement (the "Settlement Agreement") which provided, *inter alia*, for the restructuring of the Original Notes into Revised Note 1 and Revised Note 2, both dated May 20, 2008 (the "Revised Notes"). In addition, Applejack and Appelman each executed a Guaranty Agreement, both also dated May 20, 2008 (the "Guaranty Agreements").<sup>3</sup>

Pursuant to the Settlement Agreement, (a) AJ Ross, Applejack and Appelman also agreed to waive all defenses, counterclaims and rights of offset against the Revised Notes; (b) the scope of the Appelman Guaranty was increased from its original terms to cover

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<sup>3</sup> The Settlement Agreement, the Revised Notes, and the Guaranty Agreements shall be referred to herein collectively as the "Settlement Documents".

\* 5]

the full amounts due and owing under each of the Revised Notes; (c) AJ Ross agreed to waive any and all further claims for indemnification against Ross Galleries under the Asset Purchase Agreement; and (d) all parties, including Applejack and Appelman, expressly consented to jurisdiction in the state courts of New York State.

In addition, Paragraph 6 of the Settlement Term Sheet specifically provides that "[e]xcept to the extent inconsistent herewith, the terms of the original Agreement shall survive."

Revised Note 1 reflected the then-unpaid principal balance of \$363,618.00 to be paid on a monthly basis over a 30-month period starting from July 17, 2007. Pursuant to the terms of Revised Note 1, monthly payments were based upon the sales of art during the preceding 30 days and AJ Ross was required to submit, together with the payment for each month, a schedule detailing all art inventory sold during such period.

Revised Note 2 reflected an unpaid principal balance of \$1,025,000.00, bearing interest at a rate of 6.5% per annum, payable in equal monthly installments of \$13,720.00. Payments were based upon an eight year amortization schedule with a balloon payment of the full remaining principal balance due on the maturity date of May 20, 2013.

The Revised Notes also provide, in relevant part, that:

[t]he Maker irrevocably submits to the personal and subject matter jurisdiction of any state court sitting in either the State of New York or the State of Vermont, in the choosing of the Holder, over any suit, action or proceeding arising out of or relating to this Note or any other instrument [emphasis supplied]. To the fullest extent it may effectively do so under applicable law, the Maker irrevocably waives and agrees not to assert, by way of motion, as a defense or otherwise, any claim that it is not subject to the jurisdiction of any such court, any objection that it may now or hereafter have to the laying of the venue of any such suit, action or proceeding brought in any such court and any claim that any such suit, action or proceeding brought in any such court has been brought in an inconvenient forum.

Plaintiff claims that AJ Ross has failed to: (i) remit payments on either revised Note 1 or revised Note 2 since October 2008; (ii) provide a list of inventory that it sold during the months in which it has defaulted; and (iii) produce the detailed inventory report required under the Settlement Agreement.

In addition, Ross Galleries received notification from AJ Ross in November 2008 that it was unilaterally taking a credit against amounts owed in the amount of \$25,935.30. Plaintiff claims that this credit was in clear violation of Paragraph 8 of Revised Note 1 and Paragraph 10 of Revised Note 2, which prohibit AJ Ross from taking any offset of any kind to any amounts due under either of the Revised Notes. Defendants argue that pursuant to Article 10 of

the Asset Purchase Agreement, AJ Ross is entitled to offset any amount owed under the Notes because of third-party claims.

Pursuant to Paragraph 5 of Revised Note 1 and Paragraph 7 of Revised Note 2, Ross Galleries sent a letter to AJ Ross on or about November 12, 2008, demanding cure of the purported defaults under the Revised Notes. Despite the demand letter, AJ Ross failed to cure its defaults within ten days, and plaintiff claims that as a result, the full principal balance of each of the Revised Notes has accelerated and is currently due and payable.

Plaintiff thereafter commenced this action seeking to recover damages for breach of contract, i.e., Revised Notes 1 and 2 (first cause of action); the Applejack Guaranty Agreement (second cause of action); and the Appelman Guaranty Agreement (third cause of action).

Plaintiff now moves for summary judgment.

#### Discussion

Plaintiff argues that it is entitled to summary judgment based upon AJ Ross' uncontested default under the Revised Notes and based upon the unconditional guarantees of Applejack and Appelman.

Defendants oppose plaintiff's motion for summary judgment on the ground, *inter alia*, that the parties are required to arbitrate their dispute pursuant to Section 12.06 of the Asset Purchase Agreement which provides as follows:

This Agreement and the other Transaction Documents shall be governed by and enforced in accordance with the internal laws of the State of Vermont, without reference to conflict of law principles. The parties shall participate in mediation to attempt to resolve any dispute, controversy or claim that arises in relation to this Agreement. Any unresolved controversy, claim or dispute arising out of or in relation to this Agreement, or the breach thereof, will be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof [emphasis supplied]. The parties acknowledge that this Agreement affects interstate commerce, and that, owing to the special relationship of the parties, legal and injunctive relief may be included in any award of the arbitrator(s). Any arbitration hearings will be conducted in Albany, New York.<sup>4</sup>

The United States Supreme Court has held that the question of arbitrability is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise. *AT&T Technologies, Inc. v Communications Workers*, 475 U.S. 643, 649 (1986).

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<sup>4</sup> Although defendants indicated that they were contemporaneously filing a cross-motion to stay further proceedings in this action and to enforce arbitration, no cross-motion was ever filed. In addition, defendants have apparently never served a formal demand for arbitration.

It is settled that a party will not be compelled to arbitrate and, thereby, to surrender the right to resort to the courts, absent "evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes." (citations omitted). The agreement must be clear, explicit and unequivocal (citations omitted) and must not depend upon implication or subtlety (citations omitted).

*Matter of Waldron (Goddess)*, 61 NY2d 181, 183-184 (1984)

Here, plaintiff argues that there is no clear, explicit and unequivocal agreement to arbitrate since the Settlement Documents, unlike the original Asset Purchase Agreement, do not contain an express agreement to arbitrate. Moreover, plaintiff contends that the language in the Settlement Documents by which the parties consented to the jurisdiction of the New York Courts supersede the arbitration provision in the Asset Purchase Agreement.

Defendants, however, argue that the jurisdictional provision is in no way inconsistent with the arbitration clause, since agreements that are subject to arbitration clauses may also give rise to certain lawsuits (e.g., a proceeding to confirm an arbitration award).

Even if this Court were to find that the arbitration clause of the Asset Purchase Agreement survived the Settlement Documents,

plaintiff argues that defendants have waived their right to compel arbitration by failing to timely move for that relief.

"Like contract rights generally, a right to arbitration may be modified, waived or abandoned (citations omitted)." *Sherrill v Grayco Builders, Inc.*, 64 NY2d 261, 272 (1985). Thus, a defendant may waive "any right to arbitration by failing to raise it as a defense in its answer, asserting counterclaims, making a dispositive motion, and otherwise actively participating in [the] litigation" over a period of time. *Ryan v Kellogg Partners Institutional Services*, 58 AD3d 481 (2009). See also, *Estate of Castellone v JP Morgan Chase Bank, N.A.*, 60 AD3d 621 (2nd Dep't 2009); *Accessory Corp. v Capco Wai Shing, LLC*, 39 AD3d 344 (1st Dep't 2007); *DeSapio v Kohlmeyer*, 35 NY2d 402 (1974).

On the other hand, "[i]n the absence of unreasonable delay, so long as the defendant's actions are consistent with an assertion of the right to arbitrate, there is no waiver." *Stark v Molod Spitz DeSantis & Stark, PC*, 9 NY3d 59, 66 (2007), quoting *DeSapio v Kohlmeyer, supra* at 405.

In the instant case, defendants repeatedly asserted in their Answer dated March 12, 2009, that plaintiff's "allegations are required by contract and by the Federal Arbitration Act (9 U.S.C.

1-16) to be addressed in Arbitration." Defendants then produced certain documents requested by plaintiff in response to plaintiff's first demand for documents and agreed to produce a witness on three separate occasions for a deposition which was noticed by plaintiff, but which was cancelled at the last moment each time.

Moreover, defendants never formally moved to enforce arbitration prior to plaintiff's moving for summary judgment, nor did defendants properly cross-move for such relief either prior to argument on plaintiff's motion on September 30, 2009, or subsequent thereto, although the issue was discussed extensively during oral argument. It is now almost one year since the Complaint was served and ten months after defendants served their Answer.

Accordingly, this Court finds that defendants have waived any right they may have had to compel arbitration.

Defendants' only other argument in opposition to plaintiff's motion for summary judgment is that the defendants are entitled to offset any amount owed under the Notes as a result of various third-party claims asserted against AJ Ross. However, defendants have merely alluded to these claims in Appelman's Affidavit, without presenting any proof of such claims in admissible form, as is required in opposing a motion for summary judgment.

Accordingly, plaintiff's motion for summary judgment based on defendants' failure to pay the amounts due on the Revised Notes and Guarantees, all dated May 20, 2008, is granted.

Settle Order.

Dated: January 11, 2010



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BARBARA R. KAPNICK  
J.S.C.

**BARBARA R. KAPNICK**  
**J.S.C.**