

Scher v Stendhal Gallery, Inc.
2011 NY Slip Op 34078(U)
September 15, 2011
Supreme Court, New York County
Docket Number: 650598/10
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

PAULA SCHER

INDEX NO. 650598/10

MOTION DATE _____

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

- v -

STENDAHL GALLERY, INC. et al

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 *by plaintiff for partial summary judgment is GRANTED in part and DENIED in part;*

the cross motion by defendant for partial summary judgment is GRANTED to the extent of finding that Stendahl Gallery is entitled to 70% of the revenue of unsold prints, the amount to be determined at trial; and

all remaining claims and counterclaims are severed and continued —

All per the attached Decision, Order and Interlocutory Judgment.

Dated: September 15, 2011

MELVIN L. SCHWEITZER J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG.

☐ SETTLE ORDER/ JUDG.

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

FILED

OCT 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 45

-----X
PAULA SCHER,

Plaintiff,

-against-

STENDHAL GALLERY, INC.; STENDHAL
NEW YORK, INC.; MARIAM STENDHAL
GALLERY, INC.; MAYA STENDHAL
GALLERY, INC.; and HARRY STENDHAL,
each d/b/a "STENDHAL GALLERY,"

Defendants.
-----X

Index No. 650598/10

DECISION, ORDER &
INTERLOCUTORY JUDGMENT

Motion Sequence No. 004

MELVIN L. SCHWEITZER, J.:

Plaintiff Paula Scher moves, pursuant to CPLR 3212, for partial summary judgment. Plaintiff seeks an order that she: (1) is the owner of unsold prints of her artwork; (2) is entitled to the full list price for all prints sold after May 11, 2010 and for all undocumented transfers and missing prints; (3) can amend her complaint to assert a claim for, and recover, a 50% commission on the sale of her painting *Long Island*; and (4) is entitled to a sworn and detailed accounting of all of the sales of her paintings and prints.

Defendants Stendhal Gallery, Inc. (Gallery), Stendhal New York, Inc., Mariam Stendhal Gallery, Inc., Maya Stendhal Gallery, Inc. and Harry Stendhal also seek partial summary judgment. By their cross-motion, defendants seek an order declaring the Gallery to be the owner of all unsold prints of plaintiff's artwork or, in the alternative, entitled by contract to 90% of the re-sale value of the prints. Defendants also oppose plaintiff's motion for partial summary judgment, and argue that the court should deny, as untimely, plaintiff's request to amend the pleadings to add a claim regarding the *Long Island* painting as untimely.

Factual Allegations

This case arises out of an "Artist-Gallery Contract with Record of Assignment and Statement of Account" (Agreement) dated October 19, 2005, pursuant to which plaintiff, a visual artist and graphic designer, appointed the Maya Stendhal Gallery¹ as her exclusive worldwide agent for the exhibition and sale of her original paintings and works of art. Complaint, Ex. A: Agreement, ¶ 1. The Gallery was to receive a 50% commission on the retail price of each work sold, after an initial expense of \$50,000. *Id.*, ¶ 4. The parties agree that the Agreement covered 12 map-based acrylic on canvas paintings (Maps I works) as well as seven additional paintings created in 2006 and 2007 (Maps II works).

Paragraph 2 of the Agreement provides that it shall have a term of three years. Complaint, Ex. A: Agreement, ¶ 2. It is undisputed that the Agreement continued after the initial three-year term, and that the parties continued to do business together until May 11, 2010, when plaintiff's lawyer sent a letter terminating the Agreement. Pls. Rule 19-a, ¶ 14 & Ex. C; Defs. Rule 19--a, ¶ 14.

The parties agree that plaintiff also granted the Gallery an "oral license"² to publish fine art silk screen prints based on Scher's Maps I and Maps II works and authorized the gallery to be the exclusive sales agent for the prints and, in return, the Gallery agreed to pay plaintiff a 10% royalty or commission. Pls. Rule 19-a, ¶ 8; Defs. Rule 19-a, ¶ 8; Scher Dep. at 58-59; Harry

¹The Maya Stendhal Gallery is the predecessor in interest of the Stendhal Gallery. Complaint, ¶ 3; Answer, ¶ 3.

²Plaintiff testified that she never used the word "license" (Scher Dep. at 11), despite the fact that the complaint and her Rule 19-a statement describe the parties' arrangement as an "oral license to publish fine art prints." Complaint, ¶ 25; Pls. Rule 19-a, ¶ 8. Plaintiff did admit that she granted the Gallery "permission" to create prints. Scher Dep. at 15.

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Stendhal Aff., ¶ 5. Citing the pleadings, plaintiff maintains it is undisputed that the oral license obligated the Gallery to pay her 10% of the retail price of each copy of each print sold. See Complaint, ¶ 26; Answer, ¶ 8.

Subsequent to the grant of the oral license, the Gallery arranged for prints to be made of other artworks by plaintiff. Plaintiff admits that she approved and signed prints of *Africa, Europe, China, The World, Dark World, The United States, The United States (Blue), The United States (Red), The United States (White), NYC Transit, and Manhattan at Night*. Complaint, ¶ 32; Answer, ¶ 10. Prints of *India, Israel, and South America* were also made and have been offered for sale by the Gallery, but the parties dispute whether plaintiff approved these prints. Complaint, ¶¶ 34-35; Answer, ¶¶ 12-13. Plaintiff was to receive a number of artists proofs, the Gallery would receive some hors d'commerce prints,³ and numbered prints, either 90 or a "smaller run," would be made for sale. Scher Dep. at 49-52; Complaint, ¶ 34; Answer, ¶ 12. What is disputed is who owns the unsold Prints and what payment, if any, is due for prints sold by the Gallery after plaintiff terminated the oral license on May 11, 2010 and for future sales.

Pursuant to this court's January 25, 2011 Order, approximately 320 of the remaining prints were removed from the Gallery's former location and placed in escrow with Crozier Fine Arts, Inc. in New York, New York.

Plaintiff contends that the oral license was limited to the term of the Agreement, that she now is the owner of all prints, including any prints which she has not yet approved and signed, and that, while the Gallery may pursue a contract claim for the costs incurred in producing unsold

³Hors d'commerce are prints that the Gallery could give to charity or use to promote in any way it saw fit to promote the Prints, plaintiff's work or the Gallery itself, and no royalties are due. Scher Dep. at 49-51.

prints, the Gallery holds all prints and the proceeds from any sold prints as trust property pursuant to section 12.01 of the Arts and Cultural Affairs Law. Complaint, ¶¶ 33, 36; Pls. Rule 19-a, ¶¶ 8, 10.

Defendants deny that the Gallery's right to promote and sell the prints is limited to the term of the Agreement or the oral license. Defs. Rule 19-a, ¶ 8. According to the affidavit of Harry Stendhal submitted in support of defendants' cross motion, the publication of prints or other fine art works is very expensive, both in terms of production costs and marketing costs, and very risky because there is no guaranty that there will be a market for the published works. Harry Stendhal Aff., ¶ 6. Mr. Stendhal claims that he engaged Alexander Heinrich of Fine Art Printing (the "Printer") to produce the prints at a cost of over \$200,000. *Id.*, ¶ 8. He estimates the Gallery's promotion costs at approximately \$500,000. *Id.* Mr. Stendhal further claims that he had numerous discussions with the plaintiff about the oral license and the prints, and that prior to receiving her counsel's May 11, 2010 letter, plaintiff never indicated to him that she believed she owned the prints and would have the right to take possession of unsold prints if she terminated the license. *Id.*, ¶ 7. According to defendants, plaintiff's claim to be the owner of the approximately 320 prints commissioned by the Gallery from a third-party printer, paid for in their entirety by the Gallery, and delivered by the printer into the possession of the Gallery is extraordinary.

Harry Stendhal also now claims that the parties agreed that plaintiff's 10% royalty was to be paid, per industry custom, "net of expenses" and not based on the retail price of the print. Harry Stendhal Aff., ¶ 6. Although this is contrary to what was admitted in their Answer,

defendants argue it was an "inadvertent mistake," and request that the court allow their pleading to be conformed to the proof at trial.

Although the Gallery belatedly produced a purported accounting for print sales in its January 20, 2011 document production (*see* Pls. Rule 19-a, Ex. G), plaintiff contends that this accounting is completely inadequate to meet the gallery's fiduciary obligations to her. Plaintiff objects, *inter alia*, to the fact that the accounting is unsworn, unsigned, and incomplete; fails to include the date of the transaction; and is unsupported by any back-up documentation. Plaintiff also contends that this accounting shows below-list price sales to counsel for the Gallery, and gifts to Harry and Maya Stendhal and others.

Plaintiff maintains that no legally sufficient accounting has ever been provided for sales of the Maps I and Maps II paintings. *Long Island*, painted in 2005, is a Map I work of art. It was admittedly sold on October 23, 2007 for \$50,000. Plaintiff never received payment for this work, and claims she only found out about the sale when defendants produced documents in this case in October 2010. Scher Dep. at 92. Since the Gallery was only authorized to sell this painting at the "suggested retail price" of \$90,000, plaintiff claims that she is currently owed \$45,000 for this unauthorized sale.

According to defendants, summary judgment in plaintiff's favor on what they contend is a "newly minted" claim regarding the *Long Island* painting is unwarranted. Harry Stendhal avers that the list prices for plaintiff's paintings were "aggressive for a new artist and most of her work sold for less than the listed price." Harry Stendhal Aff., ¶ 12. He allegedly discussed the sale of *Long Island* with plaintiff shortly after it occurred and plaintiff did not object. He further alleges

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that "[t]he proceeds of the *Long Island* sale were used, in part, to finance [plaintiff's second exhibition in 2007], with Plaintiff's agreement." *Id.*

As for the accounting, defendants produced in January 2010, Harry Stendhal avers that "I believe that accounting is generally accurate." Harry Stendhal Aff., ¶ 15. However, he admits that it contains an error regarding the sale of *United States (White)* and denies that it accurately reflects that he himself took five prints. To the extent that plaintiff believes there are other errors, Mr. Stendhal offers to discuss them through counsel and mediate any issues that cannot be resolved on consent. *Id.* He contends that some of the below list price sales were "promotional expenses," and admits that the Gallery "also made below list sales to dealers, which is customary in the industry, and a small number to associates or friends of the Gallery." *Id.*

Discussion

Ownership of the Unsold Prints

The first issue that must be addressed is ownership of the unsold prints. Plaintiff, relying on Section 12.01 of the Arts and Cultural Affairs Law, contends that the Gallery is her fiduciary and any artwork held or sold on her behalf is trust property held for her benefit and any proceeds from the sale of any such art work are also trust property. Section 12.01 of the Arts and Cultural Affairs Law states, in pertinent part:

"1. Notwithstanding any custom, practice or usage of trade, any provision of the uniform commercial code or any other law, statute, requirement or rule, or any agreement, note, memorandum or writing to the contrary:

(a) Whenever an artist . . . delivers or causes to be delivered a work of fine art, craft or a print of his own creation to an art merchant for the purpose of exhibition and/or sale on a commission, fee or other basis of compensation, the delivery to and acceptance thereof by the art merchant establishes a consignor/consignee relationship . . . , and

(i) such consignee shall thereafter be deemed the agent of such consignor with respect to the said work;

(ii) such work is trust property in the hands of the consignee for the benefit of the consignor;

(iii) any proceeds from the sale of such work are trust funds in the hands of the consignee for the benefit of the consignor;

(iv) such work shall remain trust property notwithstanding its purchase by the consignee for his own account until the price is paid in full to the consignor; . . . ; and

(v) no such trust property or trust funds shall be subject or subordinate to any claims, liens or security interest of any kind or nature whatsoever."

Case law construing Section 12.01 confirms that the artist is the owner of artwork consigned for sale with an art gallery and is entitled to possession after the parties terminate their relationship. *Wesselmann v International Images*, 172 Misc 2d 247 (Sup Ct, NY County 1996), *aff'd* 259 AD2d 448 (1st Dept 1999); *Zucker v Hirschl & Adler Galleries*, 170 Misc 2d 426, 427 (Sup Ct, NY County 1996); *Koeniges v Woodward*, 183 Misc 2d 347, 349 (Civ Ct, NY County 2000). Indeed, it is a basic tenet of the law of consignment that title to the goods being consigned remains with the consignor. *Rahanian v Ahdout*, 258 AD2d 156, 158-59 (1st Dept 1999); *Childs & Co. v Waterloo Wagon Co.*, 37 App Div 242 (4th Dept 1899), *aff'd* 5 Bedell 576 (1901).

Defendants maintain that Section 12.01 of the Arts and Cultural Affairs Law applies only to physical works owned by the artist and physically delivered to the art merchant, and does not apply to licensed copies or derivative works of copyrighted works of art commissioned from a third-party printer and paid for by the art merchant. However, the statute, by its terms, applies to "prints" that the artist "delivers or causes to be delivered." In *Wesselmann v International Images*, *supra*, these terms were held to apply to signed prints of original works of art that, as

here, were commissioned by and paid for by the art merchant. In that case, the art merchant argued that there had been no delivery of prints by the artist, but the court rejected that argument, finding that the artist's approval and signing of the finished prints before they were sold constituted delivery within the meaning of Section 12.01. 172 Misc 2d at 251. The defendants in *Wesselmann* also argued unsuccessfully, as does the Gallery here, that their financial investment in publishing the prints renders the consignment and trust provisions of Section 12.01 inapplicable. *Id.* at 251-52.

Wesselmann's interpretation of the Arts and Cultural Affairs Law is binding precedent unless the case can be distinguished on its facts. *Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 419-20 (2006); *People v Turner*, 5 NY3d 476, 481-82 (2005); *Dufel v Green*, 198 AD2d 640 (3d Dept 1993), *aff'd* 84 NY2d 795 (1995); *Mountain View Coach Lines v Storms*, 102 AD2d 663, 664-65 (2d Dept 1984).

Defendants argue that *Wesselmann* is indeed distinguishable, because it did not involve the grant of a license by an artist to produce and distribute prints. The relationship was described by the Appellate Division as "most closely approximat[ing] a joint venture" (*Wesselmann*, 259 AD2d at 449-450), in which the artist and the publisher agreed to split profits from the sale of the prints on a 50/50 basis, after deducting certain expenses. *Wesselmann*, 172 Misc 2d at 249. Defendants argue that since the artist and the publisher were joint venturers, they could be deemed co-owners of the resulting prints. *See* Defs. Memo., at 3. However, neither the Supreme Court nor the Appellate Division ever described the parties as "co-owners" of the prints, and

despite finding that their relationship was akin to a joint venture,⁴ the publisher was ordered to turn over all unsold prints to the artist. Since Section 12.01 of the Arts and Cultural Affairs Law applies "[n]otwithstanding . . . any agreement, note, memorandum or writing to the contrary," the particular terms of the parties' agreement is irrelevant. *Wesselmann* is, therefore, squarely on point and compels a ruling that plaintiff is the owner of the prints.

Defendants next maintain that plaintiff's ownership claim is contrary to the basic law of sales, which holds that a buyer takes title to goods when it pays for and takes possession of them, and is also contrary to federal copyright law. Again, however, Section 12.01 of the Arts and Cultural Affairs Law, by its terms, applies notwithstanding any provision of the Uniform Commercial Code or other law or statute. Defendants also claim that this New York statute negates rights that they have pursuant to federal copyright law, and argue that "state contract law cannot provide a basis of a decision if that law conflicts with federal law," citing *Walthal v Rusk*, 172 F3d 481, 485 (7th Cir 1999). The court discerns no conflict between federal and state law and no preemption problem, because the sections of the Copyright Act cited by defendants are inapplicable in this case.

Defendants assert protection under the Copyright Act on two theories. First, defendants rely on the "first sale doctrine," which states that "the owner of a particular copy . . . lawfully made under this title . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy." 17 USC § 109 (a). This argument presupposes that plaintiff transferred ownership of the prints to the Gallery, which she disputes,

⁴Property contributed to a joint venture is deemed to be held "jointly." *Matter of Steinbeck v Gerosa*, 4 NY2d 302, 318 (1958).

and which is contrary to Section 12.01 of the Arts and Cultural Affairs Law. *Bourne v Walt Disney Co.*, 68 F3d 621 (2d Cir 1995), upon which defendants rely, is a copyright infringement case, where the court specifically acknowledged that the first sale doctrine did not serve to create ownership rights in copyrighted material. *Id.* at 632.

Second, defendants contend that the prints are not copies of the plaintiff's paintings, but rather "derivative works" withing the meaning of 17 USC § 103 (a) and that, pursuant to the termination limitations of 17 USC § 203 (b) (1), the Gallery may continue to sell the prints after plaintiff's termination of the Gallery's oral license. Section 203 (b) (1) of the Copyright Act provides that "[a] derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after termination of other derivative works based upon the copyrighted work covered by the terminated grant." In other words, where an "exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright" (17 USC § 203 [a]) is terminated, the grantee can continue to "utilize" derivative works created by the grant, but cannot create new derivative works based on the original artwork.

In order to analyze defendants' reliance on federal copyright law, the first issue that must be addressed is whether the prints are derivative works. A "derivative work" is "a work based upon one or more preexisting works, such as a[n] . . . art reproduction, . . . , or any other form in which a work may be recast, transformed, or adapted." 17 USC § 101. Derivative works have their own limited copyright protection (17 USC § 103 [b]), however, in order for a reproduction to have its own copyright protection, "there must be at least some substantial variation [from the source work], not merely a trivial variation such as might occur in the translation to a different

medium.” *Batlin & Son, Inc. v Snyder*, 536 F2d 486, 490 (2d Cir), *cert denied* 429 US 857 (1976).

In support of her motion for partial summary judgment, plaintiff claimed that the prints are not derivative works, because they “exactly replicated Ms. Scher’s works in another medium.” Pls. Memo. at 4, n 5. However, plaintiff offers no factual support for this statement. It is also contrary to the May 11, 2010 letter in which plaintiff’s counsel uses the term “derivative works” to describe the prints. Defs. Rule 19-a, Ex. C. Plaintiff’s current position is also directly contrary to her deposition testimony wherein she testified:

“The prints – the silkscreens are not reproductions of the paintings. The silkscreens are of the paintings. That’s very different.

A reproduction means you – you make a photograph of the painting and then you’re taking that photograph and you’re making color separations in an exact printing process that completely reproduces the painting and to the best of that – the sophistication of that process. Like four-color offset, for example, is something that people very often use to reproduce artwork because they take a photocopy and they break it down into four colors that theoretically, when you lay them over one another, reproduce the painting very accurately.

Silkscreen doesn’t do that. Silkscreen is a fine art process where the works become much more original in their form because they’re not – it’s not a reproduction.”

Scher Dep. at 21-22. Plaintiff also testified that the Map I and II works were “massive” in size and “very intricate,” and would be done in “hundreds of colors” that had to be reduced down to about 30 colors for the much smaller silkscreens prints. *Id.* at 19-20, 38-39. She also testified that she was the “author” of the prints, that “[t]hey’re my work from my work,” and that she was the person who had to make “artistic judgments” about how to “reduce the amount of colors from the painting.” *Id.* at 31- 34, 40.

On this motion, without the benefit of seeing the original works and the prints firsthand,⁵ the court is not in a position to judge whether the latter are reproductions or derivative works. This presents a question of fact that cannot be resolved on summary judgment.

Plaintiff argues that even if the prints are derivative works, Section 203 (b) (1) of the Copyright Act simply does not apply. Plaintiff claims that the oral license she gave the Gallery to publish and sell fine art prints of her paintings was not a "grant of a transfer or license of copyright or of any right under a copyright" (17 USC § 203 [a]), because no copyright rights can be transferred without a written agreement.

Section 204 (a) of the Copyright Act states that "[a] transfer of copyright ownership . . . is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent." Here, admittedly the parties had an oral agreement regarding the prints. "If an oral transfer of a copyright license is later confirmed in writing, the transfer is valid." *Valente-Kritzer Video v Pinckney*, 881 F2d 772, 775 (9th Cir 1989), *cert denied* 493 US 1062 (1990); *see also* 3-10 Nimmer on Copyright § 10.03 [A] [3] (2011). Both the May 11, 2010 letter written by plaintiff's counsel on her behalf and the complaint itself admit that plaintiff granted the Gallery "an oral license to produce fine art prints." Neither document, however, satisfies Section 204 (a) since the terms of the oral license are disputed and it is unclear which of the four "exclusive rights" of copyright ownership that apply to "pictorial, graphic or sculptural works" (*i.e.* the rights of reproduction, adaptation, distribution, and display [17 USC § 106]), were granted to the Gallery.

⁵The black and white photocopies of the prints allegedly being depicted on the Gallery's website, attached to Plaintiff's Rule 19-a Statement, are illegible.

Radio Tel. Espanola S.A. v New World Entertainment, Ltd., 183 F3d 922, 927 (9th Cir 1999) ("A mere reference to a deal without any information about the deal itself fails to satisfy the simple requirements of § 204 [a]"). Defendants maintain that the prints are derivative works that they "produced," but acknowledge that the Prints were "finalized through an iterative process between the Printer and Plaintiff." Defs. Rule 19-a, ¶ 21.⁶ Indeed, plaintiff maintains that she is the "artist" or "author" of the prints, and that she was required to approve and sign the prints prior to their sale. Scher Dep., at 30-31. Accordingly, absent a written agreement that sets forth "precisely what rights are being transferred and at what price," (*Effects Assoc., Inc. v Cohen*, 908 F2d 555, 557 [9th Cir 1990], *cert denied sub nom Danforth v Cohen*, 498 US 1103 [1991]), defendants' reliance on Section 203 (b) of the Copyright Act as a basis for claiming ownership of the prints is rejected.

Plaintiff is entitled to partial summary judgment of her fourth claim for relief seeking replevin on the unsold prints of her artwork.

The Gallery's Right to 90% of the Re-sale Value of the Prints

Even though plaintiff is entitled to return of the prints pursuant to Section 12.01 of the Arts and Cultural Affairs Law, this does not defeat the Gallery's contract right to 90% of their re-sale value. That argument was considered and rejected by *Wesselman* wherein both parties were allowed to proceed with their respective contract claims arising out of their prior business arrangement. In response to the publisher's claim that turning over the unsold prints to the artist would be a deprivation of its property without due process of law, the Supreme Court stated that

⁶Harry Stendhal admits that plaintiff was "closely involved in the first edition of the Prints produced," but claims that "her involvement declined in subsequent editions." *Harry Stendhal Aff.*, ¶ 8.

the publisher's "claim for its share of the profits upon the sale of the Prints still remains to be determined." *Wesselmann*, 172 Misc 2d at 252. The Appellate Division agreed, stating:

"Although plaintiffs prevailed to a limited extent upon reargument, the thrust of their motion, that no accounting was needed since defendants were not entitled to keep any share of the profits of the parties' business venture, was a rehash of the arguments that the court previously . . . rejected." 259 AD2d at 450.

Plaintiff is not, therefore, entitled to a declaration that she is entitled to the full list price for all of her prints sold after May 11, 2010. Defendants's contractual rights under the oral license have not been extinguished by Section 12.01 of the Arts and Cultural Affairs Law. In addition, there is a question of fact regarding whether the parties' 90/10 split is based on gross sales, as plaintiff contends, or net sales, as defendants contend is the custom and practice in the industry. See *Harry Stendhal Aff.*, ¶ 6. The admission in paragraph 8 of defendants' Answer is clearly an inadvertent mistake, as claimed, since paragraph 92 alleges that plaintiff "would be paid a 10% commission from the sale price of any sold prints, after the expenses of creating and publishing said prints were reimbursed."

Plaintiff's Right to an Accounting

Since this court finds that Section 12.01 of the Arts and Cultural Affairs Law applies to the parties' relationship, plaintiff is clearly entitled to the accounting she seeks in the complaint's eighth claim for relief. The unsworn accounting of plaintiff's print sales that defendants provided in its January 2011 supplemental document production lacks dates and, in many instances, print numbers, and fails to provide any backup documentation. Harry Stendhal admits it contains mistakes and omissions. Defendants are ordered to supply plaintiff with a sworn

accounting that includes the print number and amount of each run, the date of sale, the consideration agreed upon and actually received, the name and address of the purchaser of the work, any discounts offered and the reason for the discount. *Accord Hirschfeld v Margo Feiden Galleries Ltd.*, NYLJ, July 26, 2000, at 27, col 5, 2000 NY Misc LEXIS 663, * 13 (Sup Ct, NY County). Since defendants are also claiming that plaintiff's 10% royalty payments are net of expenses and claim to have incurred over \$700,000 in expenses of producing and marketing the sold and unsold prints, those expenses must be included. A similarly-detailed and sworn accounting must be provided of all sales of plaintiff's Maps I and Maps II paintings, including any expenses claimed to have been deducted from the past payment of commissions.

Long Island Painting

Plaintiff moves for partial summary judgment, claiming a right to recover \$45,000 on the sale of her painting *Long Island*, based on the Agreement's "suggested retail price" of \$90,000 for this painting. Defendants admit that the painting was sold shortly after plaintiff's second exhibition in 2007 for \$50,000, but that, per an oral agreement with Harry Stendhal, plaintiff agreed to the sale at this price and also agreed that the proceeds of the sale could be used, in part, to finance the second exhibition. Defendants argue that this claim is also newly-minted, and that summary judgment may not be awarded on an unpleaded cause of action.

Summary judgment may be awarded on an unpleaded cause of action if the undisputed proof supports the award and if the opposing party has not been misled to its prejudice. *Kramer Levin Naftalis & Frankel LLP v Canal Jean Co., Inc.*, 73 AD3d 604, 605 (1st Dept 2010); *Weinstock v Handler*, 254 AD2d 165, 166 (1st Dept 1998); *Torrioni v Unisul, Inc.*, 214 AD2d 314, 315 (1st Dept 1995). Although plaintiff's complaint does not mention this particular

painting, it does assert claims for breach of the Agreement (the fifth claim for relief) and seeks money damages for that breach. Even if the complaint cannot be said to encompass a claim for a commission based on the sale of *Long Island*, there is no prejudice to defendants. They were put on notice of this claim in April 2011 when plaintiff moved for partial summary judgment. By stipulation of the parties, defendants were given an opportunity to depose plaintiff before their opposition papers were due, and her deposition took place on May 17, 2011, at which she was questioned about this painting. Scher Dep. at 92, 173, 176. Defendants fail to identify what additional discovery they would have sought from plaintiff or third parties to defeat this claim, and offer testimonial evidence from Harry Stendhal in opposition to summary judgment on the claim, which the court now considers.

The Agreement contains several provisions pertinent to this claim. The price at which a painting could be sold is discussed in two places. The first page of the Agreement states:

“Please see attached list of suggested retail prices.

The prices set forth as follows, are subject to change, and will be approved by the artist and gallery prior to the finalization of any sale of the works.”

Complaint, Ex. A, at 1. Under the subheading “Prices,” the Agreement provides:

“The Gallery and artist shall sell the works at the retail prices shown on the Record of Consignment, subject to the Gallery’s right to make customary trade discounts to such purchasers as museums and designers.”

Id., ¶ 5. The Agreement states that all modifications “must be in writing and signed by both parties. This Agreement constitutes the entire understanding between the parties hereto.” *Id.*,

¶ 11. Thus, although the parties agreed that the sale price of any given work was subject to change, that change had to be approved in writing by both the artist and the Gallery prior to

finalizing any sale. This admittedly did not occur with the Gallery's sale of *Long Island* in October 2007 for considerably less than the agreed retail price of \$90,000.

Here, Mr. Stendhal's conclusory assertions fail to defeat partial summary judgment in plaintiff's favor. While he claims that most of her work sold for less than the listed prices, he does not disclose the actual sales prices of her other paintings nor offer any detail concerning the amount of expenses the Gallery incurred for the second exhibition that he claims were partially offset by the 50% commission due to plaintiff on this sale. In any event, Mr. Stendhal's claim that plaintiff and the Gallery orally modified the Agreement regarding the sales price of *Long Island* is barred by both the parties' contract merger clause and General Obligations Law § 15-301. The latter statute specifically provides that changes to a written agreement which contains a provision to the effect that it cannot be changed orally, as here, may only be effected by an executory agreement in writing which is signed by the party against whom enforcement of the change is sought. *Opton Handler Gottlieb Feiler Landau & Hirsch v Patel*, 203 AD2d 72, 73 (1st Dept 1994); *Levine v Trattner*, 130 AD2d 462, 463 (2d Dept 1987).

Thus, plaintiff has established her entitlement to partial summary judgment on her claim for a \$45,000 commission on the sale of *Long Island*. However, entry of judgment will be held in abeyance until the remaining claims in this case have been resolved at trial or by settlement. *See* CPLR 3212 (e) (2).

Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment is granted to the following extent:

-- granting partial summary judgment on the fourth claim for relief,
ADJUDGING and DECLARING that plaintiff Paula Scher is the owner of and

entitled to immediate possession of all of the approximately 320 unsold prints of her artwork currently being held in escrow by Crozier Fine Arts, Inc., upon service of a copy of this order and interlocutory judgment with notice of entry on the independent escrow agent, John B. Koegel, Esq., and full payment of the storage and escrow fees as per the court's January 25, 2011 order; and

--granting partial summary judgment on the fifth claim for relief, ruling that defendant Stendhal Gallery, Inc. owes plaintiff Paula Scher a \$45,000 commission for the sale of her painting *Long Island*, but that entry of judgment shall be held in abeyance pursuant to CPLR 3212 (e) (2) until the remaining issues in this case are resolved at trial or by settlement;

--granting partial summary judgment on the eighth claim for relief seeking an accounting, and ordering defendants to provide a sworn and detailed accounting of all sales or other dispositions of plaintiff's paintings and prints, including expenses incurred, in accordance with the directives contained in this decision and order no later than 45 days from service of a copy of this order and interlocutory judgment with notice of entry; and

plaintiff's motion is denied in all other respects; and it is further

ORDERED that defendants' cross motion for partial summary judgment is ~~granted to the extent of ruling that~~ ^{denied,} and ^{not} ~~to any portion of the value of the 320 unsold prints~~ ^{or otherwise,} ~~value of the unsold prints, either gross or net of expenses, and the amount, if any, owed to~~ ~~except for the Gallery's printing costs;~~ ~~defendants shall be determined at the plenary trial of this action;~~ and it is further

ORDERED that all remaining claims and counterclaims are severed and continued pursuant to CPLR 5012.

Dated: September 15, 2011

ENTER:

FILED

OCT 19 2011

NEW YORK
CITY CLERKS OFFICE

J.S.C.

Norman Goodman
CLERK of the COURT
18

5/9/12:

Judgment amended pursuant to order of Justice, Melvin L. Schweitzer dated 5/23/12 and filed on 5/17/12, document No. 78. ngfuf

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

-----X
PAULA SCHER,

Plaintiff,

- against -

STENDHAL GALLERY, INC.; STENDHAL
NEW YORK, INC.; MARIAM STENDHAL
GALLERY, INC.; MAYA STENDHAL
GALLERY, INC.; and HARRY STENDHAL,
each d/b/a "STENDHAL GALLERY,"

Defendants.
-----X

Index No.650598 / 2010

JUDGMENT

FILED

OCT 19 2011

AT 10:47 AM
N.Y. CO. CLK'S OFFICE

5/19/12:
Judgment amended pursuant to order of
Justice, Melvin L. Schweitzer dated 5/23/12
and filed on 5/17/12, document number
78. No/lup

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