

Marc Jancou Fine Art Ltd. v Sotheby's, Inc.
2012 NY Slip Op 33163(U)
November 13, 2012
Sup Ct, NY County
Docket Number: 650316/2012
Judge: Ellen M. Coin
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK

NEW YORK COUNTY

PRESENT: ELLEN M. COIN
J.S.C.
 Justice

PART 63

Index Number : 650316/2012
 MARC JANCOU FINE ART LTD.,
 vs.
 SOTHEBY'S, INC.
 SEQUENCE NUMBER : 002
 SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

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

MOTION IS DECIDED IN ACCORDANCE
 WITH THE ANNEXED DECISION
 AND ORDER.

This constitutes the decision and order of the Court.

Dated: 11/13/12

Ell, J.S.C.

ELLEN M. COIN
 J.S.C.

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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

-----X

MARC JANCOU FINE ART LTD., Doing
Business As MARC JANCOU CONTEMPORARY,

Plaintiff,

Index No.: 650316/2012
Subm. Date: August 29, 2012
Mot. Seq.: 002

-against-

DECISION AND ORDER

SOTHEBY'S, INC. and CADY NOLAND,

Defendants.

-----X

For Plaintiff :

Hanly Conroy Bierstein Sheridan Fisher & Hayes LLP
By Paul J. Hanly, Jr., Esq.
112 Madison Avenue
New York, New York 10016-7416
212-784-6400

For Defendant Sotheby's:

Stroock & Stroock & Lavan LLP
By Charles G. Mordler, Esq.
180 Maiden Lane
New York, New York 10038
212-806-5400

Papers considered in review of these motion and cross-motion for summary judgment :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Memorandum of Law in Support of Motion to Dismiss.....	<u>2</u>
Jancou's Notice of Cross-Motion for Summary Judgment.....	<u>3</u>
Hanly's Affirm. in Opp. with Attachments Annexed.....	<u>4</u>
Memorandum of Law in Opposition. and in Supp of Cross-Motion.....	<u>5</u>
Memorandum of Law in Reply.....	<u>6</u>

ELLEN M. COIN, J.:

This case arises out of the consignment for sale at auction of a work of art by Plaintiff Marc Jancou Fine Art, Ltd. ("Jancou") with defendant Sotheby's, Inc. ("Sotheby's"). Sotheby's moves for an order (1)granting summary judgment dismissing the two causes of action asserted against it in the amended complaint and (2)severing its counterclaims. Plaintiff Jancou cross-moves for partial summary judgment on its first cause of action, for breach of contract, against

Sotheby's. For the reasons stated herein, the motion is granted and the cross-motion is denied.

The parties entered into a consignment agreement dated September 9, 2011. In its introductory paragraph, it provided, "This agreement confirms your and our agreement under which **the property listed on the attached Property Schedule** ("Property") will be offered for sale at auction...." (Exh. 1 to the Affirmation of Charles G. Moerdler dated May 11, 2012)(emphasis added). The Property Schedule attached to the consignment agreement describes the property as follows: "Cady Noland, Cowboys Milking, 1990 Aluminum print, 48.2 x 72 in." (Id.). The print was to be auctioned by Sotheby's on November 10, 2011 (Compl., para. 6; Exh. 3 to the Moerdler Aff.).

At the time that the print was initially unpacked in Sotheby's Central Receiving area, it was noted that "there is [s]ome bending of the aluminum at 3 of the corners [and] there are some small areas of bending/indentation in the aluminum; ex: along the left side near the upper corner, and also along the bottom edge near center." (Email dated September 27, 2011; Exh. 10 to the Moerdler Aff.).

It is undisputed that on or about November 7, 2011, Noland viewed the print and thereafter, through her attorney, asserted that the print had been modified or damaged subsequent to her authorship. Noland then disclaimed authorship of the work under the Visual Artists Rights Act, 17 USC § 106 ("VARA") and demanded that Sotheby's withdraw it from auction (Affirmation of Jonathan A. Olsoff dated May 10, 2012, paras. 6,7).

Sotheby's attempted to persuade Noland to reconsider her position. When that effort was unsuccessful, Sotheby's immediately contacted Jancou's principal, Marc Jancou, to advise him that Noland's disavowal required Sotheby's to withdraw the print from the auction. Mr. Jancou,

in turn, advised Sotheby's that he had a report by a conservator, Christian Scheidmann, that might help persuade Noland to change her mind and reverse her position. Although the report was dated June 30, 2011, Jancou had not disclosed its existence to Sotheby's until after Noland's demand that the work be withdrawn. Mr. Jancou offered to forward the report to Sotheby's, and Sotheby's received it on or about November 9, 2011 (Olsoff Aff. paras. 9, 10).

Regarding the condition of the print, the report stated, "Compared to many other aluminum sheets of this body of work this particular work is in very good condition...However, all four corners are bent and slightly deformed. On the left side upper edge there is a 3" long deformation in the metal." In describing the "Actual Treatment" by the conservator, the report stated, "The corners were straightened multiple times with minor success. Also the upper left side edge was bent back into straight shape with little success. The work appears now better maintained than before. **Some deformations, however, will always be noticeable.**" (Exh. 11; emphasis added).

Upon viewing the conservator's report, Sotheby's advised Jancou that the report was unhelpful and unlikely to persuade Noland to change her position. With Jancou's consent, Sotheby's suggested to Noland's counsel that he speak to the conservator. On November 9, 2011, Sotheby's received an email from Noland's counsel, in which he "repeat[ed] and re-emphasize[d]" Noland's demand that Sotheby's withdraw the print from auction. He asserted, "The current condition of the work materially differs from that at the time of its creation." He stated that he did speak with the conservator, "who confirmed Ms. Noland's suspicions that there had been attempts at restoration," adding, "It's apparent then that Christie's agreed at Ms. Noland's request not to offer the work for sale, in 2011, after [the] efforts at restoration."

(Presumably the dealer/consigner of ‘Cowboys Milking’ was well aware of Christie’s declination before submitting the work to Sotheby’s). [The conservator] said that he reduced the damage, but could not remove the damage, and could not fix it. [He] emphasized that he could not restore the work to its original condition.” (Email of Jonathan N. Halpern to Jonathan Olsoff dated November 9, 2011; Exh. 8 to the Moerdler Aff.).

Thus, Noland’s counsel declared her objection to the auctioning or other sale of the work, asserting “her rights under VARA and . . . that her honor and reputation will be prejudiced as a result of offering ‘Cowboys Milking’ for sale with her name associated with it, in light of the material and detrimental changes to the work that have occurred since its creation.” (*Id.*).

Sotheby’s withdrew the print from the November 10, 2011 auction sale.

The Amended Complaint

The amended complaint asserts two causes of action against Sotheby’s: (1) for breach of contract and (2) for breach of fiduciary duties.

Discussion

The Visual Artists Rights Act (“VARA”) was enacted in 1990 as an amendment to the Copyright Act, to provide for the protection of the “moral rights” of certain artists. (*Pollara v Seymour*, 344 F3d 265, 269 [2d Cir 2003]). “[M]oral rights afford protection for the author’s personal, non-economic interests in receiving attribution for her work, and in preserving the work in the form in which it was created, even after its sale or licensing.” (*Id.*, citation omitted).

The statute provides *inter alia* that the author of a work of visual art “shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her

honor or reputation....” (17 USCA §106A(a)(2)).

Determination of the instant motion and cross-motion does not require interpretation of VARA. Instead, the issue for the Court is whether, in the face of the artist’s objection under VARA to the use of her name as the author of the print, there is any material issue of fact as to whether Sotheby’s failed to comply with its contractual and fiduciary obligations to plaintiff. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

The consignment agreement provided that the property listed on the Property Schedule was to be auctioned. Significantly, the property was listed on that Schedule as “Cady Noland, Cowboys Milking....” (Exh. 1 to the Moerdler Aff.). Regarding withdrawal, the agreement provided that Sotheby’s could withdraw any Property at any time before sale if in its “sole judgment (a) there is doubt as to its authenticity or attribution, (b) there is doubt as to the accuracy of any of [Janou’s] representations or warranties....” (Id. at para. 9). Among the representations and warranties contained in the agreement was the representation that Janou had no reason to believe that the property “is not authentic....” (Id. at para. 7).

The essential elements of a breach of contract claim are the formation of a contract between parties, performance by plaintiff, the defendant’s failure to perform, and resulting damage to the plaintiff. (*Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]; *Severo v Rockefeller Univ.*, 19 Misc3d 1122A, *3 [Sup Ct, New York County 2008]).

In this case the consignment agreement gave Sotheby’s the right to withdraw the print from auction “if in [its] sole judgment” there were doubt as to attribution. Given Noland’s assertion of her right under VARA to prevent the use of her name in connection with plaintiff’s print, there was more than “doubt” as to attribution, and Sotheby’s was within its rights to

withdraw the print from the auction in the circumstances here. Only Sotheby's judgment was to be considered under the consignment agreement, and the record establishes that there was a substantial, objective basis for Sotheby's judgment that there was such doubt as to attribution.

The conservator's report, pre-dating the consignment agreement (but not provided to Sotheby's by plaintiff until after execution of the agreement and Noland's assertion of her VARA rights), establishes that the work bore permanent damage that could not be fully repaired. Indeed, Sotheby's Central Receiving department, upon inspection of the print post-execution of the consignment agreement, confirmed damage to the print. While plaintiff points to the excitement expressed about the print in an email by a Sotheby's employee (Exh. 1 to the Affirmation of Paul J. Hanly, Jr., dated June 1, 2012), that email is dated June 9, 2011, and preceded plaintiff's delivery of the print to Sotheby's and Noland's assertion of her right to prevent the use of her name as its author.

Similarly, the undated Condition Report for the print (Exh. 2 to the Hanly Aff.), transmitted by email from Sotheby's to Jancou on November 16, 2011 (in apparent response to a request for it), while stating "This work is in very good condition overall", also states that "[t]here is a crimp to the upper right corner and another to the lower left corner." Moreover, the Report contains the following disclaimer: "**Please note that Sotheby's is pleased to provide a verbal opinion of the condition of a lot as a courtesy to our clients. However, as we are not professional conservators we do not guarantee the content of the written condition reports.**"(emphasis in text). In the face of Noland's invocation of her VARA rights, this subsequently-delivered, qualified report fails to undercut Sotheby's position that in its sole judgment there was "doubt" as to attribution.

Sotheby's has established that it was within its contractual right to withdraw the print from auction. Absent the author's name, the print was not the "Property" listed on the Property Schedule attached to the consignment agreement and there was more than doubt as to attribution: there was no attribution. Under the circumstances here, there is no issue of fact that Sotheby's was not in breach of the consignment agreement. Thus, it is entitled to summary judgment dismissing plaintiff's cause of action for breach of contract.

Similarly, there is no triable issue of fact precluding summary judgment dismissing plaintiff's claim against Sotheby's for breach of fiduciary duty. The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct. (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-670 [1st Dept 2011]; *Rut v Young Adult Institute, Inc.*, 74 AD3d 776, 777 [2nd Dept 2010]).

Under general principles of agency, an auctioneer acts as the agent of the consignor. (*Cristallina S.A. v Christie, Mansan & Woods Int'l, Inc.*, 117 AD2d 284, 292 [1st Dept 1986]). Thus, an agent is a fiduciary with respect to matters within the scope of its agency. (Restatement [Second] of Agency §13).

While Sotheby's as auctioneer on behalf of Jancou became its agent, its responsibilities were defined and circumscribed by the parties' consignment agreement. (*Greenwood v Koven*, 880 F Supp 186, 194 [SDNY 1995]; *Sveaas v Christie's Inc.*, 452 Fed Appx 63, 66-67 [2d Cir 2011]; *Mickle v Christie's*, 207 F Supp 2d 237, 244-245 [SDNY 2002]).

Thus, Sotheby's fiduciary duty to Jancou was modified, *inter alia*, by the provision of the consignment agreement giving Sotheby's the right to withdraw the print from auction if in its

“sole judgment there is doubt as to its authenticity or attribution.” “Agreements conferring upon one party an indefinite right to condition performance upon a determination that is based on an act of personal discernment or sole discretion are uniformly upheld—subject to a duty on the part of the party so empowered to exercise honest judgment . . .” (*Mickle*, 207 F Supp 2d at 246 [citation omitted]). There is no indication that Sotheby’s withdrawal of the print item was made in bad faith. On the contrary, Sotheby’s has established that there was ample support for its determination that there was doubt as to the print’s attribution, and thus Jancou’s claim for breach of fiduciary duty must be dismissed. (*Id.* at 246-248).

In accordance with the foregoing, it is hereby

ORDERED that defendant Sotheby’s Inc.’s motion for summary judgment is granted and the complaint is severed and dismissed as against Sotheby’s Inc. only, and the rest of the action shall continue; and it is further

ORDERED that plaintiff’s cross-motion for summary judgment on its breach of contract cause of action is denied.

This constitutes the decision and order of the Court.

Date: November 13, 2012
New York, New York

ENTER:



Ellen M. Coin, A.J.S.C.