SHIRLEY WERNER KORNREICH
J.S.C

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

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LEW NUSSBERG a/k/a LEV NUSSBERG,

Index No.: 650741/2009

Plaintiff,

DECISION & ORDER

-against-

GARY TATINTSIAN a/k/a GARRI TATINTSIAN, GARY TATINTSIAN GALLERY, INC., and VIKTORIA PUKEMOVA,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Motion Sequence Numbers 013, 014, 016, and 017 are consolidated for disposition.

I. Procedural History & Factual Background

The court assumes familiarity with its order dated April 30, 2013 (the SJ Order).[1] *See* Dkt. 313; 2013 WL 7117772. On June 7, 2013, the remaining parties, Nussberg and the Tatintsian Defendants, each filed motions *in limine*. Seq. 013 & 014. Oral Argument on these motions was held on August 27, 2013. *See* Dkt. 391 (8/27/13 Tr.). The court made certain rulings on the record but did not issue an order on the motions because, given the confusing history of this action, the court felt it important to issue a written order to provide clarity about what cannot be introduced at trial. On October 8, 2013, a pre-trial conference was held, at which the court made further evidentiary rulings and directed the parties to conform their trial evidence books accordingly. *See* Dkt. 430 (10/8/13 Tr.). In an order dated November 12, 2013 (the App Order), the Appellate Division affirmed the SJ Order. *See* 111 AD3d 441 (1st Dept 2013).

However, on November 22, 2013, Nussberg moved for renewal of the SJ Order on the ground that the App Order supposedly modified the SJ Order on the issue of defendants' burden of proof on their fraud/forgery counterclaims. Seq. 016. Nussberg argued such claims should be

[1] A capitalized terms have the same meaning as in the SJ Order.

dismissed because defendants lack the quantum of proof mandated by the Appellate Division. The Tatintsian Defendants opposed this motion. For the reasons that follow, Nussberg's motion to renew is denied.

Finally, on May 14, 2014, the Tatintsian Defendants moved for leave to supplement the record on Nussberg's *in limine* motion (seq. 014) to include testimony from a witness, residing in Russia, who was not previously produced for a deposition. Seq. 017. The Tatintsian Defendants' motion is denied for the reasons that follow.

II. The Tatintsian Defendants' Motion in Limine (Seq. 013)

The Tatintsian Defendants' motion is granted on two issues.

First, Nussberg may not introduce evidence about the 2009 Contract's enforceability (e.g, that it was entered into under duress) because summary judgment on Nussberg's claims under the 2009 Contract was already granted in the SJ Order.

Second, Nussberg may not testify about the authenticity of the Returned Works. The authenticity of the Returned Works require expert testimony. Though Nussberg may testify about how he came to own the works, he may not opine on the works' authenticity because he is not qualified to do so. In other words, Nussberg may testify that he received the works from the artist and other matters of provenance, but Nussberg may not opine on whether the works are forgeries (except, of course, to deny that he forged them).

III. Nussberg's Motion in Limine (Seq. 014)

At the outset, the court notes that Nussberg's motion, which is nominally a motion *in limine*, for the most part, seeks summary judgment. No good cause exists to allow further summary judgment. *See Brill v City of New York*, 2 NY3d 648 (2004). Hence, the court will not

address the portions of Nussberg's motion that seek summary judgment based on the argument that the Tatintsian Defendants lack any admissible evidence to prove their counterclaims.[2]

Additionally, the court will not preclude any of the Tatintsian Defendants' expert evidence on the ground that such evidence supposedly fails to meet the *Frye* standard. *See generally People v Angelo*, 88 NY2d 217, 222-23 (1996) ("the customary admissibility test for expert scientific evidence [] looks to general acceptance of the procedures and methodology as reliable within the scientific community"); *Nonnon v City of New York*, 32 AD3d 91, 102 (1st Dept 2006). Nussberg, on occasions far too numerous to recount, has been told by the court that *Frye* objections, such as Martin's methodology supposedly being novel and unreliable, must either be made in a pre-trial *Frye* hearing or else Nussberg would be left to rebut defendants' expert with his own at trial. The court was clear that attacks on Martin's methodology, such as Martin's failure to follow the very methodology listed on his company's website, are not grounds for a preclusion order and would only be formally considered at a *Frye* hearing. At this late stage, after Nussberg's counsel repeatedly represented to the court that they have no interest in a *Frye* hearing, the court will not further delay the trial to conduct one.

It should be noted, however, that the record on the instant motions does not warrant the preclusion of Martin's testimony. Rather, objections to Martin's testimony "are actually matters going to trial foundation or the weight of the evidence, both matters not properly addressed in the pretrial Frye proceeding." *See People v Wesley*, 83 NY2d 417, 426 (1994); *People v Assi*, 63 AD3d 19, 28 (1st Dept 2009) (expert's reliance on "photographic evidence to form his opinion went to the weight to be accorded his opinion by the jury rather than its admissibility").

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[2] Averring that "defendants will be unable to prove" a claim is a summary judgment argument, not an *in limine* application. The purpose of the instant motions is to rule on the admissibility of evidence, not to grant dismissal of claims that Nussberg failed to timely raise on his previous summary judgment motion.

The rest of Nussberg's *in limine* motion, which was briefed in a confusing manner, is best addressed by ruling on each of the 14 categories of relief sought by Nussberg.

First, Nussberg's argument that the Tatintsian Defendants lack any evidence of fraud is rejected. As mentioned earlier, and multiple times below, no further summary judgment will be granted. That being said, and as the court held on the record on August 27 and October 8, 2013, hearsay evidence about, *inter alia*, Russian purchasers' forgery claims or related lost business, will not be allowed into evidence. Only live witness testimony will be permitted for the truth of matter asserted and such testimony is limited to those witnesses who have appeared for a deposition. The court assumes that, by now, more than seven months after the final pre-trial conference, the parties' evidence books are trial ready (i.e. they comply with the specific *in limine* rulings made at the pre-trial conference).[3]

Second, Nussberg's statute of limitations arguments are rejected. The time to make such arguments was on the summary judgment motion.

Third, the court will not categorically preclude evidence of alleged payments under the 2006 Agreement. The questions of fact about the parties' net financial obligations will be resolved by the jury.

Fourth, again, the court will not categorically preclude evidence of the Tatintsian Defendants' alleged damages. Of course, inadmissible hearsay evidence will not be allowed, and the court will not permit an unduly speculative damages award unsupported by the evidence.

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[3] The court commends the Tatintsian Defendants' for respecting the rulings of the court (both on the merits of the dismissed claims and on the *in limine* rulings) and appreciates the fact that the Tatintsian Defendants did not use this round of briefing to effectively reargue this court's rulings, much of which were not in their favor. The court expects the same to be true in front of the jury, so the need for objections regarding the admissibility of evidence can be kept to a minimum. Rulings are made prior to trial to assure that the jurors' precious time can be spent listening to the evidence and not wasted waiting for argument and rulings.

Fifth, as the court has already ruled, a determination of the amount, if any, of punitive damages will not be made until after trial on liability.

Sixth, Nussberg's hearsay objections to the Tatintsian Defendants' expert evidence misses the mark. As the Tatintsian Defendants correctly acknowledge, hearsay evidence relied on by experts is inadmissible, but expert conclusions informed by hearsay demonstrated to be reliable and of the type commonly relied upon in the profession, are admissible. *Hambsch v NYCTA*, 63 NY2d 723, 725-26 (1984); *see Belmer v HHM Assocs., Inc.*, 101 AD3d 526, 529 (1st Dept 2012).

Seventh, the court will not categorically exclude foreign language documents. The court assumes that the minor translation issues discussed at the pre-trial conference have been resolved. The translations, of course, must be certified by an appropriate translator.

Eighth, the issue of the ownership of the Tatintsian Gallery is moot because Tatintsian admits that he owns the gallery. *See* Dkt. 378 at 8.

Ninth, the court will not rule on whether the 11 Malevich drawings were part of the 2009 consignment. This is a question of fact for the jury to resolve.

Tenth, Nussberg's own valuations of the 2009 works are admissible as an admission. However, the only valuation permitted into evidence is for the 1 work from the 2009 Contract that was part of the Retuned Works, since the Tatintsian Defendants cannot get a forgery set-off for works still in Russia.

Finally, the *Eleventh*, *Twelfth*, *Thirteenth*, and *Fourteenth* issues are mostly duplicative of the matters discussed above. Aside from Nussberg's hearsay and *Frye* objections rejected by the court, Nussberg's technology objections (e.g., native files) are either substantively without merit

or have been remedied by subsequent disclosure. Nussberg failed to raise any reasonable inference of file tampering or a lack of relevant technological data necessary to refute the contentions in the Tatintsian Defendants' expert reports.

IV. Nussberg's Motion to Renew the SJ Order (Seq. 016)

CPLR 2221(e) provides that, on motion to renew, the movant "shall demonstrate that there has been a change in the law that would change the prior determination."

Nussberg argues that the App Order, even though it affirmed the SJ Order, really contains a new standard of proof that this court is bound to follow. To be sure, "'[a]n appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court.'" *Carmona v Mathisson*, 92 AD3d 492 (1st Dept 2012), quoting *J-Mar Serv. Ctr., Inc. v Mahoney, Connor & Hussey*, 45 AD3d 809 (2d Dept 2007). Here, however, the Appellate Division affirmed the SJ Order, did not expressly state that the evidentiary standard set forth in the SJ Order was erroneous in any way, and employed language that mirrors the SJ order. Compare SJ Order, 2013 WL 7117772, at *4 ("The only opinion that can shed any light on the authenticity of the Returned Works is that of an expert who has examined the originals and the Returned Works and has the wherewithal to detect a forgery"), with App Order, 111 AD3d at 441 ("The motion court correctly determined that expert testimony is required to identify and authenticate the works of art; specifically, the testimony of an expert who viewed the consigned works before they left the United States in 2009 and who can testify that they were forgeries when they left and were forgeries on their return"). This court cannot discern a meaningful difference between the standard articulated by this court and by the Appellate Division. Indeed, as the Appellate Division noted, this standard "is consistent with how art work

and forgeries are identified, authenticated and detected." *Id.* at 441, citing *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 99 (1st Dept 2009).

The basis for Nussberg's renewal motion is premised on his attorneys' continued conflation of two, distinct issues that the Tatintsian Defendants must prove to prevail on their forgery claims: "that (1) the Returned Works are the same works given to them by Nussberg; and (2) the Returned Works are forgeries." *See* SJ Order, 2013 WL 7117772, at *5; *see also* Dkt. 411 at 12 (where the Tatintsian Defendants acknowledge they must establish both that (1) "the Returned Works are … what Nussberg sold and (2) … the Returned Works are forgeries."). In other words, even if the Tatintsian Defendants' expert evidence conclusively proves that the Returned Works are forgeries, their forgery claims will fail if they cannot also prove that the Returned Works are the same works sold to them by Nussberg. Moreover, as noted in the SJ Order, since the Tatintsian Defendants' forgery counterclaims were pled as common law fraud causes of action and not contractual warranty breaches, such claims also will fail if they do not prove that "Nussberg knew that the works are forgeries at the time the parties entered into the contracts," even if the works are actually forgeries because scienter is an element of fraud. *See* SJ Order, 2013 WL 7117772, at *5 n.5.

V. The Tatintsian Defendants' Motion to Supplement the Record (Seq. 017)

This motion is denied. Fact discovery has long been closed. This is a 2009 case that should have been tried years ago. The delay was caused by the Appellate Division's allowance of Tatintsian Defendants' forgery counterclaims [*see* 90 AD3d 563 (1st Dept 2011)], claims that the Appellate Division, perhaps, recognized should not have been allowed to be added, as evidenced by their affirmance of the SJ Order, which established a high evidentiary bar that the

Tatintsian Defendants have, for the most part, not come close to meeting. *See* SJ Order, SJ Order, 2013 WL 7117772, at *5 n.5 ("even if the Tatintsian Defendants established that all 35 [now, at most, only the 22 analyzed by experts] of the Returned Works are forgeries, the value of such a set-off would likely be minimal compared to the money owed under the subject contracts, because the vast majority of the approximately 200 works at issue are not impacted by the forgery allegations."). Accordingly, it is

ORDERED that the motions *in limine* are decided in accordance with this decision and the rulings by the court on the record on August 27, 2013 (Dkt. 391) and October 8, 2013 (Dkt. 430); and it is further

ORDERED that plaintiff's motion to renew is denied; and it is further

ORDERED that the Tatintsian Defendants' motion to supplement the record is denied; and it is further

ORDERED that a final pre-trial conference will be held on July 29, 2014 at 11:00 am, at which time court will ensure the case is trial ready and, if so, a trial date will be scheduled.

Dated: June 20, 2014

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH

J.S.C