

High Value Trading LLC v Shaoul

2014 NY Slip Op 31875(U)

July 15, 2014

Supreme Court, New York County

Docket Number: 651788/11

Judge: Joan A. Madden

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

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HIGH VALUE TRADING LLC and
ALSKOM REALTY, LLC,

Index No. 651788/11

Plaintiffs,
-against-

JACK SHAOUL and UNIVERSE ANTIQUES, INC.,
Defendants.

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Joan A. Madden, J.:

Plaintiffs move for summary judgment dismissing defendants’ first counterclaim (motion seq. no. 003). Defendants oppose the motion and separately move for an order compelling discovery and/or granting discovery sanctions (motion seq. nos. 005 and 006).¹ With respect to the second motion to compel, plaintiffs cross move for sanctions.

This action arises out of allegations that defendants sold plaintiff Alskom Realty LLC (“Alskom”) a fake painting purportedly created by Renoir, for \$1,100,000 in March 2010. Defendant Jack Shaoul is the owner of defendant Universe Antiques, Inc. (“Universe”), which is in the business of selling artwork. Non-party Alexander Komolov is an art dealer and the owner of Alskom and plaintiff High Value Trading, LLC (“High Value”).

The complaint asserts causes of action for unjust enrichment, conversion, and fraudulent misrepresentation. Defendants answered the complaint and asserted two counterclaims. At issue here is the first counterclaim, for breach of consignment contracts, as asserted in defendants’ second amended answer. It alleges that in July 2011, Universe delivered to High Value, Alskom and Komolov and an associate Nicholas Milani, three art works on consignment. The three artworks are: 1) “Meindert Habbema,” oil on panel painting 31" by 42," 1) Andy Warhol’s

¹Motion seq. nos. 003, 005 and 006 are consolidated for disposition.

“Mao” silkscreen and acrylic on canvas 36" by 32", 3) Andy Warhol’s Marilyn Monroe, silkscreen and acrylic on canvas 36" by 36." It is alleged that the total value of the first two items in “a dealer to dealer transaction” was \$2,000,000 and 6,000,000 appraised and that the third item in “a dealer to dealer transaction” was \$150,000 and \$160,000 appraised. In support of the counterclaim, defendants refer to exhibit 3 of the second amended answer which includes three invoices for the consignments. The counterclaim seeks \$2,150,000 based on the total value of the consignments or, in the event of fraud, \$6,160,000.

Plaintiffs now move for summary judgment dismissing the first counterclaim on various grounds including that a “Possession Agreement” entered into between Komolov and Shaoul gave Komolov temporary possession of the three artworks, and that Komolov returned the work after his appraiser determined that the “Mao” by Warhol was a fake and therefore the artwork was worth less than \$2,700,000 stipulated by the parties to the Possession Agreement. In addition, plaintiffs argue that Possession Agreement did not refer to or concern any of the named plaintiffs in this action but rather was between Komolov, in his personal capacity, and Shaoul. In support of its motion, plaintiff submits a copy of the Possession Agreement, Komolov’s affidavit, and a receipt for the return of the three artworks dated September 6, 2013 and signed by Shaoul and his attorney.

The Possession Agreement, which is dated July 22, 2011, and signed by Komolov and Shaoul, was entered into in an effort to settle this action. It provides, in pertinent part that, defendants shall “furnish to [Komolov] on or about July 26, 2011, the following items (“Items”):

- 1) “Meindert Habbema,” oil on panel painting 31" by 42,"
- 2) Andy Warhol’s “Mao” silkscreen and acrylic on canvas 36" by 32",

3) Andy Warhol's Marilyn Monroe, silkscreen and acrylic on canvas 36" by 36."²

It further provides that Komolov shall "employ the services of a professional art expert to examine authenticity of the Items [and] [i]f the Items are found to be authentic and if the market value of the items exceeds \$2.7 million...the parties to [this action] shall enter into a Stipulation of Settlement dismissing [this action] and signing General Releases." In addition, the agreement states that "Komolov is not taking ownership of the Items at the present time [and that] [i]n the event the Items are not authentic and/or their value is below the amount stated, Mr. Komolov will return the Items to Mr. Shaoul."

Based on the Possession Agreement, the signed receipt for the return of the three artworks, and Komolov's affidavit, defendants have made a prima facie showing entitling them to summary judgment and the burden thus shifts to defendants to raise a triable issue of fact. Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Here, defendants have not met this burden. In opposition, defendants do not dispute that the Possession Agreement governs the arrangement between Komolov and defendants with respect to the three artworks at issue in the first counterclaim, nor do they dispute that plaintiffs returned the artwork. In fact, in his affidavit, Shaoul states that "[t]his motion shows that I have won the counterclaim on consent with the surrender of my art to me demonstrates the validity of my position."

Moreover, none of the discovery sought by defendants in their two motions to compel are relevant to the first counterclaim or would lead to evidence sufficient to raise a triable issue of fact as to the viability of the counterclaim. In this connection, while defendants seek to have

²The Possession Agreement also refers to a fourth item described as a sculpture of a "Fat Banker holding a cane and cigar," but that item is not at issue here, apparently because it was to be examined a Universal.

plaintiffs turn over certain documents accompanying the artwork which is the subject of the first counterclaim, they do not explain how such documents would create an issue of fact.

Furthermore, the “mere hope” that plaintiffs “might be able to uncover some evidence during the discovery process” is insufficient to deny summary judgment. Pow v. Black, 182 AD2d 484, 484 (1st Dept 1992)(internal citation and quotation omitted). In addition, while at oral argument, defendants’ attorney argued, for the first time, that these documents were provided with the artwork, and that the counterclaim therefore remains viable, such argument cannot be considered as defendants do not include such allegations in their first counterclaim. Accordingly, plaintiffs are entitled to summary judgment dismissing the first counterclaim asserted in the second amended answer.

With respect to defendants’ motion to compel discovery, CPLR 3101(a) provides that “[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action.” The words “material and necessary” are “liberally interpreted to require disclosure, upon request, of any facts bearing on a controversy which will assist in sharpening the issue at trial.” Roman Catholic Church of Good Shepherd v. Tempo Systems, 202 AD2d 257, 258 (1st Dept 1994). At the same time, however, “a party is not entitled to unlimited, uncontrolled or unfettered disclosure.” Gutierrez v. Trillium, USA, 111 AD3d 669 (2d Dept 2013)(internal citation and quotations omitted).

At issue on the motion to compel are plaintiffs’ responses to defendants’ Third Demand for Documents. With respect to Demand 1, which seeks originals of all letters from all experts including reports and correspondence, plaintiffs responded that “there are no documents...beyond what has already been produced.” Likewise, in response to defendants’ request for originals

various documents, that is Demands 22-26, 29,30, 32, plaintiffs have stated that no documents exist or that none exist beyond what has been produced. To supplement these responses, plaintiffs are to provide an affidavit from a person with personal knowledge providing a “detailed statement” as to “the past and present status” of the documents sought, the record keeping methodology with respect to the documents, and the nature and extent of the search conducted for such documents. Long v. Armor Elevator. Co., Inc., 278 AD2d 127 (1st Dept 2000); Faggots v. Time Inc., 24 AD2d 443 (1st Dept 1965)(requiring plaintiff to produce documents where objection that he did not have the requested documents was not supported by an affidavit from plaintiff or a person with knowledge).

As to the remaining demands, plaintiffs have properly objected to such demands on various grounds, including that they seek information not relevant to this action and are not reasonably calculated to lead to discovery. Thus, the demand for Komolov’s passport showing his travel destinations from 2008 to date (Demand 3) has no bearing on the issues in this case. In addition, contrary to defendants’ position, a sample of Komolov’s original signature from his passport is also not relevant since neither plaintiffs’ claims nor defendants’ counterclaims concern Komolov’s signature.

Next, Demand 4, which seeks original bank records of the plaintiffs for the period 2008-2009, showing all transactions including business done with non-party David Segal and all plaintiffs, including records and accounts in Kazakhstan, Russia, and out of the United States where the Renoir was shipped, does not seek relevant information. Specifically, as plaintiffs point out, Alskom has produced the check it used to pay for the allegedly fake Renoir painting at issue in this action. Moreover, while defendants assert that the bank records are “critical to a

companion case,” they do not assert how such records are relevant to any of their remaining counterclaims, including the second counterclaim seeking a \$100,000 balance allegedly due and owing on Renoir’s daughter painting, which was purportedly taken by plaintiffs on consignment but not purchased or returned. Additionally, Demand 33, which seeks original signature samples from signed check cleared from plaintiffs’ account in 2008, does not seek information relevant to this action.

Demands 4 and 5 which seek, respectively, “the original of contracts and letter etc with partners in Kazakhstan Russia and any others out of the United States where Renoir was shipped” and “the original of contracts and letter etc with customers in Kazakhstan Russia and any others out of the United States where Renoir was shipped” also do not seek relevant information. As plaintiffs point out, the “fake” Renoir relating to plaintiffs’ claims has been produced for inspection. While defendants assert that they believe “other Renoir paintings may have been shipped to Kazakhstan,” as there is no dispute as to the identity of the Renoir at issue, such assertion bears no relevance to this action.

Defendants also seek Komolov’s arrest records. Notably, these records are not relevant to any issues in this action and are sought by defendants solely to test Komolov’s credibility since Komolov denied at his deposition that he was ever arrested, and subsequently indicated in an errata sheet that he had been arrested for harassment and that the charges had been dismissed. Under these circumstances, plaintiffs’ production of an “errata” sheet signed by Komolov is sufficient to satisfy their discovery obligations. See generally, Gebbie v. Gert Div. of Allied Stores of New York, Inc., 94 AD2d 165 (2d Dept 1983).

Demands 10 and 21 seek, respectively, the originals of all writings claimed by the

defendants to be evidence of any agreement with plaintiffs or their assignees relating to the artwork at issue, and original documents showing the location of and custody of the artwork. Demand 10 which asks plaintiffs for writings claimed by “defendants” is properly objected to as vague and not designed to lead to relevant discovery. As for Demand 21, as there is no dispute regarding the location of the relevant artwork and defendants have inspected it, such demand does not seek relevant information. Demand 28, which seeks an “original document that states or sets forth the interest of Komolov and High Value and Alskom,” is not relevant as Komolov is not a party to the action and did not pay for the artwork at issue. As for Demand 31 which requests “the original paintings in issue,” such demand will not produce relevant discovery since the allegedly fake Renoir has been inspected by defendants and, as indicated above, the three artworks that were the subject of the first counterclaim have been returned to defendants. As for Demand 34, which seeks inspection of the original frame accompanying Renoir’s three bathers, a painting which is mentioned in connection with the second counterclaim, such request is irrelevant to this action, as the counterclaim alleges that plaintiffs paid for this painting and does not seek any relief related to its frame.

Accordingly, defendants’ motion to compel discovery (motion seq. 005) is granted only to the extent of directing that with respect to Demands 1, 22-26, 29,30, 32, that plaintiffs provide a supplemental response to such demands by submitting an affidavit(s) from a person(s) with personal knowledge as per this decision and order within 30 days of the date of the e-filing of this decision and order.

As for defendants’ second motion to compel discovery, such motion raises, without court permission, issues relating to plaintiffs’ motion for partial summary judgment motion and defendants’ first motion to compel, which were fully submitted and pending before this court,

when it was made. Additionally, the second motion to compel is not accompanied by an affirmation of good faith as required by Uniform Rules of Trial Courts section 202.7(c). Moreover, defendants' counsel did not appear on April 28, 2014 for oral argument of the motion. Under these circumstances, the motion to compel is denied. However, the cross motion for sanctions is denied with leave to renew in the event that defendants again move to compel discovery without submitting an Affirmation of Good Faith.

In view of the above, it is

ORDERED that plaintiffs' motion for partial summary judgment (motion seq. no. 003) dismissing defendants' first counterclaim is granted; and it is further

ORDERED that defendants' motion to compel (motion seq. no. 005) is granted to the extent that within 30 days of the date of this order plaintiffs are directed to provide a supplemental response to such demands by submitting an affidavit(s) from a person(s) with personal knowledge as per this decision and order with respect to Demands 1, 22-26, 29,30, 32 of defendants' Third Demand for Documents; and it is further

ORDERED that defendants' motion to compel (motion seq. no. 006), and plaintiffs' cross motion for sanctions are denied without prejudice to renewal in the event defendants again move to compel disclosure or seek discovery sanctions without submitting affirmation of good faith indicating they conferred in good faith with plaintiffs' counsel; and it is further

ORDERED that all further discovery motions must be made by order to show cause and be accompanied by an affirmation of good faith and any motion which seeks duplicative material or which is frivolous will result in the imposition of sanctions.

DATED: July 15, 2014


HON. JOAN A. MADDEN
J.S.C. **J.S.C.**