

Suzanne Geiss, LLC v Martos Gallery LLC

2014 NY Slip Op 32148(U)

August 1, 2014

Supreme Court, New York County

Docket Number: 158295/12

Judge: Shlomo S. Hagler

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X

SUZANNE GEISS, LLC,

Plaintiff,

Index No. 158295/12

Motion Seq. No. 003

- against -

MARTOS GALLERY LLC and JARRETT POSNER,

Defendants.

DECISION/ORDER

-----X

HON. SHLOMO S. HAGLER, J.S.C.:

In this action, defendant Jarrett Posner ("Posner" or "defendant") moves, pursuant to CPLR § 3211(a)(1) and (7), to dismiss the Amended Complaint against him. Alternatively, Posner moves for summary judgment, pursuant to CPLR § 3212. Defendant also seeks sanctions against plaintiff, Suzanne Geiss LLC ("Geiss LLC" or "plaintiff") and its attorneys, pursuant to 22 NYCRR §130-1.1. Plaintiff opposes the motion.

BACKGROUND

Plaintiff commenced this action seeking specific performance against defendants based on the alleged breach of an agreement for the sale of a certain 1984 painting by artist Keith Haring ("Painting"). Plaintiff alleges that Posner, as owner, engaged Martos Gallery, LLC ("Martos Gallery") as his agent to sell the Painting, and that Martos Gallery, on behalf of Posner, entered into an agreement or invoice dated November 13, 2012, to sell the Painting to plaintiff for \$1,600,000.00 ("Invoice"). (Exhibit "F" to the motion.) On the same date, Martos Gallery prepared an

another invoice wherein Martos Gallery purported to purchase the Painting from Posner for \$1,500,000 which Posner did not sign ("Unsigned Invoice"). (Exhibit "E" to the motion.)

Plaintiff further alleges that Martos Gallery breached the Invoice by refusing to either accept payment from plaintiff or deliver the Painting. Plaintiff seeks specific performance and incidental damages resulting from the alleged breach. Plaintiff pleads an alternate claim for monetary damages against John Martos ("Martos"), the proprietor of Martos Gallery, based on "his alleged breach of an implied warranty of authority if it is found that Martos purported to contract with plaintiff on behalf of Posner but in fact lacked the authority to do so." (Exhibit "A" to the motion, Amended Complaint at ¶ 12.)

Plaintiff relies upon the affidavits of Martos stating that he acted as Posner's agent for "many art deals, including the deal that started the current lawsuit." (Reply Affidavit of Jose Martos, sworn to on March 8, 2013, in Support of the Motion to Dismiss in motion sequence no. 1 ["Martos 3/8/13 Aff."], at ¶ 4.) In April and May 2011, Martos Gallery and Martos acted as Posner's agent to both sell and purchase artwork on his behalf. (*Id.*, and Exhibits attached thereto.) In both cases, Martos Gallery and Martos prepared invoices at Posner's instructions to memorialize the transactions. As per his practice, the invoices neither listed Martos Gallery nor Martos as agent for Posner even though that is what actually occurred. (*Id.*)

Due to their relationship, in June 2012, Martos contacted Posner to determine whether Posner was willing to sell the Painting through Martos Gallery acting as his agent with it earning a ten percent (10%) commission upon sale. (*Id.* at ¶ 7.) A string of e-mails reflects that Posner agreed to sell the Painting for \$1,700,000 to a client that Martos Gallery procured in return for a certain commission. However, the transaction was not completed at that time as the prospective client could not meet Posner's price demand. (*Id.* at ¶¶ 8-12, Exhibit "D" attached thereto.)

Since Martos Gallery could not find a purchaser for Posner, in October 2012, Martos asked plaintiff to assist him in procuring a client to purchase the Painting. Martos alleges that he told plaintiff that Posner was the owner of the Painting and that Martos Gallery was merely the agent for Posner. Martos made arrangements with Posner for plaintiff to visit Posner's apartment and show the Painting to prospective purchasers.

In November 2012, Martos began to have serious negotiations with plaintiff for the sale of the Painting to plaintiff's client. Plaintiff's client also did not agree to Posner's price demand of \$1,700,000, but was very interested in purchasing the Painting at a lower price. On November 13, 2012, plaintiff made an offer of \$1,600,000 on behalf of a potential purchaser. Jose Martos conveyed the offer to Posner on the same day. After a telephone conversation with Posner, Martos avers that Posner allegedly instructed him to accept the plaintiff's offer of \$1,600,000 and

they negotiated a reduced commission of \$100,000 for Martos Gallery. On that day, Martos sent Posner a written "invoice" to confirm his verbal approval and the wire instructions for the \$1,500,000 payment that Posner would receive from the sale of the Painting after deducting Martos Galleries' commission of \$100,000. (Exhibit "E" to the motion.) Later, Martos sent plaintiff a written invoice confirming the purchase price of \$1,600,000 and wire instructions to send payment to Martos Gallery to collect its commission. (Exhibit "F" to the motion.)

Martos avers that accepting verbal instructions from clients such as Posner is the standard practice in the industry as follows:

In my experience, accepting instructions from a principal regarding the sale of art verbally is in accordance with my standard practice, and with standard practice in the art industry. In fact, the need to lock in and finalize art sale transactions with potential buyers who can with time lose interest in a particular work or elect to second guess their offered purchase prices often requires that verbal instructions be relied upon to quickly close a transaction in lieu of waiting for written confirmations of such instructions.

(Affidavit of Jose Martos, sworn to on June 27, 2013, in support of the motion to dismiss in motion sequence no. 4 ["Martos 6/27/13 Aff."], at ¶ 20.)

Martos further states that the "back-to-back contracts" set forth in Exhibits "E" and "F" are standard practice in the industry and the prior course of dealing with Posner as follows:

In such an arrangement, once Martos Gallery has negotiated a sale on behalf of a

principal, I write two invoices: one to the buyer, to pay the full cost of the sale, and one to the seller, showing the amount due less Martos Gallery's commission. That is exactly what we did here, and it is consistent with my agency. (Martos June Aff. at ¶ 14.)

Posner denies engaging Martos Gallery or Martos to act as his agent for the sale of the Painting (Affidavit of Jarrett Posner, sworn to on May 21, 2013, in support of the motion ["Posner Aff.," at ¶ 8.]

Posner now moves, pursuant to either CPLR § 3211 or § 3212, to dismiss the Amended Complaint and to impose sanctions on plaintiff or its attorney. On July 15, 2013, this Court declined to exercise its authority to treat Posner's motion as one for summary judgment pursuant to CPLR § 3212, and entertained arguments solely as to CPLR § 3211. (Transcript of Oral Argument on July 15, 2013 [Mot. Seq. No. 003], p. 2.)

Standard for Motion to Dismiss

In deciding a motion brought pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the complaint should be liberally construed and the facts alleged in the complaint and any submissions in opposition to the dismissal motion accepted as true, according plaintiff the benefit of every possible favorable inference. (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted].) "The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause

of action cognizable at law.' " (*Id.*) In opposition to such a motion, a plaintiff may submit affidavits "to remedy defects in the complaint" and "preserve inartfully pleaded, but potentially meritorious claims." (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635, 636 [1976].)

On a motion to dismiss pursuant to CPLR § 3211(a)(1), the defendant has the burden of demonstrating that the documentary evidence conclusively resolves all factual issues, and that plaintiff's claims fail as a matter of law. (*Robinson v. Robinson*, 303 AD2d 234, 235 [1st Dept 2003].) While a complaint is to be liberally construed in favor of the plaintiff on a CPLR § 3211 motion to dismiss, where documentary evidence flatly contradicts the factual claims, the entitlement to the presumption of truth and the favorable inferences is rebutted. (*Id.*; accord *Scott v Bell Atlantic Corp.*, 282 AD2d 180, 183 [1st Dept 2001], *mod on other grounds*, 98 NY2d 314 [2002].)

Specific Performance

The elements of a cause of action for specific performance of a sales agreement are that the plaintiff substantially complied with its contractual obligations and was willing and able to perform its remaining obligations; that the defendant was able to convey the property; and that the plaintiff has no adequate remedy at law. (*EMF Gen. Contr. v Bisbee*, 6 AD3d 45, 51 [1st Dept 2004].)

Issues

The issues presented in this case are:

(1) Whether the Invoice that does not refer to Posner at all, and the Unsigned Invoice, that refers to Martos Gallery as the "Buyer", constitute documentary evidence flatly contradicting the factual claims, and

(2) In the Invoice, was Martos Gallery or Martos acting as an agent for Posner as a disclosed or undisclosed principal, and

(3) Is parole evidence permitted to identify Posner as the alleged disclosed or undisclosed principal?

As more fully set forth below, the answer to the first issue is no, and the answer to remaining two issues are yes.

Agent for Disclosed Principal

In *Van Damme v Gelber* (24 Misc 3d 1218[A] [Sup Ct New York County 2009, Fried, J.], *affd* 79 AD3d 534 [1st Dept 2010], *leave to appeal denied* 16 NY 3d 708 [2011]), the court set forth a scholarly recitation of certain agency principles that are useful in our case as follows:

Under the law of agency, where an agent contracts with a third-party for a disclosed or partially disclosed principal . . . the principal is subject to liability on the contract made by the agent acting within the agent's authority and if made in proper form, and with the understanding that the principal is a party (Restatement [Second] of Agency § 144; *McGarry v Miller*, 158 AD2d 327 [1st Dept 1990] [principal liable for the conduct of the agent acting within the scope of the agent's authority]).

offered to delete a person identified in a contract as a party to that contract. Thus, if a contract explicitly makes a principal a party, parol evidence is not admissible to show agreement that the principal would not become a party.

(Comment C to Restatement [Third] of Agency § 6.01 [emphasis added].)

While both the Invoice and the Unsigned Invoice do not expressly state that Martos Gallery or Martos acted as agent for Posner, Martos specifically avers that he disclosed to plaintiff at the outset that Posner owned the Painting, and Martos Gallery was merely acting as agent for Posner. (Martos 6/27/13 Aff. at ¶¶ 10, 12.) Moreover, Martos clearly states that he made arrangements with Posner to show the Painting in Posner's residence to potential purchasers, he discussed the purchase price and the payment of his commission with Posner, Posner consented to the agency, and Posner allegedly authorized the sale of the Painting to plaintiff on November 13, 2012. (*Id.* at ¶¶ 11-15.) On this motion to dismiss, this Court must accept these allegations as true and accord plaintiff the benefit of every possible favorable inference. As such, plaintiff has either pled or averred that Posner "expressly and impliedly appointed defendant [Martos Gallery] to act as his agent with regard to the sale of [the Painting]." (*Van Damme v Gelber*, 79 AD3d at 534-535).

Dark Bay Int'l, Ltd., v Acquavella Galleries, Inc.

Posner primarily relies upon *Dark Bay Intl., Ltd. v Acquavella Galleries, Inc.*, (12 AD3d 211, 211-212 [1st Dept 2004]), for the proposition that he is entitled to dismissal of this action. In *Dark Bay Intl., Ltd.*, plaintiff alleged that a non-party Michael Cohen ("Cohen") had express and/or apparent authority to sell a Picasso painting on defendant's behalf. Defendant, an art gallery, made a motion for summary judgment to dismiss the action which was granted and affirmed by the Appellate Division due to plaintiff's failure to establish that Cohen was vested with either express or apparent authority to sell the painting. Specifically, the Appellate Division held that Cohen had no implied or apparent authority due to prior consignments between defendant and Cohen. The Appellate Division also held that plaintiff failed to make any inquiry into Cohen's authority to sell the painting.

The facts of this case are clearly distinguishable from *Dark Bay Intl., Ltd.* as the Appellate Division determined that Cohen (described as a "fugitive from justice") was not an agent of defendant because there was little or no connection between Cohen and defendant to establish his authority to sell the painting, and plaintiff could not reasonably rely upon the same. In our case, however, there was a prior agency relationship as Martos Gallery previously acted as Posner's agent to both sell and purchase artwork on his behalf. There is also a series of e-mail

communications between the parties wherein Posner appears to give his consent to permit Martos Gallery to act on his behalf to sell the Painting at a certain price with payment of a specified commission. In addition, Posner authorized Martos Gallery to arrange access to his apartment to show the Painting to potential purchasers. Given the prior course of dealings between the parties on this limited record, it can not be said as a matter of law that plaintiff unreasonably relied on Martos to have the authority to act on Posner's behalf to sell the Painting.

**Documentary Evidence Does Not Conclusively
Resolve Factual Issues**

Posner argues that plaintiff's factual allegations that Posner breached the agreement to sell the Painting are flatly contradicted by documentary evidence showing that there was no agreement between plaintiff and Posner. Specifically, Posner contends that the Invoice was only between plaintiff and Martos Gallery, and there was no indication on the Invoice that either Martos Gallery or Martos was acting as agent with the authority to bind Posner. (Exhibit "F" to the motion.) While it may be inferred from the Invoice that Martos Gallery was the seller of the Painting, the documentary evidence does not conclusively resolve all factual issues whether or not Martos Gallery acted as Posner's agent and that plaintiff's claims fail as a matter of law. (*Robinson v. Robinson*, 303 AD2d 234, 235 [1st Dept 2003].)

As alluded to above, the mere fact that Martos Gallery is named as the seller of the Painting does not preclude the argument that Martos Gallery was acting as agent for the disclosed principal, Posner. (Comment C to Restatement [Third] of Agency § 6.01.) Posner's argument would be valid if the Invoice conclusively stated that Posner was **not** the principal or that Martos Gallery was **not** the agent, which would then be flatly contradictory documentary evidence to any claim of agency by the Martos Gallery. (*Id.*) Of course, the Invoice does not conclusively state that Posner was **not** the principal or that Martos Gallery was **not** the agent for Posner.

Statute of Frauds

Posner also argues that since there is no signed agreement between Posner and plaintiff any alleged sale of the Painting to plaintiff violates the Statute of Frauds. A contract for the sale of goods for the price of \$500 or more is not enforceable unless there is some writing that is signed by either the party whom enforcement is sought, or "by his authorized agent or broker." (UCC § 2-201[1].) The "course of dealing" and "usage of trade" may be considered under certain circumstances to interpret the parties' expression. (UCC § 1-205.) Specifically, a "course of dealing" is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other

conduct." (UCC § 1-205[1].) Usage of trade is defined as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." (UCC § 1-205[2].)

In this case, the Invoice is a signed writing which would not violate the Statute of Frauds if Martos was Posner's authorized agent. As set forth above, Martos argues that he had a course of dealing with Posner and the usage in his trade was to complete "two back-to-back contracts" as follows:

In such an arrangement, once Martos Gallery has negotiated a sale on behalf of a principal, I write two invoices: one to the buyer, to pay the full cost of the sale, and one to the seller, showing the amount due less Martos Gallery's commission. That is exactly what we did here, and it is consistent with my agency.

(Martos 3/8/13 Aff. at ¶ 14.)

Sanctions

Posner seek to impose sanctions on plaintiff and plaintiff's attorney for commencing this allegedly "frivolous" action and awarding him reasonable attorney's fees and costs pursuant to 22 NYCRR § 130-1.1.

Pursuant to 22 NYCRR § 130.1-1, a court in its discretion may also impose financial sanctions upon any party who engages in frivolous conduct. Conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable

argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false. (22 NYCRR § 130.1-1[c][1-3].) In determining whether the conduct was frivolous, "the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent or should have been apparent, or was brought to the attention of counsel or the party." (22 NYCRR §130.1-1[c][3].)

Inasmuch as plaintiff had a basis in law to commence this action as stated above, there are no grounds to impose sanctions on plaintiff or its attorneys.

CONCLUSION

Accordingly, based upon the foregoing, it is hereby

ORDERED, that the branch of defendant Jarrett Posner's motion pursuant to CPLR § 3211(a)(1) and (7) to dismiss the Amended Complaint against him is denied; and it is further

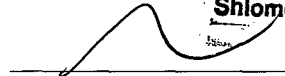
ORDERED, that the branch of defendant Jarrett Posner's motion to impose sanctions upon plaintiff, Suzanne Geiss LLC and its attorneys, pursuant to 22 NYCRR § 130-1.1 is denied; and it is further

ORDERED, that defendant Jarrett Posner shall interpose an answer to the Amended Complaint within thirty (30) days after service of entry of this Decision and Order.

The foregoing constitutes the decision and order of this Court.

ENTER :

Dated: August 1, 2014
New York, New York


Hon. Shlomo S. Hagler, J.S.C.