

Berkowitz v Christie's Inc.

2017 NY Slip Op 32246(U)

October 23, 2017

Supreme Court, New York County

Docket Number: 652549/2017

Judge: Barry Ostrager

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 61

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BARBARA BERKOWITZ, TIMOTHY MENDELSON, QUINN TIVEY	INDEX NO.	<u>652549/2017</u>
Plaintiff,	MOTION DATE	<u>7/6/2017</u>
- v -	MOTION SEQ. NO.	<u>001</u>
CHRISTIE'S INC., DOES 1-10,	DECISION AND ORDER	
Defendant.		

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The following e-filed documents, listed by NYSCEF document number 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 58

were read on this application to/for Dismiss

HON. BARRY R. OSTRAGER:

This action arises out of the contract terms in a consignment agreement between Christie's and The Sothern Trust (the "Trust"), which represents the estate of the late actress Elizabeth Taylor. Plaintiffs are co-trustees of the Trust. Defendants sued herein as Does 1 through 10 are alleged to be high-level executives, managers, or officers of Defendant Christie's that were involved with the consignment and sale of the Trust's property at issue in this action. The Agreement memorializes the terms of Christie's sale of Ms. Taylor's personal possessions at auction in December 2011 and February 2012 (the "Auction"). Among the many valuable items at auction was a piece of jewelry referred to as the "Taj Mahal Diamond" (the "Diamond")—a diamond necklace with an inscription in Persian. The Auction catalogue (the "Catalogue") described the Diamond as dating to the early 17th century and indicates it had once belonged to

Mughal Emperor Shah Jahan, who commissioned the building of the Taj Mahal. The Diamond sold for approximately \$8.8 million at the Auction, \$7.8 million of which went to the Trust.

Defendants move, pursuant to CPLR 3211(a)(1) or (a)(7), to dismiss the complaint's first cause of action for a declaratory judgment, third cause of action for breach of fiduciary duty, fourth cause of action for conversion, and fifth cause of action for accounting, leaving the breach of contract claim unopposed in this motion. Defendants also move for a counter declaration that, *inter alia*, Christie's decision to rescind the sale at issue was within its rights under a consignment agreement (the "Agreement"). The motion to dismiss is granted as to the causes of action for breach of fiduciary duty, conversion, and accounting. The motion to dismiss Plaintiffs' claim for declaratory judgment is denied. Finally, the motion for a counter declaration—essentially stating that Christie's is not in breach of the Agreement—is denied.

It is undisputed that shortly after the sale of the Diamond, the successful bidder demanded that Christie's rescind the sale and return the purchase price. Christie's rescinded the sale of the Diamond and demanded that the Trust return to Christie's all proceeds paid to it for the sale of the Diamond. The Trust declined to refund the money to Christie's—asserting that cancellation of the sale was unreasonable and unwarranted under the Agreement.

Plaintiffs allege that Christie's cancelled the sale of the Diamond to appease the buyer—a frequent bidder at Christie's auctions—who had concerns about the authenticity of the Diamond's provenance, and not because Christie's reasonably believed that the buyer's claims would subject Christie's or the Trust to legal liability.

The Agreement states, in pertinent part, that Christie's may rescind a sale "at any time if Christie's in [its] *reasonable* judgment determines that the offering for sale of any Property has subjected or may subject Christie's and/or Seller to any liability, including liability under

warranty of authenticity or title.” (Goodman Affirmation in Support of Partial Motion to Dismiss, Exh. A [NYSCEF Doc. No. 25]) (emphasis added).

Defendants argue that so long as Christie’s, in its own reasonable judgment, determined that the Diamond’s sale had subjected Christie’s—or might subject Christie’s—to any liability, it had the unilateral right to rescind the sale. Defendant attaches as exhibits to its motion several emails between Christie’s executives and Christie’s general counsel evidencing concern that the buyer could bring a meritorious action against Christie’s based on alleged misrepresentations it had made about the Diamond at the Auction. (Goodman Aff., Exh. M [NYSCEF Doc. No. 37]). Indeed, it appears based on Defendants’ moving papers that the buyer had explicitly threatened Christie’s with legal action if the sale was not rescinded. (Goodman Aff., Exh. N [NYSCEF Doc. No. 38]).

Nevertheless, on a motion to dismiss pursuant to CPLR 3211(a)(7), “[w]e accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994) (internal citations omitted). Further, “[u]nder CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” *Id.* at 88.

Under the lenient standards of CPLR 3211(a)(7), and affording every possible inference in favor of the nonmoving party, the Plaintiffs have alleged in their complaint facts that fit squarely within a cognizable legal theory for breach of the Agreement upon which relief can be afforded. Plaintiffs have alleged that Christie’s rescinded the sale to the Diamond’s buyer, not out of a reasonable fear of future litigation, but because the buyer was a VIP customer of Christie’s who refused to bid in other upcoming auctions until the Diamond purchase was

cancelled. (Complaint, ¶ 47 [NYSCEF Doc. No. 2]). It is further alleged that it was not reasonable for Christie's to fear liability from the Diamond sale—despite the buyer's explicit threat of legal action—based on the protective language of Christie's auction warranties. Specifically, Christie's provides a warranty to its buyers that is limited to particular representations made in its auction catalogues. Christie's provides a warranty for language in the Catalogue that is specifically published in capitalized lettering, and not for those representations made elsewhere in the Catalogue. Essentially, Plaintiffs assert that Christie's was protected from any suit brought by the buyer because the buyer's claims regarding authenticity were beyond the scope of the representations made in capitalized lettering, and, therefore, it was unreasonable for Christie's to fear liability based on the sale of the Diamond.

Therefore, as to Defendants' motion to dismiss Plaintiffs' claim for declaratory judgment, it is immaterial, for purposes of this pre-answer motion, that Christie's may very well have had a defense to an action brought by the Diamond's buyer. The issue at this stage of this case is whether, as a matter of law, it was *reasonable* for Christie's to believe it *could* be subjected to *any* liability. (*See* Goodman Aff., Exh. A [NYSCEF Doc. No. 25]). And while Christie's submits strong evidence with its moving papers tending to show that its fear of liability was not entirely unfounded, “the question of whether the belief was reasonable, [is] ordinarily [a] question[] of fact for the fact finder.” *Argentina v. Otsego Mut. Fire Ins. Co.*, 86 N.Y.2d 748, 750 (1995).

Further, the documentary evidence Defendants submit consists largely of selective email chains which are not dispositive. This Court will grant a 3211(a)(1) motion “only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002). The documentary evidence—while powerful—is not without some ambiguity, and fails to

conclusively rebut Plaintiffs' claims. Indeed, according to emails between Christie's executives, there appears to be have been at least some concern regarding "client relations" and some equivocation as to the strength of Christie's legal position in a potential dispute with the Diamond's buyer. (*See Fink Affirmation in Support of Plaintiffs' Opposition to Defendant's Partial Motion to Dismiss*, Exh. G, [NYSCEF Doc. No. 49]). Further fact discovery is necessary to determine whether Christie's fear of liability was, in fact, reasonable, or whether such alleged fear was merely a pretext upon which to cancel the sale in hopes of appeasing a valued customer. Until then, however, it would be premature to dismiss Plaintiffs' claim for declaratory judgment.

Notably, Defendants are not moving to dismiss Plaintiffs' breach of contract claim, but rather the other related claims for declaratory judgment, breach of fiduciary duty, conversion, and accounting. It is, however, no mystery as to why Plaintiffs' opposition papers focus so much attention on the language of the Agreement and give shorter thrift to the merits of the other related claims. These other claims, that Defendants seek dismissal of, are duplicative of the breach of contract claim.

"It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." *Clark-Fitzpatrick, Inc. v. Long Island R.R.*, 70 N.Y.2d 382, 389 (1987). "[A] breach of fiduciary duty claim [is] properly dismissed [where] the agreement covers the precise subject matter of the alleged fiduciary duty." *Celle v. Barclays Bank P.L.C.*, 48 A.D.3d 301, 302 (1st Dep't 2008). Here, Plaintiffs' allegations are "merely a restatement, albeit in slightly different language, of the 'implied' contractual obligations asserted in the cause of action for breach of contract." *Clark-Fitzpatrick*, 70 N.Y.2d at 390. The Trust alleges that Christie's breached its fiduciary duty by, *inter alia*, failing to report sales and failing to remit certain payments. The Agreement, however,

comprehensively defines Christie's duties and obligations regarding such transactions. Nothing Plaintiffs allege can reasonably be characterized as distinct and independent from Christie's alleged breach of the Agreement. The breach of fiduciary duty claim is but a restatement of the parties' express contractual obligations. Plaintiffs have failed to allege a legal duty imposed upon the defendants not already contained within the Agreement. *See D'Ambrosio v. Engel*, 292 A.D.2d 564, 564-65 (2nd Dep't 2002). There appears to be no such duty springing from circumstances extraneous to, and not constituting elements of, the contract. *See id.* And no amount of linguistic acrobatics will distract the Court from seeing that these claims are but one in the same.

The same analysis holds true for Plaintiffs' claims for conversion and accounting. "[P]laintiffs' conversion claims allege no facts independent of the fact supporting their breach of contract claim[]." *Jeffers v. American Univ. of Antigua*, 125 A.D.3d 440, 443 (1st Dep't 2015). The Trust's allegations that Christie's failed to remit to the Trust proceeds from the sale of various items, or that Christie's has wrongfully failed to return certain items, are governed by the clear terms of the Agreement. Plaintiffs' conclusory statements asserting an independent duty beyond the scope of the Agreement are unavailing.

As to the accounting claim, since "Plaintiff[s] [have] sought money damages in [their] breach of contract claim, and because discovery as to the measure of damages would be available to [them] if [they] were to prevail on that claim, [they] can obtain all the information [they] seek[] in [their] existing claim at law." *Banks v. Correctional Services Corp.*, 475 F.Supp.2d 189, 202 (E.D.N.Y. 2007). Simply put, all of the alleged issues presented to this Court are comprehensively governed by the terms of the Agreement

For all the foregoing reasons, it is hereby

ORDERED that Defendants' motion to dismiss is granted as to Plaintiffs' claims for breach of fiduciary duty, conversion, and accounting. Defendants' motion to dismiss the claim for declaratory judgment is denied, without prejudice to renewal as a motion for summary judgment as is Defendants' motion for a counter declaration. The parties shall appear in Room 232 for a preliminary conference on November 21, 2017 at 9:30 a.m.

10/23/2017

DATE

Barry H. Ostrager

BARRY H. OSTRAGER, JSC
BARRY H. OSTRAGER
JSC

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
DO NOT POST

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: