

**European Fine Art Found. v Artvest Partners LLC**

2018 NY Slip Op 31041(U)

May 29, 2018

Supreme Court, New York County

Docket Number: 651341/18

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

PRESENT: Andrea Masley  
JSC

PART 48

THE EUROPEAN FINE ART FOUNDATION and  
TEFAF NEW YORK LLC,

INDEX NO. 651341/18

MOTION SEQ. NO. 001

Plaintiffs,

-against-

ARTVEST PARTNERS LLC,

Defendant.

The following papers, numbered 1 to \_\_\_\_\_ were read on this \_\_\_\_\_.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion:  Yes  No

ORDERED that defendant Artvest Partners LLC's (ARTVEST) motion for a preliminary injunction is denied.

On March 19, 2018, plaintiffs The European Fine Art Foundation NL (TEFAF NL) and TEFAF New York LLC (TEFAF NYC) (collectively TEFAF), initiated this action seeking a declaratory judgment that, pursuant to §7.2 of the February 1, 2016 LLC Agreement (the Agreement), TEFAF is under no legal obligation to continue to employ or compensate ARTVEST for management services after ARTVEST's service term expires on June 30, 2018.

On April 25, 2018, ARTVEST moved for a preliminary injunction enjoining TEFAF from (1) terminating ARTVEST's management rights and responsibilities under the Agreement; (2) taking any action to effect the termination or transition of management in the Spring art fair; and (3) making any negative or disparaging statements regarding ARTVEST or its principals or making any statements in any way indicating that ARTVEST or its principals are no longer or will no longer be involved in management of the art fairs.

Under the Agreement, counterclaim defendant TEFAF USA, Inc. a subsidiary of TEFAF NL, joined with nonparty Spring Show NYC LLC (Spring Show), a subsidiary of ARTVEST, to create TEFAF NYC for the purpose of managing two art fairs in the fall and spring at the Park Avenue Armory. Michael Plummer and Jeff Rabin are the principals of ARTVEST. With a capital contribution of \$3,544,500, TEFAF obtained 51% of TEFAF NYC. Spring Show contributed a value of \$3 million and cash of

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

\$405,500, and holds 49% of TEFAF NYC.

On April 26, 2018, the parties stipulated to a TRO, including no disparagement, so the spring art fair would go on. Indeed, the spring art fair was held May 3 to 8, 2018, apparently to great acclaim according to the press clips provided to the court. The fall art fair is scheduled for October 2018.

In order to be granted preliminary injunctive relief, under CPLR 6301, ARTVEST must show "a probability of success, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor" (*Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990]).

As to likelihood of success, the issue is whether ARTVEST's duties under §7 of the Agreement expire on June 30, 2018 or something else. Section 7.2 (a) provides that ARTVEST will be paid "from the date hereof through June 30, 2018...a management fee in the amount of \$24,000 per month for its services and staff costs," and then an "annual rate of \$400,000 with respect to the period commencing on July 1, 2016 and ending on June 30, 2018 (the 'Artvest Service Term')." The Artvest Service Term may only be extended by TEFAF NYC and ARTVEST "with the consent of TEFAF, which consent may be granted or withheld in TEFAF's sole discretion." TEFAF does not consent to extend the Artvest Service Term. TEFAF explains that it seeks to allow the personal services portion of the LLC set forth in §7 to expire. Contrary to ARTVEST's argument, TEFAF does not seek to terminate the Agreement.

ARTVEST asserts that §7 sets forth management responsibilities and objects to its characterization as a personal services contract. Rather, it asserts that the parties allegedly set the fee for the first two years since the parties anticipated that the first few fairs would not be profitable (aff of Michael Plummer, ¶¶ 24-25). Thereafter, under this theory, ARTVEST would manage the art fairs for free. As a condition of forming TEFAF NYC, Spring Show insisted that ARTVEST would be involved in management of TEFAF NYC and the spring and fall fairs. As proof that the Artvest Service Term, expiring on June 30, 2018, relates to the management fee, and not ARTVEST's services, ARTVEST relies on §7.1 which contains a five-year noncompete provision prohibiting ARTVEST from engaging in fair related business. ARTVEST also points to §7.5 that prohibits it from resigning as manager of the spring fair without prior written consent of TEFAF NL as evidence that ARTVEST's management skills are essential to the Agreement. ARTVEST asserts that to terminate the Agreement, TEFAF must follow the buy-out procedures, set forth in §5.4, available to either party after five years from the date of the Agreement.

ARTVEST argues that it will suffer irreparable harm because money damages cannot be calculated with reasonable certainty for the loss of rights to participate in the management of a company (*see Vanderminden v Vanderminden*, 226 AD2d 1037, 1041 [3d Dept 1996] [an opportunity for defendants to shift the balance of power and assume management and control of the family company may constitute irreparable

harm)). Where contracting parties bargain over management rights, loss of that bargained-for right can constitute irreparable harm (see *Wisdom Import Sales Co., LLC v Labatt Brewing Co., Ltd*, 339 F3d 101, 115 [2d Cir 2003] ["a bargained -for minority right to participate in corporate management has a value in and of itself and denial of that right, without more, can give rise to irreparable harm"]; *Bank of Am., NA v PSW NYC LLC*, 29 Misc 3d 1216[A], 2010 NY Slip Op 51848[U], \*\*\*\*10 [Sup Ct, NY County 2010] ["the loss of a bargained-for contractual right of control can constitute irreparable harm"]). ARTVEST claims that denial of the preliminary injunction would render a final judgment for ARTVEST ineffectual. ARTVEST also fears damage to its business reputation, good will, business relationships and loss of business opportunities if TEFAF terminates the Agreement.

As to irreparable harm, TEFAF counters that since ARTVEST, through its subsidiary Spring Show, maintains its management rights, it faces no irreparable harm. Rather, Spring Show holds two of five seats on the board of TEFAF NYC. Plummer and Rabin are officers of TEFAF NYC and serve as managing directors who oversee daily operations (see Schedule 2.2 [k] [II]). Spring Show has super majority rights over certain corporate issues, such as the budget, which allows Spring Show to approve the finances.

Finally, ARTVEST insists that since it seeks to maintain the status quo, the balance of equities are in its favor (see *Gramercy Co v Benenson*, 223 AD2d 497, 498 [1st Dept 1996]). TEFAF counters that equities favor expiration of §7; otherwise TEFAF is compelled to work in a dysfunctional relationship with ARTVEST. Moreover, TEFAF asserts that expiration is consistent with the plain language of the Agreement.

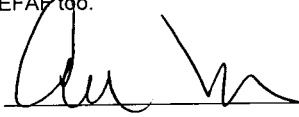
A preliminary injunction constitutes extraordinary relief. Indeed, where a contract is allegedly breached, mandatory injunctions for the specific performance of the contract, which is effectively what ARTVEST seeks here, are disfavored without clear, urgent, extraordinary equitable reasons (*Sithe Energies, Inc. v 335 Madison Ave., LLC*, 45 AD3d 469, 470 [1st Dept 2007]).

The court cannot conclude at this early juncture that ARTVEST is likely to succeed. Rather, based on the clear, unambiguous language of the Agreement, the court finds that something expires on June 30, 2018. TEFAF's explanation is viable; ARTVEST's is not. TEFAF's contends that the time period for these management services was limited to two years, so that TEFAF could evaluate to what extent, if any, TEFAF NYC would thereafter employ ARTVEST for the future provision of these services (aff of Patrick van Maris van Dijk, May 9, 2018, ¶ 12). ARTVEST's explanation that, after two years, it is obligated to work without remuneration is commercially unlikely in light of ARTVEST's alleged expertise and its expectation of profits in year three. Moreover, such an arrangement would be unenforceable since Spring Show, not ARTVEST, would receive profit distributions. ARTVEST's reliance on the noncompete provision to extend the term is also misplaced. This provision prevents ARTVEST's principals from competing with TEFAF NYC while they perform management services.

during the Artvest Service Term. While the noncompete would continue if the services were renewed, it also appears to terminate on June 30, 2018 unless it is renewed. The court rejects ARTVEST's attempt to bootstrap the potential five-year noncompete into a new five-year Artvest Service Term. Moreover, this five-year term would contradict ARTVEST's admission that its fees expire on June 30, 2018. Likewise, the court rejects ARTVEST's reliance on §5.4, the first buy-out term between TEFAF and Spring Show that allows either TEFAF or Spring Show to terminate the Agreement. ARTVEST's proposals contradict another contract rule of construction; all contract provisions must be given meaning. Under ARTVEST's theory, the expiration in §7.2 is meaningless.

The court also rejects all of ARTVEST's irreparable harm arguments because money damages are available to ARTVEST if TEFAF is unsuccessful here. Moreover, the parties can avoid damage to business reputations or goodwill or loss of business opportunities as they did when they consented to the TRO. Indeed, Spring Show and TEFAF have mutual duties to ensure that the expiration of the Artvest Service Term does not interfere in the success of their joint fair endeavor.

On its face, §7 appears to be a personal services agreement (see *Marriott Intl. Inc. v Eden Roc, LLP*, 104 AD3d 583 [1<sup>st</sup> Dept 2013] [management of a hotel is a classic example of a personal services contract]). However, there are some indicia that undermine the personal services nature of the §7, e.g., ARTVEST cannot resign during the Artvest Service Term without TEFAF's consent. Regardless of how it is characterized, a preliminary injunction cannot force parties to work together when there is significant animosity interfering with the joint endeavor (see *Gennaro v Rosenfield*, 600 F Supp 485, 492 [SDNY 1984] [granting preliminary injunction to prevent producer from employing any other choreographer for Broadway production of "Singin' in the Rain" would force the producer into the "uncomfortable position of working closely with someone who he allegedly had replaced, had litigated against and had no desire to work with"]). Therefore, equities favor TEFAF too.

Dated: 5/29/18  J.S.C.

Check one:  CASE DISPOSED  NON-FINAL DISPOSITION  
MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER  
Check if appropriate:  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE