Neumann v Sotheby's Inc.
2019 NY Slip Op 30508(U)
February 27, 2019
Supreme Court, New York County
Docket Number: 652170/2018
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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HUBERT G. NEUMANN,

Plaintiff,

-against-

SOTHEBY'S INC., and ESTATE OF DOLOROS O. NEUMANN,

Defendants.

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DECISION AND ORDER
Index No.: 652170/2018
Mot. Seq. No.: 002

O. PETER SHERWOOD, J.:

I. FACTS

Because this motion to dismiss is based on CPLR3211 (a) (1) and (7), these facts are taken from the Amended Complaint (Complaint, NYSCEF Doc. No. 73) and undisputed documentary evidence.

This case involves control over the sale of "Flesh and Spirit", a 12 foot by 12-foot painting by the acclaimed "graffiti artist" Jean-Michel Basquiat (the "Work"). Plaintiff alleges he is steward of the Neumann Family Collection (the "Collection"), a private collection of modern and contemporary art. The works in the Collection are owned by "a variety of persons and entities" (*id.* ¶ 15). The Work at issue was owned by the estate of his deceased wife and was part of her estate until it was sold in May 2018.[1]

The Complaint alleges that in March 2015, defendant Sotheby's, Inc. (Sotheby's) promised Neumann the right of approval over the marketing of all works from the Collection consigned to Sotheby's and promised him and his family favorable pricing and other terms (Complaint, ¶2). There was an agreement memorialized in e-mails exchanged between Warren Weitzman (of Sotheby's) and Neumann on March 24, 2015, and later confirmed by Gregoire Billaut (also of

[1] According to the First Amended Complaint ("FAC"), plaintiff Hubert Neumann ("Dolores") was married to Dolores Ormansky Neumann for 62 years until her death. In her will, Dolores declared that: [i]t is my desire and intent that my husband, Hubert Neumann, be disinherited by me to the fullest extent permitted by law because he has been physically abusive to me for decades and has threatened my life . . . It is my desire that my husband, Hubert Neumann, shall not be appointed as an Executor, Administrator or Trustee of my estate or any trust established to me. The will also provides that Dolores' middle daughter, Belinda Neumann, shall be the Executor of the will" (NYSCEF Doc. No. 82, ¶ TWELFTH). The Estate, which is party in this action, is not a party to this motion but supports it.

Sotheby's) (the Email Agreement, *see id.* ¶¶ 18-19). Pursuant to that agreement, Sotheby's would pay a percentage *over* the "hammer price" for each work, offer advances on sales, not charge for insurance, shipping, marketing, or travel, and would give Neumann control over the marketing for works from the Collection. In addition, and as relevant here, the agreement provided that Sotheby's would "seek [Neumann's] approval on all matters relating to cataloguing, placement, and exhibiting" the consigned art.

The alleged contract on which plaintiff relies is memorialized in three emails dated March 25, 2015, March 13, 2016 and March 17, 2016 (compl. ¶¶ 17-18 and H. Neumann affd Ex. A, NYSCEF Doc. No. 6; *see also* demonstrative presented at oral argument on January 29, 2019). The "agreement" is set forth in a one paragraph e-mail dated March 24, 2015 the subject of which is "Financial Considerations" and states in its entirety:

> "Dear Hubert, Working with you and your family is very important to me and Sotheby's. Thank you for inviting us to provide you with the following financial considerations. First, these terms will apply for a period of three years beginning, April 1, 2015. There will not be any charges or expenses for anything associated with any consignment, including packing and shipping, insurance, conservation, marketing and promotion, travelling exhibitions, etc. I propose the following commission structure: 1.) for sales up to and including a total of $5,000,000, Sotheby's will pay you 104 percent of each sold hammer price and 2.) for sales above an aggregate sold hammer of $5,000,000, we will pay you 108 percent of each sold hammer price. If you want an advance, we will provide an interest-free advance of 50 percent of our low auction estimate. We will make the experience efficient and rewarding. We are energetic and creative and will access bidders from around the world. We will place the property in the best sale venues and in the right context. We will exhibit the property ideally with excellent lighting and positioning. We will place the property in the best spot for it in each auction as we take very seriously the architecture of each auction. We will seek your approval of all matters relating to cataloguing, placement, and exhibiting each and every work consigned. We will essentially be your partner as we share the same community interests. I look forward to your response and to seeing the works you may wish to sell. All the best, Warren"

("Email Agreement" NYSCEF Doc. Nos. 86 and 83). Although not set forth in the FAC, plaintiff replied to the email on April 6, 2015 where he states, "I am reading the draft document," addresses a number of financial considerations and states that "[d]ocuments would be signed". The email concludes with the statement "I will continue to read this DRAFT tomorrow when I am fresh" (emphasis in original (NYSCEF Doc. No. 86). The email makes no reference to any of the non-financial considerations which the FAC states are "most relevant here" (*id.* at ¶ 22).

As to the second element of the contract, plaintiff cites an email sent by plaintiff dated March 13, 2016, a full year after the email containing the above quoted terms of the contract. In the email Neumann refers to "streamlining the process relating to the March 11, 2016 draft" (NYSCEF Doc. No. 6), a fourteen-page contract for the sale of a painting by Alberto Burri, entitled "Sacco" on terms that Neumann states "varies substantially" from an earlier contract for the sale of a Klein which in turn was based on the March 24, 2015 "Financial Considerations" (*id.*) (NYSCEF Doc. No. 6 and 8).

Specifically, the email recites a "HISTORY" which states "1. Warren Weitman email dated March 24, 2015 entitled "Financial Considerations" set up a three-year sales agreement between Sotheby's and the Neumann Family commencing April 1, 2015. This agreement uses the term "aggregate" sales which I interpret as the total sales during the three-year period" (NYSCEF Doc. No. 6). In paragraph 2 of the HISTORY, plaintiff states that "This March 24, 2015 agreement was revised slightly and was the basis for the Loan and Consignment Agreement dated April 9, 2015" . . . Plaintiff adds that "[t]he March 11, 2016 draft varies substantially from the Consignment Agreement dated April 9, 2015". He concludes the HISTORY by stating: "If there is a conflict relating to this current consignment or future consignments then it must be agreed that the [April 9, 2015] Consignment wording supersedes or trumps all future Consignment Agreements for this three-year period". The "HISTORY" makes no reference to the non-financial considerations in the March 24, 2015 email.

The third and final element of the alleged agreement consists of an email dated March 17, 2016 sent by Sotheby's Gregoire Billant bearing the subject line "Sotheby's Consignment Agreements" where he states: "I confirm that Sotheby's will extend the 3 years contract to April 2019 under conditions agreed on March 2015 for Klein Sale and for Burri on March 2016" (*id.*).

Neumann consigned two works (owned by family trusts) from the Collection to Sotheby's. The complaint alleges that the sales proceeded in accordance with the Email Agreement but, as described in the HISTORY, Neumann admits the terms of those consignment agreements varied (in one case "substantially") from the Email Agreement (*id.*). As appears in the record, the two consignment agreements are complex detailed documents; one, dated April 9, 2015, involving a Klein painting, is a 21-page single spaced agreement signed by plaintiff; the other, dated March 14, 2016, involving the Burri, is fourteen single spaced pages long (NYSCEF Docs. No. 7 and 8).

Neither consignment agreement gives Neuman the authority he now claims to control marketing of works in the Collection (*id.*). Rather, as reflected in the March 14, 2016 Loan and Consignment Agreement, they provide that "Sotheby's will have absolute discretion as to . . . (iii) providing catalogue and other descriptions for the Property as Sotheby's deems appropriate . . ." (Klein Agreement, § 1, NYSCEF Doc. No. 7).

In 2018, the Estate approached Sotheby's to sell the Basquiat while cutting off Neumann's right to control the marketing of the work. Sotheby's and the Estate agreed Sotheby's would auction off the painting. Sotheby's refused to discuss it with Neumann, even at his request. Belinda wanted her gallery, Neumann Wolfson Art, to have control over the sale. According to the complaint, Sotheby's then "botched" marketing of the painting by failing to highlight its unique aspects, erring in estimating its anticipated price, omitting information about the history and importance of the work, and allowing Belinda's gallery to participate in the marketing (compl. ¶¶ 6, 47). The painting sold for a hammer price of $27 million on May 16, 2018, far below its worth and value.

Plaintiff asserts claims for:

1) Breach of Contract against Sotheby's for refusing to allow plaintiff to exercise his rights under the Email Agreement
2) Promissory Estoppel against Sotheby's, as the auction house promised Neumann he would have marketing control over Collection works, on which Neumann relied.
3) Tortious Interference with a Contract against the Estate for entering into an agreement with Sotheby's that prevented Neumann from exercising his rights under the Email Agreement.

II. ARGUMENTS

A. Sotheby's Motion to Dismiss

1. Breach of Contract Claim

Although it had already filed an answer, Sotheby's now files a motion to dismiss (CPLR 3211 [e]). Sotheby's argues that the breach of contract claim fails both because of documentary evidence and failure to state a claim.

Sotheby's argues that the email exchange does not constitute an enforceable agreement. It was a proposal, which Neumann did not accept, but asked that the parties fine-tune (Memo at 12). Notably, Neumann responded to the March 24 e-mail by e-mailing Weitman on March 26, 2015,

that "we should discuss this proposal for us to fine tune it" (attached as Exhibit G to Cahill Aff, NYSCEF Doc. No. 85). The March 24 e-mail is not sufficiently definite as to give rise to an enforceable contract, and Neumann's response do not indicate unequivocal acceptance. While plaintiff claims the first e-mail proposal was confirmed by Billault in March 2016, that was a separate e-mail communication, not including Neumann, a year later (Memo at 14, citing Neumann e-mail to Billault dated March 13, 2016, attached as Exhibit I to Cahill Aff, NYSCEF Doc. No. 87). Neumann fails to allege Billault was aware of the terms of the original e-mail proposal, which was not included in the e-mail to Billault (Memo at 14). Instead, Sotheby's claims the relevant contracts are the consignment agreements dated April 9, 2015, and March 14, 2016 (Klein Agreement and Burri Agreement, respectively, attached as Exhibits B and C to Neumann Aff, (NYSCEF Docs. No. 7-8). In the April 9, 2015, Klein Agreement, Neumann agreed "Sotheby's will have absolute discretion as to . . . (iii) providing catalogue and other descriptions for the Property as Sotheby's deems appropriate. . .; (v) the marketing and promotion of the Auction; and (vi) the manner of conducting the Auction" (Klein Agreement, §1).

As far as plaintiff mentions an agreement was extended, the extension is described in the Burri Agreement, in which "Sotheby's agrees that if [Neumann], either of the Trusts, any members of the Neumann family, and any entities controlled by or under common control with any of the foregoing, consign additional property owned by any of them (the "Additional Property") . . . for auction . . . on or before April 9, 2019 pursuant to a mutually agreed consignment agreement [which] shall stipulate that Sotheby's will offer such Additional Property under the consignment terms contained in this Agreement . . . subject to appropriate modifications" (§ 15). There was no intent to be bound by the Email Agreement, only by the actual Klein and Burri Agreements (Memo at 15). Both sides expected a subsequent writing (*id.*at 16). The Email Agreement also fails for lack of consideration, as no consideration is offered by Neumann in exchange for the right to control auction items' marketing (*id.* at 17). The mere agreement to discuss in the Email Agreement is not, itself, an agreement.

Even if the Email Agreement were an actual agreement, it would be unenforceable. The Klein Agreement and the Burri Agreement have merger clauses which "supersede[] all prior or contemporaneous written, oral or implied understandings, representations of Sotheby's and

agreements of the parties relating to the subject matter of this Agreement" (§§ 23 and 19, respectively).

The Statute of Frauds also bars the Email Agreement. The proposal contemplates a three-year period, does not contain all material terms, and does not include a signed offer and acceptance (Memo at 19). NY General Obligations Law requires all agreements which cannot be completed within a year to be in writing, signed by the party to be bound (*id.*, citing NY Gen. Ob. L. § 5-701[a][1]). Nor could the Email Agreement constitute an agreement to auction an artwork, as NY City regulations of auctions require a written contract between the consignor and auctioneer (Memo at 19-20, citing NYC Rules, Dept of Consumer Aff. § 2-122). Neumann knew such a contract was needed and requested one after signing the term sheet.

Nor can Neumann allege damages. There is no injury to him (Memo at 20). He did not have an ownership interest in the Work. Having rights to a portion of Dolores' estate does not give him a right over the Work. He concedes he has no "technical" ownership interest in the Work (Complaint, ¶ 35). As he has elected a 1/3 share of his deceased wife's estate, he may be entitled to a share of the net estate (Memo at 21, quoting NY Estate Powers and Trust Law § 5-1.1-A[a]). He is not entitled to any particular assets. He has no right to control the sale of the Work.

Neumann's vague claim of reputational harm to the Family Collection is not actionable. The painting was owned by the Estate of Dolores Neumann, not a collection controlled by Neumann.

2. Promissory Estoppel Claim

The promissory estoppel claim fails because Neumann has not alleged reliance or damages (Memo at 23). There are no specific or particular allegations of reliance in the FAC. In fact, he requested a formal contract and conducted additional negotiations. Further, the result is not unconscionable (*id.* at 24). A respected auction house sold a work at the request of its owner, which had the clear right to sell it.

B. Opposition

Plaintiff argues that the contract was created by the March 24, 2015 email from Sotheby's Warren Weitman, setting out the arrangement, and the subsequent, March 17, 2016, email from

Sotheby's Gregoire Billault, confirming "that Sothby's will extend the 3 years contract to April 2019 under the conditions agreed on march 2015 for the Klein Sale and for the Burri on march 2016" [sic] (Opp at 1, Complaint, ¶ 20). Billault's e-mail shows Sotheby's intent to bind itself to the agreement (Opp at 2). Plaintiff argues the two emails and the language in the FAC are sufficient allegations of the existence of a contract to survive this motion (*id.* at 11). Plaintiff contends the original Weitman e-mail is sufficient, as it shows the concessions made by Sotheby's were "in exchange for Mr. Neumann's consignment of the Klein work to Sotheby's and as an incentive for Mr. Neumann to consign future works from his Family Collection . . . including those owned by other family members like" his deceased wife (*id.* at 12). His agreement to sell these works through Sotheby's, rather than other auction houses, is sufficient consideration. Even if the Weitman email was not sufficient to establish the contract, the Billault email is, as it confirms the existence of a contract and extends it (*id.*). This is a clear manifestation of mutual assent.

Plaintiff argues that defendants must present documentary evidence which utterly refutes plaintiff's allegation that a contract exists (*id.* at 11). The evidence provided only shows that there may be ambiguities to be evaluated at trial (*id.* at 16). While the Klein and Burri agreements have merger clauses, they only merge those agreements. The subject matter of the agreement embodied in the email at issue here is different (*id.* at 19).

As to defendants' invocation of the statute of frauds, that cannot interfere with the enforcement of the contract embodied by the emails, as the existence of the contract has been admitted by both parties (*id.* at 20). Further, an email with the party's name typed under it constitutes a writing, for the purpose of the statute (*id.* at 21, citing *Newmark & Co. Real Estate Inc. v 2615 E. 17 St. Realty LLC*, 80 AD3d 476, 477 [1st Dept 2011] ["An e-mail sent by a party, under which the sending party's name is typed, can constitute a writing for purposes of the statute of frauds"]).

It is undisputed that Sotheby's breached the agreement by failing to consult plaintiff on the marketing of the Work (Opp at 21). He has pled injury by claiming that Sotheby's actions in marketing the painting without his input resulted in poor marketing and a depressed sale price for the Work, resulting in his share of the estate being smaller. Further, the depressed price for the painting will likely lower the price of the Family Collection's other Basquiat works (*id.* at 23).

The promissory estoppel claim should survive because, if the Weitman e-mail was a mere proposal, the parties later indicated their consent to the proposal, and plaintiff relied upon that promise to his detriment when he consigned the Burri painting to Sotheby's (*id.* at 25). Without those promises, he would have made other arrangements by which he could retain control, and the reliance was to his detriment because the painting's value was reduced in value because of how Sotheby's marketed it.

C. Reply

Defendants contend that the Klein and Burri agreements are the real memorializations of the agreements between the parties (Reply at 3). When the parties agree to draft a formal agreement, there is no agreement until they have done so (*id.*, *Scheck v Francis*, 26 NY2d 466, 469-70 [1970] ["if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed"]). All of plaintiff's prior agreements with Sotheby's have been in formal writings, not e-mails (Reply at 4). Neumann has also made statements indicating his intent to enter into a formal writing (*id.*). Those written agreements, the Klein and Burri agreements, cover the same subject as the email exchange (*id.* at 5). The terms of those agreements, notably the Family Consignments Provision of the Klein Agreement, also provide that future items offered by the Neumann, the trusts he controls, or members of the family for consignment with Sotheby's will receive the same terms as contained by the Klein Agreement (*id.*). Accordingly, it was the term of the preferential conditions of the Burri Agreement which were extended, and not the terms discussed in the email exchange (*id.* at 5-6).

Further, Neumann rejected the offer presented in the email exchange when he asked for a contract draft and proposed fine tuning the proposal (*id* at 7). There was no unequivocal acceptance. Also, the marketing approval rights discussed in the emails were not included in the Klein and Burri Agreements, which improved the financial terms given to plaintiff (109% of hammer price, instead of the discussed 108% of the hammer price (*id.* at 9).

Defendants also contend that it is not consideration that plaintiff did business with Sotheby's at all (*id.* at 12). Plaintiff did not agree to forego any other opportunities. Further, the damages alleged by plaintiff are speculative. The claim that he may be entitled to more money, if he manages to invalidate his deceased wife's will, is speculative (*id.* at 13). So is his argument

that the painting would have sold for more, if his marketing strategy had been followed. Further, Neumann did not "bargain for" the marketing control rights. He pursued better financial terms, as demonstrated by the final agreements (*id.*).

As to the promissory estoppel claim, plaintiff's e-mail dated March 13, 2016, in which he proposed points for an agreement, to state that the language of the Klein Agreement regarding future consignments "supersedes or trumps all future Consignment Agreements for this three-year period even if they are executed by a member of the Neumann Family to expedite the process" (*id.* at 14, Neumann March 13, 2016 email, attached as Exhibit I to Cahill Aff, NYSCEF Doc. No. 87).

As to the statute of frauds argument, Sotheby's has not admitted the existence of a "master" agreement, as embodied by the emails. The admitted agreements are the Klein and Burri Agreements.

Nor has plaintiff lost anything as a result of the sale of the painting, or anything Sotheby's did.

III. DISCUSSION

A. Documentary Evidence

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn,* 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence

for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1,* 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' " (*id.* at 84-85).

Here, the documentary evidence provided refutes plaintiff's claims in multiple ways. The documentary evidence includes the Klein and Burri Agreements and various email chains, including one in which Neumann tells Weitman "we should discuss this proposal to fine tune it" (March 26, 2015 email, attached as Exhibit G to to Cahill Aff, NYSCEF Doc. No. 85). The authenticity of the provided documents is not disputed. These documents demonstrate conclusively that the emails alleged to constitute the "master agreement" of Neumann and Sotheby was neither an offer nor acceptance of an enforceable contract. The subject of the March 24, 2015 "contract" sent to Neumann by Weitman are limited "Financial Considerations" (NYSCEF Doc. No. 86) relating to a yet to be negotiated Loan and Consignment Agreement. Notably, Neumann replied later that day asking for "a copy of the contract and all other papers involved, including financial ones" (*id*).

On April 6, 2015, Neumann received a "draft document". In an email, dated that day under the subject line "Financial Considerations," he states that he is "reading the draft" and provides several comments reflecting terms not appearing in the March 24, 2015 "contract" (*id.*). Three days later, on April 9, 2015, Neumann and Sotheby's signed a "Loan and Consignment Agreement" concerning an auction of the Klein painting (NYSCEF Doc. NO. 7). A year later, Neumann declared the March 24, 2015 agreement "was revised slightly" and was the basis for the Loan and Consignment Agreement dated April 9, 2015" (NYSCEF Doc. No. 7). The April 9, 2015, agreement is inconsistent with the "approval" language in the March 24, 2015, "contract" which Neumann seeks to apply here. That agreement expressly reserves to Sotheby's "absolute discretion to . . . (iii) provide[e] catalogue and other descriptions for the Property as Sotheby's deems appropriate . . ., (v) the marketing and promotion of the Auction; and the manner of

conducting the Auction" (id. § 1). As Neumann has acknowledged, this agreement "supersedes and trumps all future Consignment Agreements" (NYSCEF Doc. No. 6).

The court also notes that documents alleged to constitute the purported "agreement" (which plaintiff refers to as the "Weitman-Billaut-Agreement" reflect discussions between Neumann and different people at different times concerning distinct subjects. The "agreement" involved a communication between Neumann and Weitman on March 24, 2015, concerning "Financial Considerations" relating to the auction of paintings controlled by Neumann (NYSCEF Doc. No. 85). In response to the "agreement", Neumann wrote, on March 26, 2015, "[L]et's set up an appointment" (*id.*). The "acceptance" email relied on by plaintiff consists of communications between Neumann and Billaut dated March 13, 2016, and March 17, 2016, a year later, under the subject line "Sotheby's Consignment Agreement," (NYSCEF Doc. No. 6). In his email, Billaut "confirm[s] that Sotheby's will extend the three- year contract to April 2019 *under the conditions agreed on March 2015 for the Klein Sale . . .*" (*id.*) (emphasis added). As noted above, the Klein Loan and Consignment Agreement cede to Sotheby's the authority Neumann now claims he retained. In any event, Neumann had no authority to grant or withhold approval rights in the Basquiat because he had no interest in that painting. Nor did he have authority to manage its care or disposition. The Will expressly directs that Neumann "shall not be appointed as an Executor Administrator or Trustee of [Dolores'] estate" (NYSCEF Doc. No. 79).

B. Failure to State a Claim

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]).

1. Breach of Contract

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

"To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound" (*Kowalchuk v Stroup*, 61 AD3d 118, 121 [1st Dept 2009]). The law is well settled that "in order for a promise to be enforceable as a contract, the promise must be supported by valid consideration . . . . The essence of consideration is a legal detriment that has been bargained for and exchanged for the promise. In short, the detriment must induce the promise" (*Umscheid v Simnacher*, 106 AD2d 380, 381 [2d Dept 1984]). Assuming the documentary evidence failed to show the absence of a contract as alleged, the complaint must nonetheless be dismissed for failure to state a cause of action because plaintiff has not alleged any detriment to himself as a result of the breach of contract he alleges. The damages alleged - - lower market prices for Basquiat paintings in the Family Collection and receipt of less money from the Estate - - are entirely speculative and must be rejected. He has no interest in the Basquiat at issue here and he is not bound or restricted from seeking better terms from another auction house for any work in which he has an interest. What plaintiff alleges is merely an offer of favorable terms to be provided if he chooses to do business with Sotheby's.

Accordingly, the breach of contract claim fails.

2. Promissory Estoppel

The elements of a cause of action based upon promissory estoppel are: (1) a clear and unambiguous promise; (2) reasonable and foreseeable reliance by the party to whom the promise is made; and (3) an injury sustained in reliance on that promise (*Williams v Eason*, 49 AD3d 866, 868 [2d Dept 2008]; *Guerri v Associates Ins. Co.*, 248 AD2d 356, 357 [1998]). Plaintiff claims he relied on the promise in the email by consigning the Burri work to Sotheby's to sell (Opp at 25). There is no allegation he was injured by that consignment. Accordingly, this claim fails as well.

IV. CONCLUSIONS

For the reasons discussed above, the motion to dismiss shall be granted as to both the breach of contract and the promissory estoppel claims under CPLR 3211 (a) (1) and (a) (7).

It is hereby

ORDERED that the motion to dismiss of defendant, Sotheby's, Inc. is GRANTED and the amended complaint is DISMISSED in its entirety; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment dismissing the amended complaint and to tax costs against plaintiff, Hubert G. Neumann, in an amount to be fixed by the Clerk upon presentation of a proper bill of costs.

This constitutes the decision and order of the court.

DATED: February 27, 2019

ENTER,

O. PETER SHERWOOD J.S.C.