

**Sotheby's, Inc. v Chowaiki**

2019 NY Slip Op 30970(U)

April 4, 2019

Supreme Court, New York County

Docket Number: 657068/2017

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM

*Justice*

-----X		INDEX NO.	<u>657068/2017</u>
SOTHEBY'S, INC.,		MOTION DATE	<u>12/28/2018, 12/28/2018</u>
	Plaintiff,	MOTION SEQ. NO.	<u>002 003</u>
	- v -		

EZRA CHOWAIKI, LUBA MOSIONZHNIK,

Defendant.

**DECISION AND ORDER**

-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 40, 41, 48, 49, 50, 51, 52, 72

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 42, 43, 44, 45, 46, 47, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71

were read on this motion to/for DISMISS

Upon the foregoing documents, it is

In motion sequence number 002, Luba Mosionzhnik, defendant and third-party plaintiff, moves to dismiss the complaint pursuant to: CPLR 3211(a)(1) for a defense founded upon documentary evidence; CPLR 3211(a)(5) for the expiration of the statute of limitations; and CPLR 3211(a)(7) for failure to state a cause of action.

In motion sequence number 003, David E.R. Dangoor, third-party defendant, moves to dismiss the first amended verified third-party complaint pursuant to CPLR 3211(a)(5) for the expiration of the statute of limitations and CPLR 3211(a)(7) for failure to state a cause of action.

Motion sequence numbers 002 and 003 are consolidated for the purpose of disposition.

The following factual allegations are taken from plaintiff's complaint, except as otherwise noted.

Plaintiff Sotheby's Inc. (Sotheby's) is an international auction house that engages in art auction, private sales and art-related financing (NYSCEF Doc. No. 2, compl. ¶ 8).

Mosionzhnik is a former 25% shareholder of the Chowaiki Mosionzhnik Gallery Ltd. (the Gallery) (NYSCEF Doc. No 36, first amended third-party compl. ¶¶ 8, 13).<sup>1</sup> Dangoor was a 50% shareholder in the Gallery, while Ezra Chowaiki held the remaining 25% (*id.*, ¶ 8). On October 20, 2008, Mosionzhnik was terminated from the Gallery's employment and she ceased being an officer, owner shareholder or director of the Gallery (*id.*, ¶ 3). Dangoor and Chowaiki purchased her shares giving Dangoor a 62.5% share in the Gallery (*id.*, ¶¶ 14, 16). In December 2008, Dangoor and Chowaiki incorporated Chowaiki & Co. Fine Art Ltd. (New Gallery) (*id.*, ¶ 17).

Sotheby's and the Gallery entered into a Purchase Agreement, dated March 26, 2008, whereby the parties agreed that the Gallery would purchase a Henri Matisse painting titled "Titine Trovato in Dress and Hat" (the Painting) on Sotheby's behalf for \$12 million (*id.*, ¶¶ 9, 11a). Sotheby's would offer the Painting for sale from the date of purchase until September 10, 2008 (Offering Period) for \$20 million, with a minimum net price of \$15 million (*id.*, ¶ 11b-c). If the Painting remained unsold at the end of the Offering Period, Sotheby's would try to sell the Painting at Sotheby's Impressionist and Modern Art auction in November 2008 for a mutually agreed upon reserve price (*id.*, ¶ 11d). Sotheby's and the Gallery agreed to split either the Net Profit or the Net Loss equally (*id.*, ¶ 11e). If there was a Net Loss, the Gallery would reimburse Sotheby's for

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<sup>1</sup> Since the first amended third-party complaint was filed on May 23, 2018 more than 20 days after the Reply of April 2, 2018 without a motion for leave to amend and without objection, the court presumes consent.

half of the Net Loss within 5 business days of receipt of an accounting from Sotheby's (*id.*, ¶ 11f). If the Painting was not sold, then Sotheby's and the Gallery would mutually agree to its disposition (*id.*, ¶ 11g). In further consideration for Sotheby's entering into the Purchase Agreement, Chowaiki and Mosionzhnik each signed a Guaranty (*id.*, ¶11j).

Mosionzhnik asserts that she and Chowaiki, were compelled to sign Sotheby's personal guarantees when Dangoor refused (*id.* ¶10). The Guaranty provides:

The undersigned hereby jointly and severally, irrevocably and unconditionally personally guarantee all of the representations, warranties and obligations undertaken by [the Gallery] in this Agreement. This is a guarantee of performance and not of collection and will be binding on the undersigned regardless of any amendment, waiver or forbearance by Sotheby's with respect to this Agreement. (NYSCEF Doc. No. 28, Purchase Agreement at p. 6).

The Painting did not sell during the Offering Period, leading the parties to amend the Purchase Agreement (compl. ¶¶ 13, 16). On October 28, 2008, eight days after Mosionzhnik's shares were transferred to Dangoor and Chowaiki, Sotheby's and the Gallery amended the Purchase Agreement (First Amendment) without releasing Mosionzhnik from her obligations (*id.* ¶¶ 14-16). The First Amendment lowered the reserve price for the Property to \$9.5 million (NYSCEF Doc. No. 30, First Amendment at p.1). If a Net Loss occurred, the Gallery would pay Sotheby's in two equal installments on June 30, 2009 and December 15, 2009 (*id.*). Sotheby's further agreed to reduce the Interest Rate if the Gallery chose to consign Additional Property to be offered for sale at the auctions in May and November 2009 (*id.*). The Purchase Agreement was to remain in full force and effect (*id.* at p.2). Only Chowaiki executed the First Amendment (*id.*).

The Painting was sold at a loss on May 10, 2012 for \$4.75 million (compl. ¶ 18). On September 7, 2012, Sotheby's entered into an Amendment and Forbearance Agreement (Second Amendment) with the New Gallery (NYSCEF Doc. No. 32, Second Amendment at p.1). The Second Amendment also references the Purchase Agreement and the First Amendment (*id.*). In total, Sotheby's is owed \$3.625 million and 50% of the Interest due (the Chowaiki Net Loss) (*id.* at p.2, ¶ ii).

Having to split the Net Loss, the New Gallery agreed to pay Sotheby's \$100,000 and, notwithstanding anything set forth in the Purchase Agreement or First Amendment, agreed to also pay Sotheby's in installments of \$300,000 beginning on June 30, 2012 and each successive December 31 and June 30 thereafter until Sotheby's receives \$3.625 million and 50% of the interest accruing on the \$12 million amount (as reduced by the payments received) (*id.* at p.1, ¶ i). Upon any default, the outstanding Chowaiki Net Loss becomes immediately due and payable (*id.* at p.3, ¶ vi). For example, if either the New Gallery or Chowaiki (the Guarantor) breaches or fails to perform the agreement, the outstanding Chowaiki Net Loss becomes immediately due and payable (*id.*). Sotheby's reserves its rights previous agreements in the Second Amendment which provides:

As Amended hereby, the [Purchase] Agreement shall remain in full force and effect including without limitation, the personal guarantees of Ezra Chowaiki and Luba Mosionzhnik, *provided* that such right of contribution shall not limit or waive Sotheby's right to recover any amounts due under the [Purchase] Agreement or this Amendment Agreement in full from Ezra Chowaiki and that Sotheby's shall not have any obligation to sue or otherwise attempt to collect any amounts from Luba Mosionzhnik (*id.* at p.5).

Despite the previous guarantees remaining in full force and effect, Chowaiki signed an additional guaranty (Second Guaranty) (compl. ¶22).

Defendants made payments to Sotheby's totaling \$2.1 million through December 31, 2016, but no payments have been made since this date (*id.* ¶ 24). The next payment was due on June 30, 2017 (*id.* ¶ 27). Currently, a balance of \$2,969,180.00 exclusive of additional interest is due (*id.* ¶ 24).

This action commenced in November 2017. Mosionzhnik initiated her third-party complaint in March 2018 and amended the third-party complaint in May 2018.

On a motion to dismiss under CPLR 3211, "the pleading is afforded a liberal construction. "[The court] accept[s] the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Dismissal, under CPLR 3211(a)(1), is appropriate "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*id.* at 88 [citations omitted]).

At issue is whether a guarantor remains bound by a guarantee whose underlying contract has since been modified without notice to the guarantor. A guarantor's obligation is *strictissimi juris*; the obligation cannot be altered without the guarantor's consent (*see Becker v Faber*, 280 NY 146, 149 [1939]). Alteration of the contract without the guarantor's consent releases the guarantor from liability (*see id.* at 148-49). However, a guarantor is bound by an anticipatory agreement when he agrees to future amendments or modifications to the agreement (*see Davimos v Halle*, 60 AD3d 576, 577 [1<sup>st</sup> Dept 2009]; *see also Worms v Andre Café Ltd.*, 183 AD2d 494 [1<sup>st</sup> Dept 1992]).

Mosionzhnik agreed to be bound by all future amendments made by Sotheby's when she signed the Guaranty. Using *strictissimi juris*, the black and white language of

the Guaranty leaves Mosionzhnik unconditionally and irrevocably personally liable for the obligations of the Gallery regardless of any future amendments. With the First and Second Amendments fully incorporating the Purchase Agreement, the Guaranty remains valid. At the time the Second Amendment was signed, the Gallery had become the New Gallery. Having been terminated from the Gallery and her shares disposed, Mosionzhnik was not a member of either the Gallery or the New Gallery.

Guarantors remain liable on an agreed upon guaranty, regardless of the guarantor's sale of its interest in the party corporation (see *W. & M. Operating, L.L.C. v Bakhshi*, 159 AD3d 520, 522 [1<sup>st</sup> Dept 2018] [citation omitted]). The court must determine whether the changes in the entity "have the effect of creating a principal with a new identity and one of the debts of which the guarantor never intended to guarantee when he executed the agreement" (see *Fehr Bros., Inc. v Scheinman*, 121 AD2d 13, 18 [1<sup>st</sup> Dept 1986] [citations omitted]). "The test . . . is to determine whether the changes in the entity, the debts of which, are guaranteed significantly alter the business dealings between the debtor and the creditor and the nature of the guarantor's undertaking, in particular the degree of risk the guarantor is obligated to assume" (*id.* at 19 [citations omitted]). A change in the name of a corporation, without changing the legal status or business nature does not create a new entity (see *id.* at 20 [citations omitted]).

The Gallery changed its name to the New Gallery but is treated as the same entity by Sotheby's. The Second Amendment made by Sotheby's refers to the previous agreements and acknowledges the name change. The shares of the New Gallery are held by two of three of the same shareholders, and it conducts the same business. Further, the New Gallery did not take on new debt in its dealings with Sotheby's. The

New Gallery is liable for the same debts that Mosionszhnik guaranteed, the Second Amendment simply states the sale price, the Net Loss owed, and the payment schedule. Mosionzhnik knew that she was liable for the debts of the Gallery in regards to the Painting.

Under CPLR 213, when not otherwise provided for, the statute of limitations is six years. For a promissory note, the statute of limitations is six years from the date of default, which is thirty days after the last payment was due. The First and Second Amendments were modifications that fully incorporated the Purchase Agreement. The Second Amendment was signed on September 7, 2012 and the breach occurred on June 30, 2017, the date payment was due but not received. This action commenced well within the statute of limitations.

Mosionzhnik argues that Dangoor is liable for overreaching because he forced her to sign the Guaranty when he should have signed the Guaranty. In New York, claims for overreaching are traditionally seen in the matrimonial law context (see *Gottlieb v Gottlieb*, 138 AD3d 30 [1<sup>st</sup> Dept 2016]). Outside of this context, a claim for overreaching requires an examination of the nature of the relationship between the parties, the disparity between the consideration received and the fair value of the contract, and knowledge of the incapacity of the periled party (see *Skolnick v Goldberg*, 297 AD2d 18, 20 [1<sup>st</sup> Dept 2002]). Mosionzhnik pleads bare factual conclusions that do not amount to a viable claim. It is apparent from oral argument that Mosionzhnik would have liked to argue duress or undue influence, but these claims are not in the motion papers, and thus, cannot be addressed here. Since there is no cognizable overreaching claim, there is no need to address the statute of limitations.

Contribution is a cause of action based in tort law, not the law of contracts. CPLR 1401 states that "two or more persons who are subject to liability for the same personal injury, injury to property or wrongful death, may claim contribution among them." Purely economic loss due to a breach of contract does not constitute injury to property (see *Children's Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318, 323 [1st Dept 2009] [citation omitted]). This is an action for breach of contract, and thus, Mosionzhnik's claim for contribution must be dismissed.

Last, Mosionzhnik's claim for common law or implied indemnification must be dismissed. "The party seeking indemnification 'must have delegated exclusive responsibility for the duties *giving* rise to the loss to the party from whom indemnification is sought,' and must not have committed actual wrongdoing itself" (*Tiffany at Westbury Condominium by Its Bd. of Mgrs. v Marelli Dev. Corp.*, 40 AD3d 1073, 1077 [2d Dept 2007], quoting *17 Vista Fee Assocs. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80 [1st Dept 1999]). Indemnification is permitted for breach of contract when it is based on negligence (see *17 Vista Fee Assocs.*, 259 AD2d at 81). Here, however, is a breach of contract claim, not based on negligence. While Mosionzhnik's regret for signing the Guaranty is understandable; the fact is that Mosionzhnik did sign the Guaranty.

Accordingly, its

ORDERED that defendant and third-party plaintiff Luba Mosionzhnik's motion to dismiss the complaint is denied; and it is further

ORDERED that third-party defendant David E.R. Dangoor's motion to dismiss the third-party complaint is granted and the third-party complaint is dismissed in it

entirety against said third-party defendant with costs and disbursements as taxed by the Clerk of the Court and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the third-party action is severed and continued against the remaining third-party defendants; and it is further

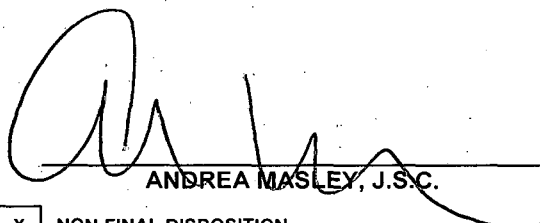
ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the County Clerk and Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-filing" page on the court's website - [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

4/4/2019

DATE

  
ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE