Mayor Gallery Ltd v Agnes Martin Catalogue Raisonne LLC
2019 NY Slip Op 32089(U)
July 2, 2019
Supreme Court, New York County
Docket Number: 655489/2016
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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THE MAYOR GALLERY LTD,

Plaintiff,

- v -

THE AGNES MARTIN CATALOGUE RAISONNÉ LLC, ARNOLD GLIMCHER, MARC GLIMCHER, and TIFFANY BELL,

Defendants.

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INDEX NO. 655489/2016

MOTION DATE

MOTION SEQ. NO. 004

DECISION & ORDER

MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 131, 136, 137 were read on this motion to/for DISMISSAL

In its April 3, 2018 decision and order (NYSCEF 66), the court granted defendants' prior motion, motion sequence number (Motion) 001, and dismissed plaintiff's First Amended Complaint (FAC) in its entirety but permitted plaintiff leave to replead several of the dismissed claims. A Second Amended Complaint (SAC), dated April 24, 2018, was filed to NYSCEF on April 25, 2018 (NYSCEF 70). Defendants now move, pursuant to CPLR 3211 (a) (1), (a) (3), and (a) (7) in Motion 004, to dismiss the SAC.

The court incorporates here its April 3, 2018 decision resolving Motion 001 (NYSCEF 66) in which the factual background of this matter is discussed in detail. The court presumes familiarity with the action and the facts in this decision and order are limited to those that illustrate the changes between the FAC and SAC and those otherwise necessary for the court to resolve Motion 004.

The Prior Motion to Dismiss the FAC (Motion 001)

The court dismissed the FAC in its April 3, 2018 decision and order. As a threshold matter, the court narrowed the scope of its review of the FAC on the preliminary bases of plaintiff's standing to

raise its various claims. Standing to raise tort claims, such as most of those contained in the FAC and SAC, necessarily depends on whether the plaintiff has sustained an injury. In reviewing the FAC, the court determined that, at that pre-answer motion to dismiss stage, plaintiff's allegations were adequate as to injury with respect to only certain artworks and as to certain defendants; that is, the court determined that, for the purpose of analyzing Motion 001 and the FAC, it would only review the claims to the extent that they involved artworks for which plaintiff had alleged an accrued injury. In short, judicial review was warranted pre-answer and pre-discovery only where plaintiff had issued a refund to certain collectors, as there was otherwise no controversy in tort between the parties to be adjudicated.

Ultimately, the court found that there was only standing as to the artworks sold to two collectors, Levy and Shainwald, who were allegedly refunded by plaintiff after the Notification Letters were sent. Further, plaintiff's injury claims amounted, for each tort claim, to the amount that the four collectors had paid and had been, or may be in the future, refunded; accordingly, the court dismissed for lack of standing plaintiff's first, second, third, fourth, and fifth (inasmuch as it sounded in tort) claims as they related to Kolodny and Labouchère, the collectors who had, at that time, not been refunded.

The court further dismissed plaintiff's first through sixth claims in the FAC as raised against the individual defendants on the basis that plaintiff had alleged "only general, conclusory allegations that the individual defendants participated in the claimed tortious acts or omissions" and had not "demonstrate[d] that the individual defendants benefited from the alleged torts" (NYSCEF 66). The court further dismissed the contract prong of the sixth cause of action as against the individual defendants for lack of privity (*id.*). Finally, the court dismissed with prejudice plaintiff's General Business Law (GBL) § 349 claim as to all defendants as inadequately pleaded (*id.*).

Amendments to the SAC

Plaintiff amended the caption to remove as defendants the "Members of the Authentification [sic] Committee of the Agnes Martin Catalogue Raisonné," identified in the FAC as "John Doe or Jane Doe ##1-6." The defendants that remain are Agnes Martin Catalogue Raisonné LLC (AMCR), Arnold

Glimcher (A Glimcher), Tiffany Bell, and Marc Glimcher (M Glimcher). M Glimcher was identified in the FAC as a member of AMCR's Authentication Committee (Committee) but his identity was not disclosed publicly pursuant to the parties' Stipulation and Order for the Production and Exchange of Confidential Information, so-ordered by Justice Oing on December 20, 2016 (NYSCEF 22).[1]

Plaintiff further amended ¶ 8 of the FAC to reflect that A Glimcher "is the managing member" of AMCR, he "controls" AMCR and the Committee, and he is "primarily" responsible for AMCR's policies, practices, procedures, and actions.

Plaintiff states in the SAC that both A Glimcher and M Glimcher are art dealers. M Glimcher is the president of Pace Gallery and was appointed to the Committee by A Glimcher, his father.

Plaintiff states in the SAC that A Glimcher "founded and principally owns" Artifex Press (Artifex), the company that publishes the Agnes Martin Catalogue Raisonné (Catalogue), and A Glimcher appointed defendant Bell to the Committee and named her the Catalogue's editor.

Plaintiff adds in the SAC that Kolodny, one of the collectors who owned an artwork at issue, demanded and obtained a full refund pursuant to a warranty of authenticity on November 1, 2016. Another collector, Labouchère, demanded a refund pursuant to a warranty of authenticity but agreed with plaintiff not to seek to enforce any warranty rights until plaintiff "prevails" in this action.

As to the thirteen artworks, the SAC includes plaintiff's allegation that all works were "purportedly signed by Agnes Martin," and one work, *Day & Night*, also has a hand-written inscription "To Delphine, Agnes Martin."[2] Plaintiff alleges that "[d]efendants failed to compare the handwriting . . . on the thirteen artworks . . . . [n]or did they engage a handwriting expert, at plaintiff's expense, to render an opinion on whether the signatures were authentic."

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[1] To the extent that any documents are filed to the NYSCEF docket in this action, the parties are directed to execute a new stipulation for the exchange of confidential material in the form accepted by Part 48 and to otherwise comport with the Part 48 Rules and Procedures, both available on the NYCourts.gov public website.

[2] The FAC included allegations regarding the inscription on *Day & Night* (NYSCEF 25 [FAC], ¶ 22).

Plaintiff further asserts in the SAC that evidence was "ignored" by defendants in evaluating *Day & Night* when it was submitted the second time: for instance, radiocarbon test results for the work's canvas; an email allegedly from Jack Youngerman, the husband of Delphine Seyrig and a friend of Agnes Martin, in which Youngerman stated "the dedication was an affectionate 'homage,' " but Seyrig never received the painting. Youngerman also expressed in that email his opinion that *Day & Night* could have been made by only Agnes Martin, not by a counterfeiter.[3]

Plaintiff states in the SAC that the collectors have not purchased any artwork from plaintiff since the Notification Letters were received and reasserts none of the thirteen artworks can be offered for resale by plaintiff because of AMCR's decision not to include the works in the Catalogue.

As to A Glimcher and M Glimcher, plaintiff asserts that there is a conflict of interest, or an appearance of such a conflict, because they both own and deal Agnes Martin artworks, and both have "substantial monetary interest in" her artworks, the value of which increases in step with the scarcity of her artworks on the market; thus, A Glimcher and M Glimcher have benefitted financially from AMCR's exclusion of the thirteen artworks from the Catalogue and "their decision to vote to reject" those artworks "was motivated by their economic interest . . . [to reduce] the number of Agnes Martin artworks in the marketplace." As to M Glimcher, plaintiff asserts that he lacks the professional experience "and objectivity" to serve on the Committee due to his financial interests.

Plaintiff seeks, apart from the general causes of action in the SAC, to enjoin all defendants to answer certain inquiries posed in the SAC, and to enjoin all defendants from engaging in the alleged improper practices outlined in the SAC. Plaintiff additionally seeks attorneys' fees from defendants other than Bell under GBL § 349 (h).

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[3] The FAC also included allegations regarding plaintiff's resubmission of *Day & Night* with radiocarbon testing results and the purported email by Youngerman (NYSCEF 25, ¶ 28; *see also id.* ex B [plaintiff's submission to AMCR for *Day & Night*, including both radiocarbon testing results and Youngerman's alleged email, annexed to the FAC]).

At oral argument for Motion 004, plaintiff's counsel clarified that the warranties of authenticity provided when the artworks were sold—no contract of sale is included in any papers before the court—were implied warranties, not written or otherwise recorded, which are "breach[ed]" when AMCR declines to include the artwork in the Catalogue, "compel[ling plaintiff] to issue a refund" (Tr at 9-10). Though not actually alleged, the court presumes that plaintiff refers to the implied warranty applicable to the sale of art goods under the UCC (*see* UCC § 2-312 [warranty of title implied in sale of art]).

The Claims in the SAC

Plaintiff alleges the following causes of action in the SAC:

1. Product disparagement against all defendants except Bell as to all thirteen artworks;
2. Tortious interference with contract against all defendants except Bell as to all artworks;
3. Tortious interference with prospective business relations against all defendants except Bell as to all artworks;
4. Negligent misrepresentation against all defendants except Bell as to all artworks;
5. Gross negligence/breach of contract against all defendants except Bell as to all artworks;
6. Breach of contract and breach of implied duty of good faith and fair dealing against all defendants except Bell (for pecuniary damages) and against all defendants (for injunctive relief) as to only one artwork, *Day & Night*; and
7. Violation of GBL § 349 against all defendants except Bell (for pecuniary damages) and against all defendants (for injunctive relief).

Defendants move, pursuant to CPLR 3211 (a) (1), (a) (3), and (a) (7), to dismiss the SAC entirely.

Discussion

As to Standing and the Individual Defendants

As to the threshold issue of standing, the court finds that plaintiff's new allegations that it has refunded Kolodny's purchase is adequate, at this pre-answer, pre-discovery phase, for the court to consider the claims as they relate to Kolodny's submissions to AMCR. As to Labouchère, plaintiff now alleges that he demanded a refund but then rescinded the demand and agreed "in substance" that he "would forebear from enforcing his rights under [the warranties of authenticity] and from demanding and receiving a refund of the purchase prices, but only if and until [plaintiff] brought and then prevailed

in [this] action" (NYSCEF 70 [SAC], ¶ 51). Based on that allegation, Labouchère has not demanded or received a refund, or created a pending legal obligation on the part of plaintiff (*see id.*). Plaintiff states, in its memorandum of law in opposition to Motion 004, that the implied warranties are those controlled by UCC § 2-725 (2), which provides the statute of limitations for enforcing a warranty of goods that involve future performance, such as artworks: the four-year statute of limitations "must await the time of such [future performance and] the cause of action accrues when the breach is or should have been discovered" (NYSCEF 113 at 5, citing UCC § 2-725 [2]). Here, the breach (inauthenticity) occurs, as plaintiff alleges, when Notification Letters decline to include the artworks in the Catalogue.

Plaintiff argues that it has cured the Labouchère-related standing issues in that Labouchère's now alleged to have demanded a refund, but then agreed with plaintiff that the time to enforce the warranty would not toll, and Labouchère would reserve his right to demand a refund, until plaintiff "prevails in [this] action" (NYSCEF 70, ¶ 51). The court disagrees. Plaintiff has not corrected the identified standing issue as to Labouchère's artworks as plaintiff does not allege that it has sustained an actual or accrued injury regarding those artworks/transactions. This action does not seek a determination or declaration that the artworks are, in fact, authentic, and such relief would not result from adjudication of these claims. Further, UCC § 2-725 (2) does not impose a legal duty on plaintiff to refund any collector for the artworks; it sets the time at which a collector's claim against plaintiff accrues and within which a collector must seek to enforce the implied warranty. Extending the collector's time to enforce the warranty does not constitute an actual injury sustained by plaintiff: there is no legal obligation imposed on plaintiff to issue a refund now, only the potential to face an enforcement demand or action in the future. Finally, plaintiff alleges in the SAC that Labouchère's right to demand a refund is contingent on plaintiff prevailing in this action; if plaintiff does not prevail, the collector's time to demand or commence an action to enforce the warranty may well have expired.

The court has not ruled, at any juncture, whether plaintiff ultimately has standing to raise its tort claims—only that, for the purposes of these pre-answer motions, it would evaluate the claims insofar as

plaintiff has alleged it has sustained an injury—the most basic, elemental aspect of standing for a tort claim. The court has some doubts as to whether plaintiff has sustained an adequate injury as to all artworks, which were sold prior to the works being sent to AMCR (or any catalogue raisonné), and—as far as plaintiff alleges—none of the sales were contingent upon future inclusion of the works in a catalogue raisonné. Further, the work that was resubmitted to AMCR by plaintiff, *Day & Night*, was rendered worthless by the initial non-inclusion in the Catalogue, as plaintiff alleges, and so the non-inclusion of *Day & Night* after resubmission does not state an accrued pecuniary loss: the artwork's value remained the same, though null, by its second non-inclusion in the Catalogue.

The court also notes defendants' contention that, pursuant to CPLR 3211 (a) (3), plaintiff lacks standing to raise any claims as to the artworks submitted by the collectors on the basis that those claims all arise from the collectors' contracts with AMCR, none of which identify plaintiff as a party to or intended beneficiary of those agreements. Defendants contend that plaintiff lacks standing to raise claims, in tort or contract, as to the collectors' submissions as plaintiff does not allege that any collector assigned or delegated their rights under those agreements to it. The court observes that, apart from its allegations that the artworks were sold with "attending" implied warranties, plaintiff alleges no facts in the SAC indicating that it maintained an interest in, or obligation arising from, the artworks it sold to the collectors. That each sale—for which there are no documents/invoices/contracts submitted—included an implied warranty of authenticity does not automatically establish a continuing interest in the artworks and plaintiff does not allege that any sale was contingent on inclusion of any given artwork in a catalogue raisonné. In fact, plaintiff alleges that the Catalogue/AMCR existed prior to the Labouchère sales yet plaintiff did not submit those works to AMCR prior to the Labouchère transactions.

Nevertheless, the court addresses standing as to the collectors' submissions as necessary in the discussion of each claim below.

All claims in the FAC against the individual defendants were previously dismissed by this court in resolving Motion 001. In the SAC, plaintiff does not assert new facts as to any act or omission by Bell

in connection with any of the claims; accordingly, the complaint is dismissed against Bell in her individual capacity. As to A Glimcher, new factual allegations as to his "control" of the Committee, Artifex, and the Catalogue, as well as his personal collection of Agnes Martin artworks being rendered more valuable by declining to include the artworks at issue here in the Catalogue, may suffice to permit the court to analyze the claims in the SAC as raised against him in his individual capacity. As to M Glimcher, plaintiff now alleges that he was motivated by personal profit in declining to include the thirteen artworks at issue because he also owns a substantial collection of Agnes Martin artworks. There are no allegations that M Glimcher controls AMCR or the Catalogue, however, and, accepting as true plaintiff's assertion that the Committee is controlled by A Glimcher, M Glimcher's financial motivation is effectively irrelevant. In any event, the court will consider the claims plaintiff alleges in the SAC as to defendants AMCR, A Glimcher, and M Glimcher as appropriate below.

Standard on a Motion to Dismiss Pursuant to CPLR 3211 (a)

On a pre-answer motion to dismiss, the court affords the complaint a liberal construction, accords plaintiff with every favorable inference, and accepts the factual allegations as true; however, bare legal conclusions and allegations that are flatly contradicted or inherently incredible are not afforded their most favorable intendment (*see Leon v Martinez*, 84 NY2d 83, 87–88 [1994]; *Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995]). Accordingly, the court addresses below the claims in the SAC and whether plaintiff's amendments have cured the identified deficiencies and has otherwise satisfied the elements of those claims as to each of the remaining defendants.

1. Product disparagement against AMCR and the Glimchers as to all artworks

"[P]roduct disparagement is an action to recover for words or conduct which tend to disparage or negatively reflect upon the condition, value, or quality of a product or property, and . . . the elements of a product disparagement which must be proven are: (1) falsity of the statement; (2) publication to a third person; (3) malice (express or implied); and (4) special damages" (*Thome v Alexander & Louisa*

Calder Found., 70 AD3d 88, 105 [1st Dept 2009] [alteration in original], *lv denied* 15 NY3d 703 [2010], quoting 44 NY Jur 2d, Defamation & Privacy § 273).

Even assuming plaintiff has standing to raise this claim as to all thirteen artworks, only one of which it submitted to AMCR to be considered for inclusion in the Catalogue (the second *Day & Night* submission [Plaintiff's Submission]), and accepting as true plaintiff's assertion that all the artworks are authentic, and further that publication of the Notification Letters to the submitting parties (the collectors and plaintiff, respectively) constitutes publication of a falsehood (i.e., that the work is inauthentic) to a third party (i.e., plaintiff asserts that the Notification Letter is a statement to the entire art world) (*see Thome*, 70 AD3d at 105-107 [noting that "[t]here is no question that . . . treating the (non-inclusion of an artwork in a catalogue raisonnè) as a publication asserting the Work's inauthenticity to the world at large would constitute a substantial expansion of the law]), plaintiff's claim remains defective.

With respect to the falsity requirement, the Notification Letters are clear that they are not to be construed as statements that a work is inauthentic, and the Notification Letters plainly state only that the work is not being included in the Catalogue. Further, whether any catalogue raisonné's inclusion or non-inclusion of an artwork has any bearing on a work's value has been recognized by New York court's as a function of the art marketplace, and it is not for the court to determine what the art market should or should not credit as reliable (*see id.* at 97-98 [noting that a catalogue raisonné is not "controlled by any governmental regulatory agency," and there is no "guarantee that the art world will accept (its) validity and reliability"; "(w)hether the art world accepts (it) as a definitive listing of an artist's work is a function of the marketplace, rather than of any legal directive or requirement," thus, a catalogue's "inclusion or exclusion of particular works creates (no) legal entitlements or obligations"]).

First, as to Levy's submission of *Day & Night*, the one-year statute of limitations for a product disparagement claim accrued, accepting the allegation that the Letter rendered the work unsaleable, on the date it was received in or around September 25 or early-October 2014, and this action was not initiated until October 17, 2017 (NYSCEF 1 [original summons and complaint]). Even if the statute of

limitations was extended by plaintiff's resubmission of *Day & Night* in May 2015, plaintiff has the above-mentioned issue of special damages relating to that work: if it was rendered worthless when it was not included the first time, plaintiff did not sustain a pecuniary loss when the resubmitted work was not included in the Catalogue. Plaintiff also has not cured its inability to allege special damages with respect to the artworks submitted by Labouchère as no refund—or any pecuniary loss—is claimed by plaintiff as to those works at this time. Furthermore, asserting only the sale price and sales tax for the sales of the artworks and nothing more is insufficient to establish special damages here. There are no particular allegations that plaintiff sustained any special damages apart from rescinding the sales to certain collectors as a result of the non-inclusion of the works in the Catalogue. Plaintiff does not assert in more than conclusory, speculative statements that it has sustained any damage to its business reputation or future sales.

In any event, even assuming that plaintiff has established special damages with respect to the artworks submitted by Shainwald and Kolodny in the amount of refunds it has issued to those collectors, plaintiff's amended allegations in the SAC remain insufficient to adequately state malice for this claim. Plaintiff's allegations that the Committee failed to consider the additional information submitted with Plaintiff's Submission of *Day & Night*—including the radiocarbon testing results and the purported email of Youngerman—were included in the FAC and were considered by the court in its earlier decision resolving Motion 001. AMCR, pursuant to the Agreements with the collectors and plaintiff, had no obligation to assign any special importance to the documents submitted with each Agreement, and there is no obligation on the part of AMCR under the Agreements to identify the basis of its decision or the procedures or methods it employed in reaching its decisions.

The amended allegations that A Glimcher and M Glimcher have substantial personal collections of Agnes Martin artworks and are, therefore, financially motivated to decline applications for inclusion in the Catalogue are vague, even accepted as true. Plaintiff's amended allegations are speculative in that they do not identify any specific financial benefit defendants, particularly the Glimchers, obtained in not

including the thirteen artworks, and combined with plaintiff's allegation that its principal, James Mayer, and A Glimcher have had unspecified "longstanding frictions" does not establish implied or actual malice sufficient to maintain this action. Likewise, the amended allegation that A Glimcher "controls" the Committee and dictates its determinations is a bare legal conclusion that is not entitled to every favorable inference and does not demonstrate malice for the purpose this product disparagement claim.

Furthermore, as the court previously stated, nothing in the Agreements with AMCR requires defendants to: provide "information and documents explaining and supporting [AMCR's] decision" to include or not include any artwork submitted; allow a submitting person or entity to "review and rebut any documents or information relied upon by defendants"; reveal the identities of the Committee members; or share the policies, practices, and procedures followed by AMCR or the Committee. The Agreements are clear in that they grant AMCR the sole discretion review artworks submitted for inclusion to the Catalogue as it deems appropriate (*see e.g.* NYSCEF 94, ex B). Plaintiff's allegations that the Committee failed to hire a handwriting expert are speculative, as are the allegations that additional documents submitted by plaintiff with Plaintiff's Submission were ignored.

Accordingly, given the numerous pleading issues impeding this claim, the court declines to infer malice under the circumstances on the record before it in this SAC, which largely reiterate the previously-dismissed allegations in the FAC (*e.g. Van-Go Transp. Co., Inc. v New York City Bd. of Educ.*, 971 F Supp 90, 106 [EDNY 1997] [discussing New York cases]).

2. Tortious interference with contract against AMCR and the Glimchers as to all artworks

As discussed above, plaintiff's amendments in the SAC do not establish continuing obligations in the sale contracts with the collectors. Furthermore, the only allegations that support defendants' knowledge that non-inclusion of the artworks in the Catalogue would force the collectors to rescind and plaintiff to issue refunds is speculative; there are no allegations that any of the defendants were aware of the terms of the sale agreements between plaintiff and the collectors, and those terms are not even

wholly alleged by plaintiff in the SAC. Moreover, plaintiff's allegations do not demonstrate that the Notification Letters were sent with the intent to induce a breach of an existing contract, rather than in the furtherance of AMCR's purpose. Nothing plaintiff alleges in the SAC has cured the deficiencies previously identified by the court with the FAC as to this claim, and speculative assertions as to defendants' knowledge or intent are insufficient to adequately allege the necessary elements.

3. Tortious interference with prospective business against AMCR and the Glimchers as to all artworks

Plaintiff has failed to cure the deficiencies with this claim as well. There are no nonconclusory or non-speculative allegations in the SAC that establish, or from which it can be inferred, that defendants were aware of continuing business relationships with the collectors or other related customers and intentionally acted to harm plaintiff's prospective business relationships. Plaintiff's allegation that the collectors have not purchased artworks from plaintiff since the Notification Letters were sent is insufficient; plaintiff does not allege that ongoing business was being conducted with the collectors, or any other customers, that was negatively affected by the Notification Letters.

Further, plaintiff has not established that defendants were solely motivated by malice or used wrongful means to interfere with plaintiff's prospective business relationships. Plaintiff has not alleged that its business relationships, aside from the collectors' particular sale contracts, were impacted by the Notification Letters. Conclusory allegations that that the collectors have not done business with plaintiff since the Letters were sent are insufficient to establish interference with future business relationships absent specific factual statements from which to infer that the collectors had ongoing, continuous business relationships with plaintiffs that were improperly and intentionally impeded by defendants' allegedly improper actions. Thus, plaintiff does not adequately allege this claim and, as malice element is not saved by an independent tort based on the court's rulings above.

4. Negligent misrepresentation against AMCR and the Glimchers as to all artworks

"The elements of a claim for negligent misrepresentation are: (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff;

(2) that the information was incorrect; and (3) reasonable reliance on the information" (*MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 840 [1st Dept 2011] [internal quotation marks and citations omitted]).

Plaintiff has not cured the defects previously identified in that there are no nonconclusory, non-speculative allegations stating that defendants were aware of the ramifications of non-inclusion of each artwork. In the SAC, plaintiff does not assert with adequate facts that defendants were aware that each collector would seek a refund from plaintiff if each submitted work was not included in the Catalogue. Further, plaintiff has not established a privity-like relationship on the basis of only defendants' position of expertise in the field of Agnes Martin artworks and the only contract for which there is privity between the parties is that for Plaintiff's Submission which was the result of an arms-length commercial transaction and which does not support plaintiff's negligent misrepresentation claim (*see Mandarin Trading Ltd. v Wildenstein*, 17 Misc 3d 1118(A), 2007 NY Slip Op 52059[U], *6 [Sup Ct, NY County 2007], *affd* 65 AD3d 448 [1st Dept 2009], *affd* 16 NY3d 173 [2011]).

Further, plaintiff's post-Notification Letter communications with defendants' attorney cannot be used to cure the pleading defects—that plaintiff communicated with defendants after the Letters were sent does not support the knowledge requirement, especially where, for instance, plaintiff only resubmitted one of the thirteen artworks for reconsideration. As discussed above, there is no tenable independent tort claim in the SAC, and, thus, this claim cannot be saved on that basis.

5. Gross negligence contract claim against AMCR and the Glimchers as to all artworks

Plaintiff's amended allegations pertaining to its gross negligence/breach of contract claim also fail to cure the deficiencies identified by the court in its prior decision. Plaintiff speculates that defendants ignored additional evidence submitted with *Day & Night* with Plaintiff's Submission and failed to engage a handwriting expert to compare the signatures and other writing on the submitted artworks—in particular, *Day & Night*, the only work for which plaintiff's executed an Agreement with

AMCR. The "new" allegations plaintiff relies on were nearly all included in the FAC and considered by the court, and they are not adequate, as repackaged in the SAC, to maintain this claim at this time.

Further, plaintiff's allegations are refuted by the Agreements entered by plaintiff and each of the collectors: in consideration for prospective inclusion of the work in the Catalogue, the contracting parties each agreed that AMCR would examine the work in the manner AMCR, in its sole discretion, deems appropriate. None of plaintiff's amended allegations in the SAC evince "a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing" (*Morgan Stanley Mtge. Loan Trust 2006-13ARX v Morgan Stanley Mtge. Capital Holdings LLC*, 143 AD3d 1, 8 [1st Dept 2016]). A contractual gross negligence claim is an extraordinary measure, and "merely alleging that breach of contract duty arose from lack of due care will not" suffice to establish such a claim sounding in tort or contract (*see Saint Patrick's Home for the Aged & Infirm v Laticrete Intl.*, 267 AD2d 166, 166 [1st Dept 1999]).

6. GBL § 349 claim against all defendants

Plaintiff's GBL § 349 claim was previously dismissed with prejudice and there are no new allegations supporting that claim. Accordingly, it is not discussed in this decision as the law of the case requires its dismissal.

7. Plaintiff's request for injunctive relief against defendants and CPLR 3211 (d) request for discovery

While plaintiff has demonstrated that the method of reviewing submitted works is left to the sole discretion of defendants, particularly AMCR, and that plaintiff's post-Notification Letter requests were not answered, plaintiff was well aware that the Agreements it and the collectors entered with AMCR permitted exactly that: AMCR, in its sole discretion, would review applications for inclusion in the Catalogue, it would not furnish explanatory reasons for its decisions to include or not include works, and it was not obligated to permit any party—a contracting party or an entity that sold the work to that party—to refute or supplement AMCR's determinations. Plaintiff has been given additional chances to replead its claims with more particularity and/or with additional nonconclusory facts, as appropriate, but it has not met its burden of alleging factual allegations to sufficiently state the elements of any of its

various claims. While limited discovery may disclose certain information to plaintiff to aid it in appropriately pleading its claims, that is not the standard. Rather, the "mere hope that discovery may reveal facts essential to justify opposition doesn't warrant denial" of a motion to dismiss (*Karpovich v City of New York*, 162 AD3d 996 (2d Dept 2018). Moreover, the court is not inclined to permit plaintiff to use pre-answer discovery to transform mere suspicions into factual assertions to submit what would now be a third amended complaint (*see Chappo & Co., Inc. v Ion Geophysical Corp.*, 83 AD3d 499, 500-501 (1st Dept 2001), especially where plaintiff has failed to allege an evidentiary basis that would circumscribe the clear language of the AMCR Agreements precluding many of plaintiff's claims with respect to its own submission of *Day & Night* (Plaintiff's Submission), and an overall failure to identify adequate facts that would permit plaintiff's claims to proceed to discovery in the first place.

The facts plaintiff purports to seek are those that have little to no bearing on the claims as the Agreements that it and the collectors freely entered preclude much of the discovery plaintiff seeks to take, and the obligations plaintiff claims were breached are nearly entirely obligations that AMCR was not required to perform or explain under those Agreements.

8. Legal fees

The issue of legal fees under Motion 004, as with Motion 001, are referred to the Special Referee to determine. Specifically, the Special Referee shall hear and report on the extent to which, if at all, the Agreement entered between plaintiff and AMCR in connection with Plaintiff's Submission encompasses plaintiff's dismissed claims in the FAC and SAC, and any other issues pertaining to liability for attorneys' fees arising from plaintiff's Agreement with respect to Motions 001 and 004 under applicable law and authority.

Accordingly, it is

ORDERED that Motion Sequence Number 004 is granted and Plaintiff's Second Amended Complaint is dismissed in its entirety; and it is further

ORDERED that Plaintiff's request for pre-answer discovery under CPLR 3211 (d) is denied; and it is further

ORDERED that the portion of Defendants' motion that seeks recovery of attorney's fees, costs, and disbursements is severed, and the issues of the amount of reasonable attorneys' fees, costs, and disbursements the Defendants may recover against the Plaintiff are referred to a Special Referee to hear and report (or, if the parties shall so stipulate, to hear and determine); and it is further

ORDERED that counsel for the Defendants shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to consolidate this matter with the previously-severed attorneys' fees issues referred in connection with Motion Sequence Number 001 and to place the consolidated matter on the calendar of the Special Referee's Part for the earliest convenient date.

7/2/2019
DATE

HON. ANDREA MASLEY
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	X	REFERENCE