

Donnelly v Neumann
2019 NY Slip Op 32382(U)
August 7, 2019
Supreme Court, New York County
Docket Number: 650318/2019
Judge: O. Peter Sherwood
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

----- X
BELINDA NEUMANN DONNELLY,

Plaintiff,

-against-

**HUBERT G. NEUMANN, MELISSA F. NEUMANN
and KRISTINA NEUMANN a/k/a REGINA NEUMANN,**

Defendants.
----- X

**DECISION AND ORDER
Index No.: 650318/2019**

Mot. Seq. Nos.: 001-002

O. PETER SHERWOOD, J.:

Motion sequence numbers 001 and 002 are consolidated for decision. As these are motions to dismiss, the facts are taken from the complaint and are accepted as true unless otherwise noted.

In this action (NYSCEF Doc. No. 1 [Complaint]), one of a number of lawsuits involving this family, plaintiff Belinda Neumann Donnelly (Belinda) seeks the partition by sale of 62 valuable works of art. Sixty of the paintings are owned in equal shares by Belinda and her sisters, defendants Melissa F. Neumann (Melinda) and Kristina Neumann (Kristina), pursuant to the Arthur J. Neumann Trust¹ (the Trust and the sixty paintings "Trust art"). In addition, the complaint seeks the partition by sale of two paintings, *Confidential Declaration* by Sandro Chia and *Untitled (Tyranny)* by Jean-Michel Basquiat the "non-Trust art". According to the complaint, Belinda, her sisters, and their father, defendant Hubert G. Neumann (Hubert), own the non-Trust art in four equal shares. It states that a sale is necessary because a fair division of the art is impracticable, joint ownership is impossible due to the parties' strained relationships, and Belinda must liquidate her assets to fund "her family's significant housing, litigation, and educational expenses" (Complaint ¶ 14).

Kristina filed her answer to the complaint on April 19, 2019 (NYSCEF Doc. No. 58). The other defendants have made pre-answer motions instead. Hubert's motion (NYSCEF Doc. No. 9) seeks dismissal under CPLR §§ 601 and 3211 (a) (4) based on an accounting for the Trust pending in Surrogate's Court, New York County or, in the alternative, a transfer of the portion of the case relating to the Trust art to Surrogate's Court. He also moves for dismissal under CPLR § 3211 (a)

¹ The complaint notes that Arthur and Hubert co-owned Richard Estes' *Canada Club*, and that therefore the Trust gave the sisters a one-sixth interest in this painting.

(7), and, as alternative relief, suggests a hearing on the issue of ownership of the non-Trust art. Melissa's motion (NYSCEF Doc. No. 23) seeks dismissal on the same statutory grounds as Hubert and the same alternative relief of removal to Surrogate's Court. Melissa also relies on CPLR §§ 325 and 603, and Surrogate's Court Procedure Act [SCP] § 209 (6). As an alternative to dismissal or transfer, she asks that the claims relating to the Trust art be stayed.

On February 16, 1987, Arthur J. Neumann ("Arthur") created the Trust for the benefit of his nieces Belinda, Melissa, and Kristina. His brother, Hubert, became sole trustee following Arthur's death on August 22, 2003. In this capacity, on September 30, 2009, Hubert assigned to his daughters equal one-third interests in the residuary trust, which includes the 60 works of art. These are works by renowned artists such as Pablo Picasso, Jean Dubuffet, Jeff Koons, Joan Miro, and Alexander Calder (NYSCEF Doc. No. 3). In addition, each of the parties has a one-quarter share in *Confidential Declaration and Untitled (Tyranny)* (NYSCEF Doc. No. 1 ¶ 12). To support her claim of partial ownership of the non-Trust art, plaintiff annexes invoices from the Anthony d'Offay and Annina Nosei galleries, which are dated May 20, 1982 and May 7, 1982, respectively. They are addressed, collectively, to Hubert, Regina,² Belinda, and Melissa Neumann (NYSCEF Doc. Nos. 4, 5). The Nosei gallery invoice has a notation which appears to state that the bill was "paid," although it is not clear who wrote this note or when the note was written. In opposition to Melissa's motion, Belinda submitted an email from Annina Nosei (Nosei) which purports to authenticate the invoice for the Basquiat piece (*Untitled [Tyranny]*) which, as noted, was addressed to all four parties to this case.

The relationships between the parties has been contentious, but they "deteriorated rapidly" after the death of Dolores Ormandy Neumann (Dolores), Hubert's estranged wife and the mother of Belinda, Melissa, and Kristina (Complaint ¶ 15). Dolores' will expressly disinherited her husband – who, she claimed, had abused her and threatened her life. Hubert has challenged these statements and suggested that Belinda unduly influenced her mother to alter the will. In addition, the will named Belinda as its "executor and primary beneficiary" (*id.* ¶ 15). The implication is that this further soured the relationship between Belinda and her sisters.

Belinda sold her mother's most valuable painting, Basquiat's *Flesh and Spirit*, to pay the estate's taxes.³ Before the date of Sotheby's auction, however, Hubert commenced a lawsuit

² Kristina Neumann is also known as Regina Neumann.

³ The rest of the money from the sale went into the residuary estate.

against Sotheby's seeking to bar it from conducting the auction. This court ruled against him and dismissed the action (*see* Complaint ¶ 17). The auction went forward and the painting sold for \$30.7 million.

The complaint in this case alleges that if Hubert's lawsuit had not "scared off" potential bidders," the painting would have sold for much more (*id.*). It also alleges that Hubert also attempted to arrogate to himself "interests in highly valuable works of art which properly belong either to [Belinda], . . . Melissa and/or Kristina, Arthur's estate, Dolores' estate, and/or the family trusts" (*id.* ¶ 18).

Even if it were not a financial necessity for Belinda to sell the artwork (*see id.* ¶ 14), partition by sale would be necessary because the contentious relationship of the parties makes joint ownership "impossible" (*id.* ¶ 19). In addition to Hubert's lawsuit over the sale of *Flesh and Spirit*, Belinda sued Hubert and her sisters for purportedly causing *Flesh and Spirit* to sell for a markedly lower price than anticipated (*Neuman-Donnelly v Neumann*, Sup Ct, NY County, Sherwood, J., index No. 652857/2018).⁴ The current complaint also mentions other legal actions relating to Dolores' estate, Hubert's fiduciary duties with respect to the Trust, and a proceeding by Hubert to evict Belinda and her family from the family townhouse in Manhattan (Complaint ¶ 19 n 4).

Hubert's Motion

In motion sequence number 001, Hubert argues that Belinda improperly joined her claims regarding the Trust art and non-Trust art in one action. He contends that joinder is improper because "the underlying circumstances surrounding the relief sought, i.e. partition, involve distinct questions of law and fact and different parties in interest, and relate to actions which took place 27 years apart" (NYSCEF Doc. No. 19 at *7). CPLR § 601 allows a plaintiff or a defendant to "join as many claims as he may have against an adverse party," and permits joinder of like claims when multiple parties are involved. Under CPLR § 603, courts can sever claims and order separate trials where the joinder causes inconvenience or prejudice. Hubert argues that because the complaint treats the Trust art and the non-Trust art collectively, severance is impossible, and therefore dismissal is mandatory (*id.* at *8).

Second, Hubert argues that he is the sole owner of the non-Trust art. He annexes invoices for the paintings which, unlike the invoices Belinda has provided, are addressed solely to Hubert. He states that he paid for the Basquiat on May 15, 1982, and that therefore the "paid" notation on

⁴ Belinda's sisters were not parties to Hubert's lawsuit, but they filed affidavits in his support.

the May 7, 1982 invoice that Belinda submitted cannot be valid. He emphasizes that his daughters were minors in 1982 and therefore they could not have purchased the paintings themselves. He annexes a February 7, 1995 note from Nosei which says that Hubert purchased two untitled Basquiat paintings from her directly and that she obtained the works from Basquiat. Hubert also submits unsigned notes from an unidentified author, dated May 11, 1982 (NYSCEF Doc. No. 15) and August 13, 1982 (NYSCEF Doc. No. 12), which Hubert states are from his father Morton Neumann (Morton). The notes indicate that the author enclosed checks of \$4,500 and \$5,000, respectively, which were loans to Hubert. Another August 13, 1982 note directs Hubert to “send \$4,000 to [Anthony] D’Offay on account for the Chia” and to pay gallery owner Tony Shafrazi \$1,000 for a work by Keith Haring (*id.*). Hubert argues this “is fatal to [Belinda’s] request for partition” of the non-Trust art and these claims must be dismissed (NYSCEF Doc. No. 19 at *6). He adds that “at the very least, a question of fact on the issue of ownership exists” and therefore, as an alternative to dismissal, “a trial must be held on the issue of ownership” (*id.* at *11).

Third, Hubert contends that the disputes over the rest of the paintings, which are part of the Trust, should be resolved in the accounting proceeding pending in the Surrogate’s Court, New York County. He claims that the court should dismiss the action as it relates to the Trust-related art under CPLR § 3211 (a) (4). Citing *Cherico, Cherico & Assocs. v Midollo* (67 AD3d 622, 622 [2d Dept 2009]), Hubert notes that courts have broad discretion to dismiss an action in such circumstances (NYSCEF Doc. No. 19 at *12; *see also Wimbledon Fin. Master Fund, Ltd. v Bergstein*, 147 AD3d 644, 645 [1st Dept 2017]). He argues that there is a substantial identity of parties and issues in the accounting proceeding and the case at hand, and that this, too, militates in favor of dismissal (NYSCEF Doc. No. 19 at **12-13). Hubert says that Melissa plans to raise an objection to the portion of the accounting that deals with Hubert’s distribution of the one-third shares of the Trust art. Thus, dismissal under CPLR § 3211 (a) (4) will avoid duplicative actions and the concomitant risk of conflicting judgments (NYSCEF Doc. No. 19 at *13).

In support of his alternative suggestion – a removal of the claims relating to the Trust art to the Surrogate’s Court under CPLR § 325 (e) – Hubert points out that Surrogate’s Court is fully empowered to rule on “all matters relating to the estates and affairs of decedents” (*id.* at *15 [quoting *Hoffman v Sitkoff*, 297 AD2d 205, 205 (1st Dept 2002)] [additional citation omitted]). Under CPLR § 325 (e), moreover, if an action in this court “affects the administration of a

decedent's estate which is within the jurisdiction of the surrogate's court," then the supreme court has the discretion to make the transfer (NYSCEF Doc. No. 19 at *15, quoting CPLR § 325 [e]).

Melissa's Motion

Melissa's motion to dismiss, motion sequence number 002, re-states the arguments raised by Hubert. She also contests Belinda's position that a sale of this artwork is necessary. Instead, she states, the Trust art can and should be distributed in-kind among the three sisters (NYSCEF Doc. No. 31 at *18). She notes that even if the value of the art varies slightly from one sister to another, cash payments to anyone with lesser value will "equalize the shares" (*id.*, quoting *Banker v Banker*, 23 Misc 3d 1111 (A), 2009 NY Slip Op 50701 (U), *7 [Sup Ct, Delaware County 2009]). This will achieve Belinda's stated goal and sever her relationship with her father and sisters (NYSCEF Doc. No. 31 at *19). As an alternative to dismissal, Melissa suggests a transfer of this case to Surrogate's Court, echoing her father's statement that she will raise her partition argument there. As another alternative, she suggests a stay of "the action as it pertains to the Trust distributions" until the accounting issues are resolved (*id.* at *20; *see id.* at *21 [citing CPLR § 2001; *Matter of Pinto*, NYLJ, Jan. 9, 2001, at page 5, col. 1 [Sur Ct, Nassau County 2001, Radigan, J.] [staying Surrogate's Court accounting proceeding pending resolution of Supreme Court action for accounting which had been commenced two years earlier]).

Melissa maintains that the paintings cannot be considered "gifts" to her and her sisters because they occurred while the New York Uniform Gifts to Minors Act (Estates, Powers and Trusts Law [EPTL] §§ 7-4.1 *et. seq.* [UGMA]) was in effect, neither Hubert nor his father Morton provided the requisite form governing transfers of tangible personal property (*see* EPTL § 7-4.2 [a] [7]), and Hubert did not physically deliver the artwork to his daughters (EPTL § 7-4.1). The court notes however, that the UGMA has been repealed and it no longer applies to gifts that predate the Uniform Transfers to Minors Act (UTMA) (*see* EPTL §§ 7-4.1—7-4.13). Accounts for gifts made under the prior law and still in effect are construed pursuant to UTMA provision (*see Matter of Gould*, 24 Misc 3d 973, 974 n 1 [Surrogate's Ct, Erie County 2009]). Therefore, the court shall not address this issue further.

Belinda's Opposition

In opposition Belinda argues that CPLR § 601 does not mandate dismissal of unrelated claims (NYSCEF Doc. No. 44 at *7; NYSCEF Doc. No. 51 at *3-4). Instead, under CPLR § 603,

“the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue” (*see* NYSCEF Doc. No. 44 at *7, quoting statute).⁵ She contends, severance is not appropriate. She points out that “common issues of law and fact” rather than identity of issues is necessary for joinder (NYSCEF Doc. No. 44 at *8). She argues that here, joinder of the claims is proper because the primary question, whether partition is necessary, is critical to both the Trust art and the non-Trust art; many of the relevant facts apply to all the artwork; and the joint owners of the works are similar.

Further, she suggests that defendants’ interpretation of CPLR § 601(a) is overly restrictive. She notes that under the statute, a plaintiff can join as many claims as she or he has against a defendant or defendants. Furthermore, this is consistent with the modern view that a party has flexibility in the construction of her or his lawsuit (NYSCEF Doc. No. 44 at *8-9). Belinda states she is entitled to assert all of her claims against her sisters in one action (NYSCEF Doc. No. 44 at *7) and to join Hubert under CPLR § 1002 (c) (NYSCEF Doc. No. 44 at *9). If the court agrees that the complaint impermissibly merges the Trust and non-Trust art claims, CPLR § 3024 (c) allows her to provide a more definite statement (NYSCEF Doc. No. 44 at *10).

Belinda rejects the argument that the non-Trust art claim does not state a cause of action under CPLR § 3211 (a) (7). Paragraph 12 of the complaint is sufficiently specific, she alleges, as it specifically identifies the two paintings at issue. In addition, the complaint expressly incorporates the invoices upon which she bases her argument (NYSCEF Doc. Nos. **4-5). In further support of the motion, she annexes a sworn statement from Annina Nosel authenticating the invoice upon which Belinda relies (NYSCEF Doc. No. 43). Belinda says these allegations are sufficient because courts must accept the complaint’s statements as true when they evaluate pre-answer motions to dismiss (NYSCEF Doc. No. 44, **12-13). At this stage, Belinda does not have to prove her case. To the extent that Hubert and Melissa’s motions rely on documentary evidence (CPLR § 3211 [a] [1]), this evidence merely raises issues of fact and thus dismissal is not appropriate (NYSCEF Doc. No. 44 at **13-22 [evaluating Hubert’s evidence and arguing it is not conclusive]). Belinda also argues that that UTMA is not the only means by which parties make gifts to minors.

According to Belinda, Hubert and Melissa’s position that Surrogate’s Court must decide the issue of partition of the Trust art is “so frivolous that it borders on being sanctionable”

⁵ Plaintiff also argues that “[m]isjoinder of parties is not a ground for dismissal of an action” (NYSCEF Doc. No. 44 at *7, quoting CPLR § 1003).

(NYSCEF Doc. No. 51 at *4). Although both movants state that Melissa will file a formal objection to the account's proposed division of the Trust art, Melissa has neither filed such objection nor submitted a personal affidavit on the issue (*id.*). The September 2018 accounting for the Trust, moreover, does not propose a distribution or partition of the artwork. She suggests the Surrogate's Court lacks jurisdiction over an inter vivos trust such as the one at hand and that the accounting in Bronx County only includes an accounting of a testamentary trust which Arthur's will created.

In addition, Belinda states that the accounting has not been served on her or her sisters and therefore, under the Surrogate's Court Procedure Act (SCPA) § 43, which defines "process," the Surrogate's Court does not have jurisdiction over them (NYSCEF Doc. No. 51 at **4-5, also citing SCPA §§ 307, 309). Therefore, CPLR § 3211 (a) (4) does not apply (NYSCEF Doc. No. 51 at *5, citing *San Ysidro Corp v Robinow*, 1 AD3d 185, 186 [1st Dept 2003]) and joinder with the inactive accounting is improper (NYSCEF Doc. No. 51 at *5-6 n 3). Belinda also challenges Melissa's argument that the Trust artwork should be distributed in-kind on the grounds that 1) a trial on this matter would be prohibitively expensive, and 2) the sisters likely would disagree about which artworks go to which sister. Belinda acknowledges that courts have the discretion to direct an in-kind distribution but states that such an order is premature (*id.* at *7).

Hubert and Melissa's Replies

Hubert's reply reiterates his initial arguments. He also challenges Belinda's argument that the accounting has not been commenced, noting that under SCPA § 203, the filing of the petition commences the proceeding (NYSCEF Doc. No. 54 at **3-4). He argues that Belinda may raise her objections in the Surrogate's Court accounting. He rejects her contention that the Trust and the distribution of Arthur's estate are not related proceedings, as the artwork in the Trust was a pour over from the estate and the Trust art "constitutes a principal component of the Trust accounting" (*id.* at *5).

Melissa reiterates her earlier arguments. She claims that Belinda cannot show that the handling of the Trust art is *not* intertwined with the accounting proceeding. She states that her position that Hubert owns the non-Trust art has added weight because it is against her financial interest (NYSCEF Doc. No. 56 at *11 n 4). Melissa contends that it is not relevant that the siblings may feud over the distribution of the art, as the Surrogate's Court will choose the most equitable relief. A forced sale, Melissa states, would be unfair to her and Kristina, as they may want to keep the artwork. Belinda is free to sell her third of the pieces following distribution. Finally, she rejects

Belinda's argument that the Surrogate's Court cannot preside over the Trust art distributions, pointing out that the Trust art is already part of the accounting in Surrogate's Court.

Analysis

The Trust art claims shall be transferred to the Surrogate's Court, New York County. The arguments advanced in this court and the Surrogate's Court regarding the Trust art are intertwined, and they relate to the administration of Arthur's estate and trust.

Furthermore, such claims should be tried in the Surrogate's Court. Belinda commenced the current action on January 16, 2019, nearly four months after the September 2018 filing of Hubert's petition for judicial settlement of the account of the Arthur J. Neumann Trust (*see MGI Repetti LLP v Millstein*, 52 Misc 3d 1207 [A], 2016 NY Slip Op 51063 [U], *1 [Sup Ct, NY County 2016]). Under SCPA § 302 (a), a proceeding commences upon filing. The "first-in-time rule," applicable under CPLR § 3211 (a) (4), states that the first proceeding generally is the one that should retain jurisdiction (*see Syncora Guar. Inc. v J.P. Morgan Sec. LLC*, 110 AD3d 87, 95, 96 [1st Dept 2013]). Though the four-month difference between the commencement dates of the litigations is not dispositive, the equities weigh in favor of removal of the claims (*see IRX Therapeutics, Inc. v Landry*, 150 AD3d 446, 447 [1st Dept 2017] [considering the equities]; *San Ysidro Corp.*, 1 AD3d at 186).

Contrary to Belinda's suggestion, the Surrogate's Court has jurisdiction over all "matters relating to the affairs of decedents" (*Matter of Piccione's Estate*, 57 NY2d 278, 290 [1982] [*Piccione*] [internal quotation marks and citation omitted], *rearg denied*, 58 NY2d 824 [1983]). This includes jurisdiction over accountings. Furthermore, the Surrogate's Court may exercise jurisdiction over such claims whenever the controversy affects a decedent's affairs or the administration of his or her estate (*Matter of Rosenthal*, 99 AD3d 573, 573 [1st Dept 2012], *lv dismissed in part, denied in part*, 20 NY3d 1058 [2013]). All parties here have an interest in the treatment of the Trust art, either as trustee or as beneficiaries, and the siblings can assert their respective challenges in the context of the accounting. The Surrogate's Court therefore should be able to afford comprehensive relief (*see id.*).

However, dismissal is not the proper remedy despite the inclusion of the Trust art claims in this lawsuit. Under CPLR § 3211 (a) (4), "the court need not dismiss upon [the] ground [that there is another action pending] but may make such order as justice requires." The statute gives courts "broad discretion" in determining how to proceed (*see Cooper v Bao Thao*, 162 AD3d 980,

981 [2d Dept 2018] [internal quotation marks and citations omitted]). Here, the most prudent course of action is a severance and removal of the Trust-related claims to the Surrogate's Court (see *Garland v Raunheim*, 29 AD2d 383, 389 [1st Dept 1968] [action for partition transferred to Surrogate's Court presiding over accounting proceeding]; see also *Lawrence v Miller*, 48 AD3d 1, 5-6 [1st Dept 2007] [removal to Surrogate's Court with jurisdiction over estate proceedings], *affid.* 11 NY3d 588 [2008]). Further, the Trust art described in the accounting is identical to the Trust art here and, as stated, the accounting proceeding should resolve the claims relating to the 60 pieces of Trust art (see *Wagenstein v Shwarts*, 82 AD3d 628 [1st Dept 2011] [keeping application for partition of assets in *inter vivos* trust in Surrogate's Court, where trust terminated, and assets were divided upon decedent's death]). The court further notes that even if, as Belinda fears, she and her sisters disagree as to which one of them gets which pieces of art within the Trust, this is not a reason for the dispute to be tried in the Supreme Court. Belinda's argument to the contrary are unpersuasive. Even if the disputes mentioned arise, the Surrogate's Court has broad equitable powers and is as capable as the Supreme Court of crafting a just resolution.⁶

Also, on this issue, the court rejects Hubert's position that the claims cannot be separated from the lawsuit and therefore the non-Trust art claims must be dismissed. He asserts this position in connection with his arguments relating to the misjoinder of claims, but arguably it is relevant here as well. However, it is easy to consider the ownership disputes relating to the Chia and Basquiat paintings on their own for the very reason that they are based on distinct facts and legal issues.

Finally, the court denies the branches of the motions which seek dismissal for failure to state a claim (CPLR § 3211 [a] [7]). On a pre-answer motion to dismiss for failure to state a cause of action under CPLR § 3211 (a) (7), "the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true" (*Alden*, 159 AD3d at 621-22). The contentions in Belinda's complaint are "sufficient to establish a prima facie case for partition" because the pleading asserts joint ownership of the non-Trust paintings and states that physical

⁶ The court considered granting a stay pending the resolution of the accounting proceeding (see *Lupoli v Lupoli*, 205 AD2d 595, 595 [2d Dept 1994]). Ultimately, however, a stay would be more problematic. Although the precedent is mixed (e.g., *Corrado v Rubine*, 25 AD3d 748, 749 [2d Dept 2006] [reversing order which denied stay]), most courts state that a stay is proper only when the other action or proceeding will resolve all the questions in the pending action (see, e.g., *Otto v Otto*, 110 AD3d 620, 621 [1st Dept 2013]) and when there is "complete identity of the parties, the causes of action and the judgment sought" (*952 Assoc., LLC v Palmer*, 52 AD3d 236, 236-237 [1st Dept 2008]; see *GE Oil & Gas, Inc. v Turbine Generation Servs., LLC*, 140 AD3d 582, 583 [1st Dept 2016]). Such is absent here.

partition would prejudice her because she needs the funds imminently (*Rokeach v Zaltz*, 112 AD2d 209, 209 [2d Dept 1985]; see *MurrayRayeDebbie, LLC v Rosenphil LLC*, 172 AD3d 615, --, 98 NYS3d 837, 837 [1st Dept 2019] [under RPAPL § 901 (10)]).

Furthermore, the documents which Melissa and Hubert say are dispositive are insufficient to defeat the complaint as a matter of law. Hubert relies in part on the assertion that he paid for the Basquiat after the invoice Belinda submitted, which states “pd” on the front. The fact that someone scrawled “pd” on the bill for the Basquiat does not constitute documentary evidence that “utterly refutes” (*McCully v Jersey Partners, Inc.* 84 NY 2d 83, 87-88 [1988]), Belinda’s claim. The undated inscription could have been made long after Hubert allegedly paid the bill. Also, Hubert has not established the date of payment. The Nosei letter does not specify this date, and though Hubert states he paid with check number 1820, he does not attach a copy of the check or otherwise support his allegation.

In addition, the statement in Nosei’s letter that Hubert paid for the Basquiat does not eliminate the possibility that Hubert bought it on behalf of himself and his daughters. The fact that Hubert’s daughters were minors when he purchased the Basquiat and the Chia does not defeat Belinda’s claim as a matter of law, as he might have purchased it on behalf of all four of the alleged owners. It is unlikely that every time a purchase is made on behalf of a group, the entire group shows up to make the purchase. The unsigned notes which indicate that the author loaned \$4,500 and \$5,000 to Hubert in 1982 do not establish conclusively that Morton was the author or that these particular loans were earmarked by Hubert for the artwork in question. Further, they do not preclude the possibility that Hubert sought the loans for other reasons or that he sought the loans to buy the works on behalf of all four parties to this action. Similarly, the unsigned note from August 1982, which directed Hubert to pay Anthony D’Offay \$4,000 on account for the Chia and to pay Nosei \$1,000 on account for a Keith Haring painting, does not indicate the identity of the signatory, does not mention anything about the Basquiat painting currently in dispute, and does not indicate that the purchases are for Hubert’s benefit rather than for the others.

The assertion that Melissa’s version of the facts should be weighted more heavily because the statement is against her financial interest seeks to invoke an evidentiary concept about credibility which has no place in a pre-answer motion to dismiss. The court has considered the movants’ other arguments on this issue and finds them unpersuasive.

Based on the above, it is clear that Melissa and Hubert merely have raised issues of fact which may – or may not – defeat Belinda’s claims to a share of the two paintings. Thus, they have not shifted the burden to Belinda to establish her case, much less shown that Belinda does not state a claim. In arguing to the contrary, they confuse the standard required in a pre-answer motion to dismiss for failure to *state* a claim with the standard required for summary judgment. Even if this were a summary judgment motion, all Melissa and Hubert have shown are that issues of fact exist. Indeed, Hubert suggests as much when he states that “at the very least, a question of fact on the issue of ownership exists” (NYSCEF Doc. No. 19 at *11). Hubert further suggests that there should be a trial on this issue. This may be appropriate after he and Melissa have answered the complaint and the parties have had the opportunity to conduct discovery.

Accordingly, it is hereby,

ORDERED that motion sequence numbers 001 and 002 are granted to the extent of severing the Trust art claims and removing them to the Surrogate’s Court, and are otherwise denied; and it is further

ORDERED that that portion of the plaintiff’s action that relates to the Trust art is severed; and it is further

ORDERED the severed portion of above-titled action now pending in this Court is removed to the Surrogate’s Court, New York County for determination; and it is further

ORDERED that the Clerk of this Court, upon filing with him a copy of this order, shall forthwith deliver a copy of all papers and records in the above-entitled action to the Clerk of the Surrogate’s Court, New York County; and it is further

ORDERED that the portion of the action relating to the non-Trust art shall continue before this Court; and it is further

ORDERED that within twenty (20) days of the date of the filing of this order with notice of entry, Belinda shall file an amended complaint which is confined to the non-Trust art claim; and it is further

ORDERED that Melissa and Hubert are directed to serve and file their answers to the remaining portion of the complaint within twenty (20) days of the filing of the amended complaint; and it is further

ORDERED that when issue has been joined, the parties are to contact the Clerk of Part 49 and schedule a preliminary conference.

This constitutes the decision and order of the court.

DATED: August 7, 2019

ENTER,


O. PETER SHERWOOD J.S.C.