

<b>Bruce v G.O.L.A., Inc.</b>
2020 NY Slip Op 30257(U)
January 23, 2020
Supreme Court, New York County
Docket Number: 652339/2018
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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STEPHEN BRUCE,

Plaintiff,

- v -

G.O.L.A., INC., KRISTINE WOODWARD

Defendant.

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INDEX NO. 652339/2018

MOTION DATE 08/07/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents and for the reasons set forth on the record at oral argument (1/16/2020), Stephen Bruce’s motion for summary judgment pursuant to CPLR 3212 and for dismissal of defendants’ counterclaims pursuant to CPLR 3211 is denied.

Reference is made to a consignment memo (the Consignment Memo) dated March 15, 2008 pursuant to which Mr. Bruce consigned certain artwork designed and created by Andy Warhol (the Warhol Collection) to the Woodward Gallery for sale (NYSCEF Doc. 26). G.O.L.A., Inc. is the incorporated name of the Woodward Gallery. The one-page Consignment Memo lists eight lithographs, two books and one stamp at a value “[t]o be determined” and states:

Consignee shall be responsible for loss or damage to the work until it is safely returned to the Consignor or until it is paid in full. Title to the work shall remain with the Consignor during the consignment. Title will transfer once purchase price is received in full and post [sic] to Consignor's account.

(id.).

A separate and undated consignment memo (the **Return Memo**) signed by Mr. Bruce acknowledges the return on June 17, 2008 “in the same, vintage condition” of the book consigned as part of the Warhol Collection (NYSCEF Doc. No. 28).

The complaint alleges that the parties always understood that the Warhol Collection items would be listed for sale as single lot (Compl., ¶ 7). However, the Woodward Gallery obtained a purchaser for only a part of the Warhol Collection and despite Mr. Bruce’s objections to the terms of the sale and a demand for the immediate return of the Warhol Collection, the Woodward Gallery sold the items and/or otherwise refused to return the remaining items (Bruce Aff., ¶ 13). Mr. Bruce also alleges that he has not been paid in full for the sale to date (Bruce Aff., ¶ 23).

In opposition, the defendants contend that on September 27, 2013, after the sale of five of the lithographs in the Warhol Collection was consummated, Ms. Woodward sent Mr. Bruce a check payable to him for \$48,000, together with an invoice for the sale. According to the defendants, the check represented payment in full for the purchase price of the sold prints (\$12,000 each) less a 20% commission to the Woodward Gallery, which defendants claim is the industry standard commission rate (NYSCEF Doc. No. 46 [invoice and check]; McAdams Aff., ¶ 10). The Consignment Memo is silent as to the commission. The defendants argue that Mr. Bruce’s failure to cash the check does not negate their tender in full as they did all they could do to compensate Mr. Bruce for the sale.

A letter dated September 7, 2013 to Mr. Bruce signed by Ms. Woodward references the sale and states:

We have been in touch with one another recently about the Warhol Shoes that you consigned to Woodward Gallery in 2008. Since that time we have had the work custom framed and each individually authenticated. As you know the process took well over a year.

It happened that at such time, the economy took a massive hit from the recession, so collectors were not quickly committing to the material. After much effort on your behalf, we have finally invoiced a very good collector for five of the hand painted prints. I have discussed the progression of this sale with you by phone in late July, August and now a few days ago.

The agreement on the work is that it would be paid for this Fall. I have charged \$12,000. USD for each piece, and from our original conversations you know that Woodward Gallery expects 20% commission for our efforts. The net to you will be \$48,000. USD as soon as we collect those funds!

There remains 3 Warhol shoes from your collection (Dial M For Shoe, Shoe of the Evening Beautiful Shoe and My Shoe is your Shoe) that we had also had authenticated and framed at our time and expense. The Gallery is happy to purchase these pieces from you, but we will need to pay over time for these works. If you prefer to have them back, they are available for immediate return.

(NYSCEF Doc. No. 29).

Mr. Bruce's attorney, Kenneth L. Small replied to Ms. Woodward by letter dated September 13, 2013:

Mr. Bruce has informed me that he neither contemplated nor authorized Woodward Gallery to enter into a sale which involves some, but not all, of the art pieces in the Collection. Additionally, Mr. Bruce is unwilling to engage in any sale of the Collection which does not entail the immediate payment of the purchase price in full. Accordingly, Mr. Bruce hereby rejects the proposed sale described in your September 7<sup>th</sup> letter and hereby instructs Woodward Gallery not to take any further action with respect to that sale, or collect any sale proceeds from the proposed purchaser, or release or deliver possession of the subject works of art to the proposed purchaser.

Furthermore, Mr. Bruce has requested that I inform you that unless Woodward Gallery currently has a purchaser who is prepared to acquire the entire Collection and make immediate payment of the purchase price in full, Mr. Bruce requires that the Collection be returned to him forthwith.

(*id.*).

Based on the foregoing, Mr. Bruce alleges that the defendants are in breach of Consignment Memo. The complaint asserts five causes of action as follows: (1) breach of contract, (2) unjust enrichment, (3) breach of fiduciary duty, (4) constructive trust, and (5) injunction (NYSCEF Doc. No. 23). The defendants assert two counterclaims for \$250,000 that they claim they are owed for (1) authenticating the Warhol Collection and (2) framing and storing the Warhol Collection.

The defendants have not provided a bill of sale for the sold items from the Warhol Collection. Instead, Ms. Woodward supplied an affidavit, dated March 29, 2019, attesting that she “searched the records of the [Woodward Gallery] and have been unable to locate the Bill of Sale for the Andy Warhol art work that is the subject of this litigation” (NYSCEF Doc. No. 27).

On a motion for summary judgment pursuant to CPLR 3212, the movant must tender evidence, by proof in admissible form, to establish entitlement to judgment as a matter of law (*Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]). If such entitlement is demonstrated by the movant, the burden shifts to the opponent of the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*id.*). A grant of summary judgment is appropriate where no material, triable issue of fact is presented.

Here, the Consignment Memo is insufficient to grant summary judgment in favor of Mr. Bruce as it does not address the critical issue alleged by Mr. Bruce: whether the items were intended to

be sold together as a lot or could be sold piecemeal. Moreover, it is unclear what the intended term of consignment was, whether Mr. Bruce could object to any sale or what would happen if Mr. Bruce did object to the sale and demanded the items returned. Under the circumstances, summary judgment is inappropriate, and the motion is denied.

That aspect of the motion seeking to dismiss the counterclaims is also denied. Although the counterclaims are not stated in detail, the defendants have sufficiently alleged that they were responsible for authenticating the Warhol Collection and framed said items for sale. The Consignment Memo does not address either undertaking and it is not clear if this was intended to be an additional service or provided as part of the consignment. The court cannot dismiss these claims in this instance.

Finally, to the extent that the defendants have made a letter application dated November 12, 2019 – after the motion was marked fully submitted -- to request that the court *sua sponte* grant summary judgment based on the October 1, 2019 deposition of Mr. Bruce, the court declines to do so (NYSCEF Doc. No. 48-50).

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment and dismissal is denied; and it is further

ORDERED that the plaintiff is directed to file a note of issue on or before January 31, 2020; and  
it is further

ORDERED that the parties appear for a pre-trial conference in the matter on February 13, 2020  
at 11:30 AM.



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1/23/2020  
DATE

ANDREW BORROK, 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