

Phillips Auctioneers LLC v Shagalov
2020 NY Slip Op 32449(U)
July 24, 2020
Supreme Court, New York County
Docket Number: 653468/2016
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

<p>PHILLIPS AUCTIONEERS LLC</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>ANATOLE SHAGALOV,</p> <p style="text-align: center;">Defendant.</p>	X	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 20%;">INDEX NO.</td> <td style="border-bottom: 1px solid black; text-align: right;">653468/2016</td> </tr> <tr> <td>MOTION DATE</td> <td style="border-bottom: 1px solid black; text-align: right;">11/21/2019</td> </tr> <tr> <td>MOTION SEQ. NO.</td> <td style="border-bottom: 1px solid black; text-align: right;">005</td> </tr> </table> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>	INDEX NO.	653468/2016	MOTION DATE	11/21/2019	MOTION SEQ. NO.	005
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HON. MARCY S. FRIEDMAN:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 143, 144, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 159

were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT.

In this action for breach of contract against defendant Anatole Shagalov, plaintiff Phillips Auctioneers LLC (Phillips) moves, pursuant to CPLR 4403, to confirm the report and recommendation of Special Referee Elizabeth Shamahs, dated October 23, 2019 (the Report [NYSCEF Doc. No. 142]) and to award plaintiff the relief set forth in the Report. For the reasons discussed below, the motion to confirm is granted.

Background

The Referee's Findings of Fact

As found by the Referee and not disputed by defendant,¹ on November 8, 2015, Phillips held a public evening auction of 20th century and contemporary works of art in New York. Phillips also published a November 8, 2015 auction catalogue. The catalogue included Phillips' Conditions of Sale and Buyer's Guide. The subject works of art were listed in Lot 5 and Lot 13. Lot 5 contained a painting by Morris Louis, entitled Para IV, 1959 (the Louis painting), and was subject to a guarantee. Lot 13 contained a painting by Christopher Wool entitled Untitled

¹ The following summary of the Referee's findings is taken virtually verbatim from the Referee's Report at 2-4.

(P271), 1997 (the Wool painting) and was subject to a guarantee. Shagalov was the successful bidder of both paintings at auction. The hammer price for the Louis painting was \$1,900,000.00. The hammer price for the Wool painting was \$2,700,000.00. Both lots were subject to a disclosed “buyer’s premium” payable by the successful bidder.

On November 8, 2015, Phillips sent Shagalov an invoice demanding immediate payment of the total amount due of \$5,959,817.50. This total included the hammer price of \$1,900,000.00 and buyer’s premium of \$385,000.00 for the Louis painting, and the hammer price of \$2,700,000.00 and buyer’s premium of \$489,000.00 for the Wool painting. The invoice further stated that Phillips reserved the right to charge late payments at 12% per annum. Shagalov failed to make payment for the two paintings.

On or about June 30, 2016, Phillips commenced this action against Shagalov for breach of contract, seeking an award of “damages in an amount to be determined at trial, but no less than \$5,474,000.00, plus 12% interest; [or], in the alternative, specific performance of the contract, whereby Shagalov shall pay [Phillips] \$5,959,817.50 for the [Louis painting and Wool painting] pursuant to the Invoice and the Conditions of Sale, in return for which [Phillip] [sic] shall transfer good and valid title of the [Louis painting and Wool painting] to Shagalov; . . . legal [sic] and costs, expenses and disbursements in an amount to be determined at trial; and [a]warding [Phillips] such other relief as the Court deems just and proper.” (Referee Report, at 3-4, quoting Complaint, Wherefore Clause, at 6-7 [NYSCEF Doc. No. 1].)

On May 25, 2017, Phillips re-sold the Louis painting in a private sale for \$2,200,000.00. On May 16, 2017, Shagalov was informed of Phillips’ intention to sell this painting.

On February 5, 2018, the parties stipulated to permit certain amendments of the Complaint and Answer. (Stipulation [NYSCEF Doc. No. 60].) The Complaint was amended in part to read: “[b]y written agreement for private sale dated May 24, 2017, and pursuant to

paragraph 9 of the Conditions of Sale, Phillips sold the Morris Louis painting to a third party in the total amount of \$2,200,000.00, and is therefore entitled to continue to seek damages from [Shagalov] in the amount of \$85,000, this amount being the shortfall between the hammer price bid by [Shagalov], plus applicable buyer's commission payable under the Invoice for that work, and the amount received by Phillips on the subsequent private sale (the "Louis Balance"), plus interest to the date of the private sale . . . Shagalov's breach of his contractual [sic-error in Stipulation] by failing to pay for the [Louis painting and Wool painting] without excuse has damaged Phillips in the amount of \$3,274,000.00 plus interest." (Referee's Report, at 4, quoting Stipulation, ¶ 2.)

On October 5, 2018, Phillips resold the Wool painting at a public auction in London, England for £2,479,000 Sterling. Shagalov was informed of Phillips' intention to sell the Wool painting at auction on September 11, 2018.

The Reference

By decision on the record on April 18, 2019, the transcript of which was so ordered on July 9, 2019 (NYSCEF Doc. No. 105), this court granted Phillips' motion for summary judgment to the extent of awarding Phillips judgment against Shagalov as to liability on Phillips' sole cause of action for breach of contract, and directing a reference on damages. (Transcript at 15-19 [NYSCEF Doc. No. 105].)² The court also entertained, and denied, Shagalov's unpleaded defense seeking rescission of the contract. (Id., at 18-19.) By separate order dated July 9, 2019 (NYSCEF Doc. No. 104), the court referred the following issues to a Special Referee to hear and report with recommendations:

"the damages to which plaintiff is entitled, including but not limited to,

² In awarding Phillips judgment as to liability, the court rejected Shagalov's argument that there was no contract because there was no meeting of the minds on an essential term – that is, a payment schedule. (Transcript at 16.) The court also rejected Shagalov's claim that he did not breach the contract by failing to make timely payment of the purchase price, because Phillips agreed to an extension of 10 months from the date of the auction for Shagalov's payment of the purchase price. The court held that Phillips agreed to an extension of only 90 days. (Id., at 16-17.)

1. The issue of the difference, or shortfall, between the proceeds plaintiff would have obtained from Mr. Shagalov's bids for the two paintings at the heart of this dispute, namely the Morris Louis and Christopher Wool paintings, versus the proceeds plaintiff actually obtained from the subsequent resale of the two paintings, and

2. The issue of whether plaintiff is entitled to prejudgment interest under the parties' contract, or otherwise, and if so, from what date, in what amount, and at what rate, and

3. The issue of whether plaintiff is entitled to legal costs, expenses and/or disbursements under the parties' contract, or otherwise, and if so, in what amount."

The Referee's Findings

The parties submitted briefing (NYSCEF Doc Nos. 109-128), and the Special Referee held a hearing on September 25, 2019 (NYSCEF Doc Nos. 129-141). On October 25, 2019, the Special Referee filed her Report, recommending that Phillips be awarded specified damages, including interest, and attorney's fees. The Referee found that Phillips' "catalogue [for the auction] included Phillips' Conditions of Sale and Buyer's Guide which form a contract and govern auctions between Phillips and prospective and successful buyers." (Referee's Report, at 2-3; Parties' Joint Rule 19-A Statement of Material Facts (Joint Statement [NYSCEF Doc. No. 74]), ¶ 4: "As part of customary business practice, Phillips published a catalogue including Phillips' Conditions of Sale and Buyer's Guide which form a contract and govern the Auction as between Phillips [as agent for its consignor(s)] and any prospective and successful buyer(s).")

The Referee further reasoned:

"On November 8, 2015, Shagalov successfully bid on two paintings. He was contractually obligated to pay Phillips for these paintings in accordance with the Conditions of Sale. Phillips is contractually entitled to the shortfall, prejudgment interest and storage fees, as remedies, pursuant to paragraph 9 of the Conditions of Sale. The undersigned recommends that Shagalov be found liable, for a shortfall of \$85,000.00 for the Louis painting, prejudgment interest of \$1,306,116.00 for the Louis and Wool paintings, and storage fees of \$14,460.00 for the Louis and Wool paintings. The total liability is \$1,405,576.00."

(Id., at 14.)

With respect to legal fees, the Referee found:

“The undersigned finds that the rates charged by Mr. Robinson [Phillips’ attorney] were reasonable. Based on Mr. Robinson’s expertise and specialization in art law and the art world, his fees must be found to be reasonable. After reviewing the invoices and the testimony concerning the tasks performed, the work performed by Phillips’ attorney and the hours expended, in this matter, must also be found to be efficient and reasonable. Mr. Robinson’s legal efforts were appropriate, necessary and non-duplicative to achieve the results obtained in this three-year long dispute. Moreover, Mr. Robinson did write off certain fees after his own review of the invoices which resulted in a lesser amount than the amount shown in the invoices. In sum, the undersigned reports and recommends that the total attorneys’ fees and disbursements be awarded in the total sum of \$357,593.32.”

(Id., at 20-21.)

The Referee concluded:

“The Conditions of Sale is deemed to be a valid contract to which the parties incurred certain contractual obligations and remedies. On April 18, 2019, Justice Friedman awarded summary judgment as to liability to Phillips and against Shagalov. In essence, it was found that Shagalov breached the Conditions of Sale, the contract. Phillips enforced remedial claims pursuant to the contract by filing the instant action and pursuing its remedies pursuant to the contract. Those remedies included the shortfall for the Louis painting, storage fees for the paintings, 12% interest for non-payment of the art work, resale of the paintings, and the costs of legal proceedings. Hence, Phillips should be awarded the shortfall of \$85,000.00 for the Louis painting, 12% interest for both paintings as detailed above in the amount of \$1,306,116.00, storage[] fees for both paintings, prior to the resale, of \$14,460.00, attorneys’ fees of \$345,394.30 and disbursements of \$12,199.02. The total sum to be awarded to Phillips is \$1,763,169.32.”

(Id., at 21.)

Discussion

CPLR 4403 provides in pertinent part: “Upon the motion of any party or on his own initiative, the judge required to decide the issue may confirm or reject, in whole or in part, . . . the report of a referee to report; may make new findings with or without taking additional testimony; and may order a new trial or hearing.” As the Appellate Division has explained, “[i]t is well settled that the report of a Special Referee shall be confirmed whenever the findings contained therein are supported by the record and the Special Referee has clearly defined the issues and

resolved matters of credibility.” (Steingart v Hoffman, 80 AD3d 444, 445 [1st Dept 2011], quoting Nager v Panadis, 238 AD2d 135, 135–136 [1st Dept 1997]; accord Safka Holdings, LLC v 220 W. 57th St., Ltd. Partnership, 142 AD3d 865, 866 [1st Dept 2016]; Matter of Continental Cas. Co. [v Lecei], 65 AD3d 931, 932 [1st Dept 2009] [confirming report of Special Referee where his finding was “substantiated” by the evidence in the record] [internal quotation marks and citation omitted]; Kardanis v Velis, 90 AD2d 727, 727 [1st Dept 1982] [observing that “generally courts will not disturb the findings of a referee ‘to the extent that the record substantiates his findings’”] [citation omitted].)

The central dispute between the parties is whether the Referee erred in awarding interest on the entire purchase price—i.e., the amount bid by Shagalov for the two paintings plus the buyer’s premiums—and not merely on the shortfall, if any, on the resale prices of the two works. Phillips contends that the award of interest was authorized by the contract. Shagalov contends that Phillips’ actual loss was the shortfall on the aggregated resale prices of the two works, and that “[t]he interest could only be calculated on the product of the shortfall of \$85,000 [on the resale of the Louis painting] and the profit of \$59,569” on the resale of the Wool painting. (Def.’s Memo. In Opp., at 8 [NYSCEF Doc No. 148].)

The court holds that the Referee properly determined that interest should be calculated from the date payment of the purchase price was due until the dates of resale of the two paintings. As the Referee correctly observed, and the parties acknowledged, Phillips’ Conditions of Sale in the catalogue for the auction formed a contract between Phillips and successful bidders. (See Report, at 2-3; Joint Statement, ¶ 4.) This holding was consistent with this court’s July 9, 2019 decision awarding partial summary judgment to Phillips as to liability on its breach of contract cause of action based on Shagalov’s breach of the Conditions of Sale by not making timely payment of the purchase price for the two paintings.

Moreover, section 9 of the Conditions of Sale specifies remedies for non-payment of the Purchase Price -- i.e., the price bid at auction plus the buyer's premium. (See Conditions of Sale, § 6 [a] [defining Purchase Price].) Section 9 provides in pertinent part: "Phillips may in our sole discretion exercise one or more of the following remedies . . . (iv) charge interest at 12% per annum from the date payment became due until the date the Purchase Price is received in cleared funds." In awarding interest on the entire purchase price from the date payment was due, and not merely on the shortfall in the purchase price from the date of resale, the Referee expressly reasoned that Phillips was entitled to such interest "pursuant to the contractual provisions of the Conditions of Sale." (Report, at 11, 12.) The court concurs in the Referee's rejection of Shagalov's interpretation of the contract as authorizing recovery of interest only on any shortfall between the purchase price and the resale price of the paintings, and in her interpretation of the contract as permitting the award of interest on the entire purchase price from the date payment was due.

Significantly, courts that have addressed conditions of sale in auction catalogues have repeatedly recognized that such conditions are generally binding on the successful bidder. (E.g. Hessel v Christie's Inc., 399 F Supp 2d 508, 514-515 [SD NY 2005] [reviewing authorities that have held that "by placing a bid in an auction, the bidder 'consent[s] to be bound by the terms in the catalog governing the auction'"] [internal citations omitted]; accord Koch v Greenberg, 2008 WL 4778813, * 3 [SD NY 2008]; Finnish Fur Sales Co. Ltd. v Juliette Shulof Furs, Inc., 970 F Supp 139, 145 [SD NY 1991].)

In holding that the Referee properly awarded interest, the court rejects Shagalov's further contention that Phillips is not entitled to interest because "interest is a remedy to make a plaintiff whole when a breach has deprived them of the use of money." (See Def.'s Memo. In Opp., at 10.) Shagalov appears to contend that this condition for recovery of interest is not met by

Phillips because there is no evidence in the record that Phillips paid guarantees to the consignors of the paintings and, if so, the amount of the guarantees. (Id.)³ This argument was not made before the Referee. Even if not waived, the argument is without merit, as Shagalov acknowledged in the Joint Statement that Phillips paid the guarantees to the consignors of both the Louis and Wool paintings, and “became the owner of all right, title and interest in and to the two works.” (Joint Statement, ¶ 8.) Moreover, Shagalov does not assert that he (or his counsel at the time of the hearing before the Referee) did not have access to information about the amounts paid on the guarantees.

In holding that the Referee properly calculated damages, the court also concurs in the Referee’s determination that, pursuant to UCC Section 2-706 (6), Phillips, as mitigating party reselling the works, is entitled to claim any shortfall from Shagalov, as the defaulting buyer, but that Shagalov is not entitled to aggregate the resales in calculating any shortfall on the resales of the paintings. (Report, at 13-14.) This determination that the two lots should be treated distinctly is amply supported by the evidence that the Louis painting and the Wool painting were consigned by separate consignors with separate consignment and guarantee agreements, and were offered, sold, and invoiced to Shagalov as separate lots. They were resold by different means (one a private sale, one at public auction) involving different expenses, 18 months apart, on different continents, under different market conditions. The Referee nevertheless equitably adjusted the recommended award of interest downward to account for the alleged excess on the Wool Work resale. (Id.)

The court has considered, and finds to be without merit, Shagalov’s remaining objections to the Referee’s methodology for calculating damages, including her rejection of Shagalov’s claim that the shortfall on the resales of the two paintings should be based on the aggregate

³ “A ‘guarantee’ is the confidential minimum price guaranteed to the seller by Phillips. . . .” (Joint Statement, ¶ 7.)

resale prices of the paintings, and her award of interest on the purchase price and buyer's premium. It is noted that Shagalov does not claim error as to the specific dollar amounts calculated using that methodology. The court accordingly confirms the Referee's award of damages, before attorney's fees, of a shortfall of \$85,000.00 for the Louis painting, pre-judgment interest of \$1,306,116.00 for the Louis and Wool paintings, and storage fees of \$14,460.00, for a total of \$1,405,576.00.

Finally, Shagalov argues that the claimed attorney's fees are disproportionate to the recovery, calculated by Shagalov as zero, or "\$25,431 plus statutory pre-judgment interest from the dates of the re-sales." (Def.'s Memo. In Opp., at 12.) This court disagrees, and finds that the Referee's award of legal fees is fully supported by the record.

As the Referee correctly determined, Phillips' right to attorney's fees and costs is not based on a common law or statutory prevailing party theory but on its contractual rights under the Conditions of Sale. (See Report, at 17-18.) Section 9 (a) (vii) of the Conditions of Sale includes, among the remedies available to Phillips upon a buyer's failure to make payment of the Purchase Price for a lot, that Phillips may "commence legal proceedings to recover the hammer price and buyer's premium for that lot, together with interest and the costs of such proceedings." Based on a fair reading of the language of this provision, the Referee rejected Shagalov's contention that the provision does not authorize recovery of legal fees. As the Referee also noted, "[t]here was no objection to the reasonableness of these [attorneys'] fees or the experience of Phillips' counsel," and that the testimony of Hartley Waltman, Phillips' General Counsel, Americas, on these issues was "uncontradicted." (See Report, at 18.) Nonetheless, the Referee properly examined the time sheets and biographical information provided, and determined that the attorney rates were reasonable and that the hours expended were "efficient and reasonable." (Id., at 20.) The Referee determined that counsel's legal efforts were "appropriate, necessary and


non-duplicative to achieve the results obtained in this three-year long dispute,” and recommended that the “total attorneys’ fees and disbursements be awarded in the total sum of \$357,593.32.” (Id., at 20-21.) The court will confirm this recommendation as the fees are fully supported by the record before the Referee and are reasonable for the result obtained.

The total award to be confirmed is accordingly \$1,763,169.32, representing damages of \$1,405,576.00 and attorney’s fees of \$357,593.32.

It is accordingly hereby ORDERED that the motion of plaintiff Phillips Auctioneers LLC to confirm the Report and Recommendation of Special Referee Elizabeth Shamahs, dated October 23, 2019 (the Report), is granted to the extent of confirming the Report in its entirety; and it is further

ORDERED that plaintiff Phillips Auctioneers LLC shall forthwith settle judgment.

This constitutes the decision and order of the court.

<u>7/24/2020</u> DATE	 MARCY S. FRIEDMAN, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input checked="" type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE