

**Artemus USA LLC v Leila Taghinia-Milani Inc.**

2020 NY Slip Op 32958(U)

September 8, 2020

Supreme Court, New York County

Docket Number: 656115/2017

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

*Justice*

-----X

ARTEMUS USA LLC, EDELMAN ARTS, INC.,

Plaintiff,

- v -

LEILA TAGHINIA-MILANI INC., LEILA HELLER ART  
GALLERY LLC, LEILA HELLER, ALEXANDER HELLER

Defendant.

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INDEX NO. 656115/2017

MOTION DATE 02/19/2020

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 61, 62, 63, 64, 65, 66, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78

were read on this motion to/for

DISMISS

Upon the foregoing documents, Leila Taghinia-Milani Inc., Leila Heller Art Gallery LLC, Leila Heller, and Alexander Heller's (collectively, the **Defendants**) motion to dismiss pursuant to CPLR § 3211 (a)(7) is denied.

**The Relevant Facts and Circumstances**

Reference is made to a Consignment Agreement (the **Agreement**; NYSCEF Doc. No. 65), dated September 26, 2016, by and between Edelman Arts, Inc. (**Edelman**) as consignor and Leila Taghinia Milani Inc. and Leila Heller Art Gallery LLC jointly and severally as consignee. The Agreement provided, in part, that:

*Consignor warrants title to the above-described works (the "Consigned Works") will be free and clear of any and all liens, security interests and other encumbrances, etc. upon sale. Upon sale and payment in full of the agreed net consignment price, or otherwise agreed price, Consignor shall pass and warrant good title on said works. In the event that any payment is not made on the date when due, Consignee shall be in default of a*

*material condition of the Agreement and, without further notice, the entire sum then due to Consignor shall become immediately due and payable ...*

*The Consigned Works shall remain the sole property of the Consignor. Consignee therefore will not permit any other security interest, or other lien or encumbrance, to attach to said works ...*

*In the event that any Consigned Works are lost, stolen, damaged or destroyed, or any other occurrences, such as fraud, failure to return the works by agreed date, failure, in the event of sale, to remit payment within the agreed time, etc. Consignee shall be liable to Consignor for the minimum net amount payable to Consignor under this Agreement (the Net Amount). This amount shall be paid to Consignor within 30 days of the loss, occurrence of damage or 30 days of the termination of the Agreement, whichever is soonest, without taking into account the timing or amount of any insurance payment to the Consignee ...*

(*id.* at 2-3 [emphasis added]).

On January 26, 2018, the Plaintiffs filed an Amended Complaint for breach of the Agreement. In particular, the Plaintiffs allege that an artwork owned by Artemus USA LLC (**Artemus**) was damaged while consigned to the Defendants (NYSCEF Doc. No. 36, ¶¶ 5, 15-19). The Plaintiffs also allege that Edelman was entitled to a commission on any sale of the consigned artwork and that Edelman entered into the Agreement as agent for the owner, Artemus (*id.*, ¶¶ 4, 30-32).

The Defendants filed their Answer on February 14, 2018 and the parties subsequently completed discovery. The Defendants now move to dismiss all claims asserted by Artemus in the Amended Complaint

## **Discussion**

On a motion to dismiss, the pleadings are to be afforded a liberal construction and the facts as alleged in the complaint are accepted as true (*Leon v Martinez*, 84 NY2d 83, 87 [1994]).

Dismissal under CPLR § 3211 (a)(7) requires the court to assess whether the proponent of the pleading has a cause of action and not whether he has stated one (*id.*).

As an initial matter, the Plaintiffs' argument that the instant motion is untimely fails because a motion to dismiss for failure to state a claim can be made at any time (CPLR § 3211 (e)).

Furthermore, although the Defendants did not include Artemus's lack of standing as an affirmative defense in its Answer, it would be excessively severe to waive such a defense when this prejudice can be cured by permitting the Defendants to amend its pleadings and discovery has already been conducted on whether Artemus was owner of the artwork (*see Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75, 81 [1st Dept 2015] [refusing to waive statute of limitations defense because prejudice caused by defect was easily curable by amending the pleadings]).

The Defendants argue that all claims asserted on behalf of Artemus must be dismissed because Artemus has no standing to sue under the Agreement as either a party, third-party beneficiary, or agent of Edelman. In their opposition papers, the Plaintiffs argue that Artemus has standing to sue because it is the owner of the artwork that is the subject of the Agreement. The court agrees.

Although the Agreement refers to Edelman as the sole consignor and does not mention Artemus, it is significant that the Agreement does not contain any representation that the consignor owned the artwork. The Agreement simply provided that the artwork was to "remain the sole property of the Consignor" and that damages would "be paid to Consignor" in the event that the artwork was damaged (NYSCEF Doc. No. 65, at 2-3).

A nonparty to a contract must suffer direct harm flowing from the contract or be a third-party beneficiary to have the requisite standing to challenge a contract (*Decolator, Cohen & DiPrisco, LLP v Lysaght, Lysaght & Kramer, P.C.*, 304 AD2d 86, 90 [1st Dept 2003]). Here, the Plaintiffs have sufficiently alleged that Artemus was the owner of the damaged artwork and suffered certain damages due to breach of the Agreement (NYSCEF Doc. No. 36, ¶¶ 5, 41).

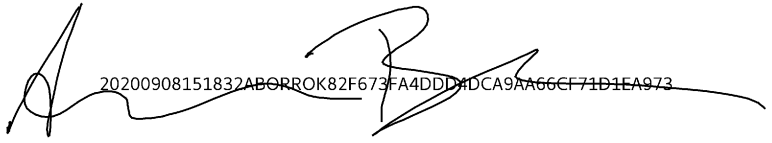
It is also well settled that an undisclosed principal may sue on a contract made in its agent's name (*see Leon Bernstein Commercial Corp. v Pan Am. World Airways*, 72 AD2d 707 [1st Dept 1979] [denying defendant's summary judgment motion to dismiss complaint on the basis that plaintiff had no capacity to sue as neither consignor nor consignee in an air waybill because issue of whether plaintiff was undisclosed principal of consignor and had title to goods at time of loss to be resolved at trial]). As the Plaintiffs assert that a principal-agent relationship existed between Artemus and Edelman, and that Edelman was in sum and substance to collect a commission while Artemus retained ownership of the artwork (NYSCEF Doc. No. 36, ¶¶ 1, 4, 5, 30), the Plaintiffs' sufficiently allege that Artemus is a proper party to this action as an undisclosed principal (*see Pensee Assoc. v Quon Indus.*, 241 AD2d 354, 359 [1st Dept 1997] [principal-agent relationship includes relationship between commission agent and principal for sale of goods, where title remains with the principal]). Accordingly, the Defendants' motion to dismiss is denied.

For the avoidance of doubt, the court disregarded the deposition testimony offered by the Plaintiffs to demonstrate that Artemus was purportedly the owner of the consigned artwork because deposition testimony is not a type of documentary evidence that may be considered on a

motion to dismiss (*see Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651, 651 [1st Dept 2011]).

Accordingly, it is

ORDERED that the Defendants' motion to dismiss is denied.

  
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9/8/2020  
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