SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS A. KAHN, III** **PART** **IAS MOTION 32**

Acting Justice

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CLAUS KLEBER,

Plaintiff,

- v -

10012 HOLDINGS INC d/b/a GUY HEPNER, and GUY HEPNER, Individually,

Defendants.

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INDEX NO. 656750/2019

MOTION DATE ___ _____

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 26-31, 33-46 were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the motion is decided as follows:

In this case it is alleged that in April 2019, Plaintiff Claus Kleber and Defendant Guy Hepner ("Hepner") on behalf of his gallery, Defendant 10012 Holdings Inc, ("Holdings"), entered an agreement regarding the purchase of an "Uncle Sam" screen print Edition 1/5 by Andy Warhol, signed and numbered by the artist. The description of the screen print and the Terms and Conditions of the Sale were printed on an invoice, dated April 5, 2019. Pursuant to the Terms set forth, Plaintiff was required to pay half of the $45,000.00 purchase price upon receipt of the invoice and "the remaining due after inspection and prior to delivery." Further, the Terms reflected that,

> "2. The buyer acknowledges that seller may be purchasing or taking delivery of the Artwork from a third-party following issuance of this invoice. If that is the case, and the seller does not for any reason actually receive delivery of the Artwork, seller reserves the right to rescind the transaction and refund any monies paid to the buyer in full satisfaction of any obligation of seller to buyer with respect to the subject transaction."
>
> "3....Under no circumstances shall seller be liable to buyer with respect to any claim relating to the transaction described in this invoice in any amount exceeded the purchase price paid hereunder, and buyer expressly waives the right to seek any damages in excess of such purchase price."

In the complaint it is alleged that as part of this transaction, on April 12, 2019, Plaintiff paid a deposit in the amount of $22,500. On April 18, 2019, Plaintiff's art expert travelled to Defendants' Manhattan gallery to inspect the subject screen print that Defendant "presented as the Artwork and as 'ready to be shipped.'" However, it was discovered that the presented

artwork was not the agreed upon screen print and according to Plaintiff, Defendants' employee told Plaintiff's expert that real screen print would be in the gallery soon.

Plaintiff claims in his complaint that Defendants then admitted the real screen print was never in New York but was in Sweden. Nevertheless, the parties agreed to an inspection of the subject screen print which occurred on June 10, 2019 through the seller's gallerist in Sweden. Afterwards, Plaintiff claims Defendants informed him that they had "London representation and a British VAT." This was advantageous for Plaintiff, given that he lived in Germany and using the British VAT would reduce his costs and allow direct shipment of the screen print from Sweden to Germany. Thus, the parties agreed for the transaction to go through London and Plaintiff requested a new invoice of the full amount to be issued to him from London. However, on June 14, 2019, Plaintiff learned from the seller's gallerist that Defendants provided an invalid British VAT number and resulted in the seller withdrawing the screen print from the sale. According to Plaintiff, from that point forward, various communications were exchanged with Defendants to have the deposit returned to him without success.

On November 13, 2019, Plaintiff filed his summons and complaint alleging three causes of action: breach of contract, breach of express warranty pursuant to the Arts and Cultural Affairs Law and fraudulent inducement. After Defendants failed to answer, Plaintiff moved and was granted default judgment on February 28, 2020. In May 2020, Defendants moved to vacate the default judgment and in September 2020, the parties stipulated to vacate the default judgment entered.

Now, Defendants move pursuant to CPLR §3211[a][1] and [7] to dismiss the complaint or in the alternative strike the demand in the complaint for treble damages of $66,500. Defendants further seek Plaintiff to pay their legal fees for maintaining this action in bad faith.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a][7], the allegations contained in the complaint must be presumed to be true, liberally construed and a plaintiff must be accorded every possible favorable inference (*see e.g. Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46 [2016]). In determining such a motion, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

In certain situations, however, the presumption falls away when bare legal conclusions and factual claims contained in the complaint are flatly contradicted by evidence submitted by the defendant (*see Guggenheimer*, supra; *Kantrowitz & Goldhamer, P.C. v Geller*, 265 AD2d 529 [2d Dept 1999]). When in the uncommon circumstance the evidence reaches this threshold (*see Lawrence v Miller*, 11 NY3d 588, 595 [2008]), the court "must determine whether the proponent of the pleading has a cause of action, not whether she has stated one" (*Kantrowitz & Goldhamer, P.C. v Geller*, supra; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).

A motion to dismiss pursuant to CPLR §3211[a][1] may only be granted where "documentary evidence" submitted decisively refutes plaintiff's allegations (*AG Capital Funding*

Partners, L.P. v State St. Bank & Trust Co., 5 NY3d 582, 590-91 [2005]) or "conclusively establishes a defense to the asserted claims as a matter of law" (*Held v Kaufman*, 91 NY2d 425, 430-431 [1998]; *see also Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). The scope of evidence that is statutorily "documentary" is exceedingly narrow and "[m]ost evidence" does not qualify (*see* Higgitt, *CPLR 3211[a][1] and [7] Dismissal Motions—Pitfalls and Pointers,* 83 New York State Bar Journal 32, 34-35 [2011]).

To the extent that Defendants seek dismissal of Plaintiff's breach of contract cause of action in its entirety, that branch of the motion fails. Plaintiff has clearly stated a valid cause of action in breach of contract by pleading "the existence of a contract, the Plaintiff's performance thereunder, the Defendant's breach thereof, and resulting damages" (see *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]; *see also Blue Art Ltd. v Zwirner*, 2016 NY Slip Op 32196 [U] [Sup Ct. New York County, 2006]).

With respect to the branch of the motion to dismiss which is, in effect, to limit Plaintiff's damages to the return of his deposit as per the terms of the invoice (*see Princetel, LLC v Buckley*, 95 AD3d 855, 856 [2d Dept 2012]), it is established that a "clear contractual provision limiting damages is enforceable absent a special relationship between the parties, a statutory prohibition or an overriding public policy" *(Ryan v IM Kapco, Inc.*, 88 AD3d 682, 683 [2d Dept 2011]; *see also Colnaghi, U.S.A., Ltd., v Jewelers Protection Services, Ltd.*, 81 NY2d 821, 823 [1993]).

"However, public policy forbids a party's attempt to escape liability, through a contractual clause, for damages occasioned by grossly negligent conduct" (*Southern Wine & Spirits of America, Inc. v Impact Environmental Engineering, PLLC,* 104 AD3d 613, 614 [1st Dept 2013]). Gross negligence, when invoked to defeat an agreed-upon limitation of damages in a contract, must "'smack[] of intentional wrongdoing' [or be] . . . conduct that evinces a reckless indifference to the rights of others" [internal citations omitted] (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 554 [1992]).

Here, Plaintiff alleges in the complaint that Defendants knowingly made false statements regarding the quality of the print offered for sale and its location in Defendants' gallery in New York. Further, Plaintiff pled that Defendants falsely represented that the Swedish seller required a deposit. Plaintiff also claims that despite the transaction being cancelled by the Swedish seller, his repeated demands for the return of his deposit were rebuffed by Defendants. It is undisputed that, to date, Plaintiff's deposit has not been returned. For the purposes of this motion, all these allegations must be presumed to be true (*see Guggenheimer*, supra) and sufficiently state, for pleading purposes, a claim of willful conduct to sustain a claim of gross negligence (*see Dolphin Holdings, Ltd. v Gander & White Shipping*, Inc., 122 AD3d 901 [2d Dept 2014]). Despite Defendants' denials of the accuracy of these factual assertions, Movant failed to flatly contradicts these claims. Accordingly, Plaintiff has sufficiently stated a claim for his demanded damages for the alleged breach of contract.

Turning to the second cause of action alleging breach of an express warranty made pursuant to the Arts and Cultural Affairs Law[1], pursuant to that statute "[w]henever an art

[1] Plaintiff's claim in his complaint for "further damages under Art. 2 NY UCC" is misplaced since the Arts and Cultural Affairs Law governing express warranties in the art world 'supplant the otherwise applicable provisions of

merchant, in selling or exchanging a work of fine art, furnishes to a buyer of such work who is not an art merchant a certificate of authenticity or any similar written instrument it shall be presumed to be part of the basis of the bargain" and "shall create an express warranty for the material facts stated as of the date of such sale or exchange" (*see* Arts and Cultural Affairs Law §13.01 [1][a],[b]). The Arts and Cultural Affairs Law §13.05 [1] further states:

> "When an art merchant furnishes the name of the artist of a multiple[2], or otherwise furnishes information required by this title for any time period as to transactions including offers, sales or consignments, the provisions of section 13.01 of this article shall apply except that said section shall be deemed to include sales to art merchants. The existence of a reasonable basis in fact for information warranted shall not be a defense in an action to enforce such warranty, except in the case of photographs produced prior to nineteen hundred fifty, and multiples produced prior to nineteen hundred."

Plaintiff must also plead that Defendants, as art merchants or merchant consignees, offered or sold a multiple in, into or from this state, without providing the information required for the appropriate time period, or who provided required information which is mistaken, erroneous or untrue (*see* Arts and Cultural Affairs Law §15.15 [1]).

In his complaint, Plaintiff identifies the "detailed description of the Artwork" found in the invoice to "constitute[] an express warranty pursuant to Section 13.05 in connection with Section 13.01 of the New York Art and Cultural Affairs Law." Thereafter, Plaintiff pled that Defendants presented in their New York gallery "an inferior copy of the Artwork that did not match the description of the Artwork on the invoice." However, as pled, this was immediately detected by Plaintiff's art expert upon inspection and resulted in a second inspection. In the end, as Plaintiff alleges in his complaint, over the course of this transaction, his expert travelled to Stockholm and inspected the Artwork that was specified on the invoice. As such, the required information was provided, there was no breach of the express warranty and there exists no basis for treble damages (*see* Arts and Cultural Affairs Law §15.15 [3]; *Tananbaum v Gagosian Gallery, Inc.*, Sup Ct. New York County, August 20, 2019, Scarpulla, J., Index No. 651889/2018); *compare to Blue Art Ltd v Zwirner*, ____Misc3d____, 2016 NY Slip Op 32196 [U] [Sup Ct. New York County, 2006]).

As for Plaintiff's third cause of action, the elements of a claim for fraudulent inducement are: 1) a false representation of material fact; 2) known by the utterer to be untrue; 3) made with the intention of inducing reliance and forbearance from further inquiry; 4) that is justifiably

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the Uniform Commercial Code'" (*Christie's Inc. v SWCA, Inc.*, 22 Misc3d 380, 387, fn. 5 [Sup Ct. New York County, 2008] *citing Levin v Dalva Bros.*, 459 F3d 68,77 [1st Cir 2006]).

[2] "Visual art multiples" or "multiples" means prints, photographs, positive or negative, sculpture and similar art objects produced in more than one copy and sold, offered for sale or consigned in, into or from this state for an amount in excess of one hundred dollars exclusive of any frame or in the case of sculpture, an amount in excess of fifteen hundred dollars. Pages or sheets taken from books and magazines and offered for sale or sold as visual art objects shall be included, but books and magazines are excluded (*see* Arts and Cultural Affairs Law §11.01 [21]).

relied upon; and 5) results in damages (*see Connaughton v Chipotle Mexican Grill, Inc.*, 135 AD3d 535, 537 [1st Dept 2016]; *Schumaker v Mather,* 133 NY 590, 595 [1892]). Irrespective of the presumptive truthfulness of any false claims attributed to Defendants in the complaint, this cause of action fails since, as discussed above, Plaintiff did not detrimentally rely on any alleged misrepresentations regarding the quality of the work since he engaged an art expert who identified the discrepancy and which ultimately resulted in inspection of the artwork that comported with the description on the invoice. Any misrepresentation regarding the requirement of a deposit by the Swedish seller was immaterial because the invoice required a deposit of half of the purchase price upon receipt. All said, "Plaintiff did not rely on [Defendants'] representations to his detriment" (*Meyercord v Curry*, 38 AD3d 315, 316 [1st Dept 2007]).

Finally, Defendants' motion also seeks an order of this Court directing Plaintiff to pay Defendants' legal fees for maintaining this action in bad faith, pursuant to Arts and Cultural Affairs Law §15.15 [4]. That section states:

> "In any action to enforce any provision of this article, the court may allow the prevailing purchaser the costs of the action together with reasonable attorneys' and expert witnesses' fees. In the event, however, the court determines that an action to enforce was brought in bad faith it may allow such expenses to the art merchant as it deems appropriate."

For Defendants to prevail, they would need to show that Plaintiff commenced this action with disingenuous or dishonest motives (*see Pavia v State Farm Mut. Auto. Ins.. Co.*, 82 NY2d 445, 451-452 [1993]). Simply put, Defendants have not shown that in bringing this action, Plaintiff acted in bad faith since Defendants concede that at the time of its commencement, they had not repaid Plaintiff's deposit. Therefore, that branch of Defendants' motion for attorneys' fees is denied.

Accordingly, Defendants' motion to dismiss the complaint is granted insofar as the causes of action for breach of an express warranty pursuant to Art and Cultural Affairs Law and for fraudulent inducement are dismissed. Further, the branch of Defendants' motion seeking legal fees from Plaintiff for maintaining this action in bad faith, pursuant to New York Arts and Cultural Affairs Law §15.15 [4] is denied.

2/8/2021
DATE

FRANCIS A. KAHN, III, A.J.S.C.

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

HON. FRANCIS A. KAHN III
J.S.C.