

<b>Baradel v Edelman Arts, Inc.</b>
2021 NY Slip Op 32218(U)
November 8, 2021
Supreme Court, New York County
Docket Number: Index No. 653717/2019
Judge: Louis L. Nock
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. LOUIS NOCK PART 38M

*Justice*

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MARC BARADEL,

Plaintiff,

- v -

EDELMAN ARTS, INC., and THOSE UNDERWRITERS AT  
LLOYD'S LONDON WHO SUBSCRIBED TO THE POLICY  
OF INSURANCE/CERTIFICATE NUMBERED  
[Redacted]5082,

Defendants.

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INDEX NO. 653717/2019

MOTION DATE 05/27/2021

MOTION SEQ. NO. 008

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 008) 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 275, 276, 277, 281, 282, 283, 284, 287, 291

were read on this motion to/for DISCOVERY.

LOUIS L. NOCK, J.

Upon the foregoing documents, the motion of defendant Those Underwriters at Lloyd's, London Who Subscribed to the Policy of Insurance/Certificate Numbered [Redacted]5082 ("Underwriters") to compel discovery is granted, in accord with the following memorandum decision.

**Background**

**I. The Pleadings**

This case arises from plaintiff Marc Baradel's ("Plaintiff") ownership of a marble sculpture, titled *Le Poisson* (the "Sculpture"), purportedly created by renowned artist Constantin Brancusi ("Brancusi"). Pursuant to a "Consignment Agreement," dated July 3, 2018 (the "Consignment Agreement"), Plaintiff consigned the Sculpture to defendant Edelman Arts, Inc. ("Edelman Arts"). As alleged in the amended complaint, while in consignment, the Sculpture fell

and broke (NYSCEF Doc No. 63, amended complaint ¶ 28). The Consignment Agreement provides that Edelman Arts, as Consignee, “warrants the work to be insured under the terms of his policy against any loss or damage in the amount of the insured value” (NYSCEF Doc No. 64 at 1, Consignment Agreement). The “Insurance Value” indicated in the Consignment Agreement is \$5,000,000 (*id.*).

Several months before the consignment, Underwriters issued an insurance policy (the “Policy”) to Edelman Arts that covers loss or damage to “antiques, jewellery [sic] and objects of art of every nature and description,” subject to the Policy’s terms, conditions, and exclusions (NYSCEF Doc No. 67). The effective dates of the Policy was March 29, 2018 through March 29, 2019 (*id.*). Contemporaneous with the consignment, non-party HUB International Northeast Limited (“HUB”), thereafter issued a Certificate of Insurance (“COI”) for the Sculpture with an insured amount of \$5,000,000 to Edelman Arts that names Underwriters as underwriter and Plaintiff as “Additional Insured / Loss Payee” (NYSCEF Doc No. 65).<sup>1</sup> The effective dates of the COI were July 3, 2018 to October 3, 2018 (*id.*).

The amended complaint alleges that the Sculpture “was appraised at \$22,500,000 fair market value by an appraiser prior to the damage” (NSYCEF Doc No 63, amended complaint ¶ 74). It further alleges that Edelman incorrectly obtained insurance in the “temporary” amount of \$5,000,000 instead of the amount of \$20,000,000 which “was requested,” and that Edelman “had agreed to increase the insurance amount to \$20,000,000” (*id.* ¶¶ 18-19). Plaintiff seeks to recover the “Policy value \$5,000,000 plus 10 percent” (NYSCEF Doc No. 63, amended complaint ¶ 23) from Underwriters and the remainder of the alleged appraisal value of \$22,500,000 from Edelman Arts. Underwriters disputes these allegations and asserts that HUB did not act as its

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<sup>1</sup> The complaint was discontinued as against HUB by a stipulation between the parties dated May 8, 2020 (NYSCEF Doc No. 229).

agent or broker in connection with this matter or the Policy and had no authority to change the terms of the Policy (NYSCEF Doc No. 238, answer ¶¶ 6, 14). Underwriters also disputes the authenticity of the Sculpture and the alleged \$22,500,000 value.

The second and fifth causes of action and all causes of action as asserted against Asher Edelman were dismissed pursuant to an order of this court dated February 5, 2021 (NYSCEF Doc No. 232). The remaining causes of action are for (1) breach of contract, against the Edelman Arts, (3) declaratory relief against all defendants, and (4) breach of the covenant of good faith and fair dealing against Underwriters. The first cause of action for breach of contract cites to the provisions of the Consignment Agreement that required Edelman to insure the Sculpture for \$5,000,000 and alleges that Consignment Agreement was “prepared erroneously by Edelman because the Plaintiff had requested and insisted on insurance coverage for \$20,000,000 which change was in progress when the loss occurred” and, therefore, Edelman is liable to Plaintiff for all damages to the Sculpture (*id.* ¶¶ 110-111). The third cause of action for declaratory relief seeks a declaration regarding whether the Policy was changed and whether HUB had authority to do so (*id.* ¶126). Finally, the fourth cause of action for breach of the covenant of good faith and fair dealing asserts that Plaintiff is entitled to collect under the Policy in the amount of \$5,500,000 and that Underwriters violated the covenant of good faith and fair dealing by failing to pay his claim, for which breach they are obligated to pay the full appraised value of the Sculpture, \$22,500,000 (*id.* ¶¶ 139, 144).

## **II. Relevant Factual Background**

Sometime after the Sculpture was damaged, Underwriters commenced an investigation into the damage pursuant to the Policy. Underwriters represents that its attempts to obtain information “have been frustrated by Plaintiff’s non-cooperation and his incomplete,

incomprehensible, and non-sensical responses to Underwriters' discovery requests" (NYSCEF Doc No. 273 at 6-7, mem in support). Underwriters contends that the primary issue in the action, and pertinent to discovery, is the authenticity of the Sculpture, which it has called into question for the following reasons:

(i) Brancusi is one of the world's most renowned artists but also one of the world's most forged artists; (ii) Plaintiff has provided Underwriters with very little information regarding the Sculpture's (and Collection's) provenance; (iii) Plaintiff purchased the Sculpture (and Collection) from a Romanian farmer, and Plaintiff has produced conflicting documents concerning the alleged purchase; (iv) the Sculpture appeared suddenly on the art market without reportedly having ever been consigned; and (v) the Sculpture still has not been authenticated by a recognized Brancusi expert.

(*id.* at 7). Underwriters' contentions regarding the "Collection" refer to nineteen additional pieces of artwork that were purportedly purchased and transported with the Sculpture (*id.*; NYSCEF Doc No. 276 at 2, supplemental interrogatory responses). Plaintiff avers that, in April 1990, he purchased the Sculpture and the Collection together from non-party Gorges Manea ("Manea") in Bucharest for the sum of \$300,000.00 French francs, which was paid in cash in the year 1990 (*id.*). He further contends that Manea sold the Sculpture to Plaintiff in Romania and the "collection came from his friend, Dica Brandl, son of Mrs. Lucia Brandl (art collector), [] They knew Brancusi and are referenced in several publications about [] Brancusi" (*id.*). However, the various documents submitted by Plaintiff in this matter contain conflicting information regarding acquisition of the Sculpture (*see e.g.*, NYSCEF Doc No. 272 at 12, purported Original Bill of Sale with Declaration ["I donated to my friend Mark Baradel originally of France 20 (twenty) pieces in stone and in marble . . . I wanted this out of pure patriotism because those who stole power in Romania (the neo-communists) were too little interested in art and culture."])).

Two conflicting affidavits of Manea were produced by the parties in connection with earlier motions in this action. In the affidavit produced by Plaintiff, dated September 17, 2019, Manea attests that he sold the Sculpture and Collection to Plaintiff on April 1, 1990 in Romania, and that the Collection was given to him by Brandl, as represented by Plaintiff (the “first Manea affidavit”) (NYSCEF Doc No. 34). The first Manea affidavit indicates it was sworn to on September 17, 2019 in the United States Embassy in Bucharest, Romania (*id.*). A second affidavit of Manea produced by Asher Edelman and Edelman, Inc., dated December 2, 2019, attests, in relevant part, the following:

I make this affidavit to retract the ‘affidavit’ of 17 September I signed for [Plaintiff] as I have come to learn that said affidavit was incorrectly translated to me and is untrue. I have owned [the Sculpture] for many years. I am its current owner. In 2015 [Plaintiff] and I agreed that I would lend possession of [the Sculpture] to [Plaintiff] so that he could take it back to France to see if he could arrange to sell it. We agreed that we would share the money from any sale equally. I did not sell [the Sculpture] to Baradel at any time. I never transferred ownership of [the Sculpture] to [Plaintiff]. I do not know what [Plaintiff] did with [the Sculpture] but he never gave me any money for it. He has never returned [it] to me.

(the “second Manea affidavit”) (NYSCEF Doc No. 178). The second Manea affidavit references the first Manea affidavit and Manea attests that in September of 2019, Plaintiff approached him through an intermediary and “promised that he would give me 100,000 Euros if I would sign a paper for him. This paper was written in a language that I did not know. [Plaintiff’s] intermediary supposedly translated it to me. It seemed truthful to me so I signed it at the United States embassy in Bucharest” (*id.*). He goes on to dispute the information set forth in the first Manea affidavit, which he indicates “was not properly and honestly translated to me before I signed it” (*id.*) Finally, he states that “I do not read, speak or understand English. This affidavit has been translated to me by my grandson, who speaks English, French, and Romanian and whom I trust” (*id.*). Counsel to

Plaintiff contends that the second Manea affidavit is perjurious and has accused counsel for Edelman, Inc. and Underwriters of subornation of perjury in obtaining it (NYSCEF Doc No. 254).

### **III. The Motion to Compel**

Following the court's February 5, 2021 order, the remaining parties commenced discovery in the action. This undertaking has been fraught with disputes between the parties, who have engaged in no less than five discovery conferences with the court to date. The present motion is the result of a dispute between the parties regarding Plaintiff's failure to fully respond to Underwriters' First Set of Interrogatories (the "Interrogatories") and First Set of Document Demands (the "Demands"), each dated March 17, 2021 (NYSCEF Doc Nos. 265-266). The Interrogatories and the Demands seek, *inter alia*, information and documents pertaining to Plaintiff's purchase, transport, care and custody of the Sculpture and the Collection (*id.*). Plaintiff responded to the Interrogatories and Demands by responses dated, respectively, March 30, 2021 and April 14, 2021 (NYSCEF Doc Nos. 268, 270). The interrogatory responses were not sworn to and contained a notation that states "Notaries in Paris closed due to COVID" near the signature line (NYSCEF Doc No. 268). Plaintiff did not respond to the substance of the motion, but Stephan Weingrad, Esq., counsel the Plaintiff, filed an affirmation (NYSCEF Doc No. 287) in which he states Plaintiff's opposition to the motion and makes reference to an Amended Answer to Interrogatories dated June 4, 2021 (NYSCEF Doc No. 276) and to a revised appraisal report from non-party Alex J. Rosenberg, an expert witness retained by Plaintiff (NYSCEF Doc No. 281). The Weingrad affirmation requests "that the above discovery be read in opposition to the motion" (NYSCEF Doc No. 287). On August 20, 2021, Plaintiff filed a second amended response to the Interrogatories dated July 20, 2021 (the "Second Amended

Integratory Response”) (NYSCEF Doc No. 290). This Second Amended Integratory Response has an attached “Certificate of Accurate Translation + Proofreading” and is signed by Plaintiff with an accompanying notary (*id.*).

On September 23, 2021, Underwriters’ counsel, Owen B. Carragher, Jr., Esq., filed a letter to the court which advises that the issues on the motion have been narrowed and identifies which items remain in contention, including Interrogatory numbers 3, 4, 6, 11, 14, 15, 18, and the corresponding document demands, which bear the same numbers (NYSCEF Doc No. 291). Carragher also outlines an additional discovery issue that arose during the pendency of the motion regarding inspection of the Collection.

### Discussion

Pursuant to CPLR § 3124, “[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . . the party seeking disclosure may move to compel compliance or a response.” On a motion brought pursuant to CPLR § 3124, the burden is on the party seeking the disclosure to establish a basis for the production sought (*see, Crazytown Furniture, Inc. v Brooklyn Union Gas Co.*, 150 AD2d 420 [2d Dept 1989]; *accord, e.g., Rodriguez v Goodman*, 2015 WL 4554460 [Sup Ct, NY County 2015]). “[T]he party challenging disclosure bears the burden of establishing that the information sought is immune from disclosure” (*Ambac Assurance Corp. v DLJ Mortg. Capital, Inc.*, 92 AD3d 451, 452 [1st Dept 2012]). A party is not required to respond to discovery demands that are “palpably improper in that they sought, inter alia, irrelevant information, or were overbroad and burdensome” (*Montalvo v CVS Pharmacy, Inc.*, 102 AD3d at 842, 843 [2d Dept 2013]).

CPLR 3101(a) provides that “[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action.” “New York strongly encourages open and

full disclosure as a matter of policy” (*MSCI Inc. v Jacob*, 120 AD3d 1072, 1075 [1st Dept 2014]). The words “material and necessary” are “to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity” (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). “The test is one of usefulness and reason” (*id.*). “A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is ‘material and necessary’—i.e., relevant—regardless of whether discovery is sought from another party” (*Forman v Henkin*, 30 NY3d 656, 662 [2018]).

The documents and information sought by Underwriters pertain to the transport (Interrogatory 3), possession, custody, or control (Interrogatory 4), valuation (Interrogatory 6), authentication (Interrogatory 11), and marketing (Interrogatory 14) of the Collection and Sculpture (NYSCEF Doc No. 265; NYSCEF Doc No. 281). Underwriters also seeks all communications between Plaintiffs and Edelman Arts relating to the consignment (Interrogatory 15) and information identifying all exchanges with Brancusi’s estate (Interrogatory 18) (*id.*) Plaintiff’s Second Amended Interrogatory Response states an objection on the grounds of relevance for Interrogatories 3, 4, 11, 18 (NYSCEF Doc No. 290). No objections are stated with respect to Interrogatories 6, 14, and 15, and no privileges are asserted for any of the Interrogatories (*id.*)

Underwriters contends that the information sought is relevant or likely to lead to relevant information regarding, *inter alia*, the Sculpture’s authenticity, provenance, and value.

“Provenance” refers to the history of ownership of a specific artwork or the “source and subsequent custodial history of an art work” (*Arnold Herstand & Co. v Gallery: Gertrude Stein, Inc.*, 211 AD2d 77, 80 [1st Dept 1995]; *Greenberg Gallery, Inc. v Bauman*, 817 F Supp 167 [D

DC 1993] [“The ‘provenance’ of the [artwork], or the chain of ownership from the original artist to the present owner, is accepted in the art world as persuasive evidence of a work’s authenticity and was important to [the] conclusion here”). Many experts consider provenance to be the best proof of a work’s authenticity (Valerie Medelyan, *Says Who?: The Futility of Authenticating Art in the Courtroom*, 36 *Hastings Comm. & Ent. L.J.* 1 [2014], citing *Greenberg Gallery v Bauman*, 817 F Supp 167, 173 [D DC 1993]).<sup>2</sup>

Each of the interrogatories addressed here unquestionably seek relevant information or information that is or likely to lead to relevant information. The authenticity of the Sculpture is a central issue of fact in the case and has a direct bearing on Plaintiff’s claims and the potential value of damages.<sup>3</sup> Information regarding the transportation, possession, custody and control of the Sculpture (Interrogatories 3 and 4) are directly relevant to the custodial history—i.e., the provenance and authenticity of the work (*see Arnold Herstand & Co. v Gallery: Gertrude Stein, Inc.*, 211 AD2d at 80). Furthermore, because Plaintiff maintains that the Sculpture and the Collection were purchased and transported together, the provenance of the Collection is also relevant to the authenticity of the Sculpture (*see Eisenberg v Hall*, 147 AD3d 602, 605 [1st Dept 2017] [Plaintiff admission that several items purchased with subject artwork later turned out to be inauthentic suggests that plaintiff should have been on notice that the subject artwork might not be authentic]). Plaintiff’s efforts to authenticate the Sculpture and Collection (Interrogatory 11) are directly relevant to the question of authenticity as are his communications with the

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<sup>2</sup> Physical examination of a work itself is also “critical to any determination of authenticity” and may include, *inter alia*, “inspecting the characteristics of a work, such as the style, colors or materials used,” verification of any signature on the work, physical testing of materials from the work (Samuel Butt, *Authenticity Disputes in the Art World: Why Courts Should Plead Incompetence*, 28 *Colum JL & Arts* 71, 73 [2004]).

<sup>3</sup> Illustrating the extent to which the authenticity of the Sculpture is at issue in this case, Plaintiff’s counsel, Stephen Weingrad, Esq., submitted a letter to the court on August 19, 2021, to which he attached two expert reports regarding the Sculpture, one of which he describes as “in favor and supporting the authenticity,” and the other as “trashing the authenticity” (NYSCEF Doc No. 289 at 2).

Brancusi estate (Interrogatory 18). Therefore, the objections on the grounds of relevance are overruled.

Turning to the sufficiency of Plaintiff's responses to the Interrogatories, the twice-revised responses provided are nevertheless facially incomplete. For example, Interrogatory 3 seeks information regarding transportation of the Sculpture and Collection from the time they came into Plaintiff's possession continuing through the present, "including but not limited to: (i) Persons with knowledge of transports; (ii) Persons responsible for transport; (iii) where the pieces of the Collection or Sculpture were transported to and from; (iv) where the pieces of the Collection or Sculpture were packed; (v) who was responsible for packing; (vi) who was responsible for shipping; (vii) insurance policies; (viii) import and export records; and (ix) declarations of value" (NYSCEF Doc No. 265 at 9, Interrogatories). Plaintiff's response states the following:

Plaintiff transported the sculpture's [sic] himself in his car due to the political situation in Romania; "I drove from Romania to Paris with the sculptures. I don't remember declaring it". No Duty, No Insurance, No Documents exist. The Sculpture in issue came to America as carry-on luggage. The collection has been in the warehouse except as noted herein.

(NYSCEF Doc No. 290 at 4-5, Second Amended Integratory Response). Plaintiff states in response to Interrogatory 1 that the Sculpture is currently located in New York, but no information has been provided regarding transport of the Sculpture from Paris to New York or at any other time, and no information regarding transport of the Collection has been provided at all (NYSCEF Doc No. 290 at 1, 4, Second Amended Integratory Response).

Interrogatory 4 requests the identity of all persons who have "had Possession, custody or control of the pieces of the Collection or the Sculpture during the Applicable Time Period and the purpose for which the Person had Possession, custody, and control of the pieces of the

Collection, including the Sculpture” (NYSCEF Doc No. 265 at 4, Interrogatories). Plaintiff’s response recites details regarding only five items in the Collection and no information regarding the Sculpture (NYSCEF Doc No. 290 at 5, Second Amended Interrogatory Response). The response also contains a reference to the proposed inspection of the Collection and states “I didn’t sell any sculptures and I have no insurance on the collection” (*id.*). This is an incomplete and insufficient response. The remaining responses are similarly deficient. It is unclear whether Plaintiff has produced all responsive documents in his possession. Although counsel to the Plaintiff has represented to the court that Plaintiff has produced all responsive documents in his possession, the Second Amended Interrogatory Response states that he continues to search for responsive documents.

Therefore, the motion to compel is granted to the extent that Plaintiff shall, on or before December 20, 2021, provide supplemental responses to Interrogatories 3, 4, 6, 11, 14, 15, 18, and produce all documents responsive to the corresponding document demands, which bear the same numbers. To the extent that the documents enumerated above are not in the Plaintiff’s possession, or cannot be located after a diligent search, Plaintiff shall, on or before December 20, 2021, provide the defendants with a *Jackson* affidavit (*see In Trade Expo Inc. v Sterling Bancorp*, 171 A.D.3d 634 [1st Dept 2019]; *Jackson v City of New York*, 185 A.D.2d 768, 586 N.Y.S.2d 952 [1st Dept 1992]) attesting to the fact that he either is not in possession of those documents or that he could not locate them after a diligent search, and describing the nature of the search that he undertook. If Plaintiff has, in fact, already provided the particular item, he shall, on or before December 20, 2021, either provide the defendants with proof that he has already provided it, or shall provide a courtesy copy of the item to the extent that he lacks proof that he has already provided it. No adjournment of this date will be permitted and Plaintiff will

be precluded from introducing at trial any document not produced by December 20, 2021.

Finally, the court will conduct a status conference with counsel for the parties on November 30, 2021 to discuss the issue of inspection raised in Mr. Carragher's September 23, 2021 letter to the court. If the parties cannot agree to terms for an inspection on or before that date, either defendant may file a motion to compel the inspection, supported by proper briefing and any necessary evidentiary support.

Accordingly, it is

ORDERED that the motion to compel is granted to the extent set forth herein; and it is further

ORDERED that counsel for the parties will attend a status conference with the court on November 30, 2021 at 11:00 a.m. to be held by Microsoft Teams meeting arranged by the court.

This will constitute the decision and order of the court.

ENTER:



<u>11/8/2021</u>			<u>LOUIS NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE