Phillips Auctioneers LLC v Grosso
2022 NY Slip Op 30838(U)
March 10, 2022
Supreme Court, New York County
Docket Number: Index No. 651782/2020
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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PHILLIPS AUCTIONEERS LLC,

Plaintiff,

- v -

PIER FRANCO GROSSO,

Defendant.

INDEX NO. 651782/2020

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77

were read on this motion to/for LEAVE TO FILE.

Upon the foregoing documents, it is

For the reasons stated on the record on March 8, 2022, defendant Pier Franco Grosso's motion for leave to file an amended answer with six new third-party claims against three new third-party defendants is denied without prejudice. Grosso shall submit the transcript to be so ordered. The following decision supplements the decision on the record.

This is an action for breach of contract. In 2016, Grosso consigned to plaintiff Phillips Auctioneers LLC (Phillips) artwork in exchange for an advance of $1.5 million. (NYSCEF 40, Amended Complaint ¶ 2.) Grosso represented that the artwork is by the late artist Cy Twombly (Work). (*Id.* ¶ 15.) Phillips estimated the Work would sell for $2.5 million to $3.5 million. (*Id.* ¶ 16.) Under Paragraph 10(a) of the consignment agreement (Agreement), Phillips is permitted to withdraw the Work from sale if, in Phillips' "sole judgment,"

> "(i) there is reasonable doubt as to its authenticity, authorship or attribution; (ii) there is doubt as to your title or your authority to place it for sale; (iii) any representation or warranty that you have made to [Phillips] is materially inaccurate or we reasonably doubt its accuracy; (iv) you have breached, or indicated that you intend to breach, any provision of this Agreement in any material respect; (v) the [Work] is damaged to the extent that it is not in the condition in which it was when [Phillips] agreed to sell it; or (vi) other just cause exists."

(NYSCEF 41, Consignment Agreement at 6[1].) Paragraph 10(b) of the Agreement says that if Phillips withdraws the Work from sale under Paragraphs 10(a)(iii) or (iv), then Grosso is required to pay Phillips's out-of-pocket costs related to the Work, a withdrawal fee of 25% of the latest low pre-sale estimate of the Work, and the entire outstanding amount of the advance plus interest. (See *id.*) Phillips determined that the provenance of the Work was questionable and withdrew it from sale. (NYSCEF 40, Amended Complaint ¶¶ 22, 25-28.) Here, Phillips seeks return of the advance and related costs.

Grosso counterclaimed for breach of fiduciary duty alleging that Phillips failed to disclose to him communications that Phillips had with nonparty Cy Twombly Foundation (Foundation), which caused Phillips to conclude that the artwork was a forgery. (NYSCEF 44, Answer ¶¶ 7-27.)

The parties in this 2020 action have concluded document discovery and have taken one deposition of the Foundation. Phillips has noticed four depositions which can begin immediately.

Grosso's proposed third-party claims—for tortious interference, prima facie tort, fraud, injurious falsehood, product disparagement, and negligent misrepresentation—against the Foundation, David Baum, the Foundation's outside counsel and secretary,

[1] Pages cited refer to NYSCEF generated pagination.

and Nicola Del Roscio, the Foundation's president are predicated upon allegedly false statements that Grosso believes harmed his reputation and the value of the Work. (*See* NYSCEF 61, Proposed Answer.)

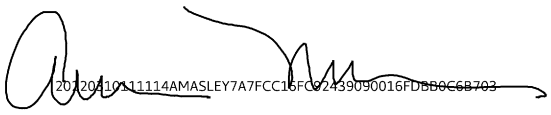
The issue here is whether the proposed third parties are "liable to that defendant for all or part of the plaintiff's claim against that defendant." (CPLR 1007.) "[T]hird-party claims are limited to claims for contribution, indemnity, or subrogation." *(U.S. Bank N.A. v Kahn Prop. Owner, LLC*, 64 Misc 3d 1236(A), *2 [Sup Ct, Suffolk County 2019], citing Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C1007:3). "While it is true that the doctrine of impleader has its roots in strict indemnity, the history and development of impleader and the language of the current statute indicate that the device is no longer wedded to this single theory of recovery . . . . It has long been clear that one of the main purposes of third-party practice is 'the avoidance of multiplicity and circuity of action, and the determination of the primary liability as well as the ultimate liability in one proceeding, whenever convenient.'" (*George Cohen Agency, Inc. v Donald S. Perlman Agency, Inc.*, 51 NY2d 358, 365 [1980] [internal quotation and citation omitted].) "At the least, the third-party claim must be sufficiently related to the main action to raise the question of whether the third-party defendant may be liable to the third-party plaintiff for the damages for which the latter may be liable to the plaintiff." (*U.S. Bank N.A.*, 64 Misc 3d at *2 [citation omitted].)

While certainly related, the third-party claims lack the claim-over component because the third-party defendants have nothing to do with Phillips' advance to Grosso. Likewise, Grosso's breach of fiduciary duty for Phillips' failure to inform Grosso of the

Foundation's statements does not involve the third-party claims. Moreover, the third-party controversy will delay the determination of the main action. (CPLR 1010 ["In exercising its discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action."].) Phillips anticipates brief depositions in a short amount of time, followed by the filing of a note of issue and summary judgment motion. Proposed third-party defendants are entitled to service, time to answer or move, and discovery far beyond the scope of allowable discovery in this action.

Accordingly, it is

ORDERED that defendant Grosso's motion for leave to file an amended answer with six new third-party claims against three new third-party defendants is denied without prejudice.



3/10/2022
DATE

ANDREA MASLEY, J.S.C.

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