

**Leonard Fox Ltd v Shivers**

2023 NY Slip Op 31415(U)

April 27, 2023

Supreme Court, New York County

Docket Number: Index No. 650428/2022

Judge: Lyle E. Frank

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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. LYLE E. FRANK PART 11M**

*Justice*

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LEONARD FOX LTD,

Plaintiff,

- v -

TOM SHIVERS, THE ESTATE OF NEIL ZUKERMAN, CFM  
 GALLERY, SOTHEBY'S NEW YORK

Defendant.

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INDEX NO. 650428/2022

MOTION DATE 05/27/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
 MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

This action arises out of an alleged breach of contract. Defendants, Tom Shivers, The Estate of Neil Zukerman and CFM Gallery (hereinafter referred to as Shivers, Zukerman and CFM respectively), move pursuant to CPLR § 3212 for summary judgment on its counterclaims, including requiring plaintiff to return to defendants their artwork, as well as dismissal of the complaint. Plaintiff opposes the instant motion and cross moves for summary judgment and to amend its summons and complaint. For the reasons set forth below defendants' motion is granted and plaintiff's motion is denied.

**Background**

This action arises out of a contract, dated October 5, 2021, between plaintiff and defendant Shivers. See NYSCEF Doc. 2. The contract provides that plaintiff will receive "25% of any piece sold directly by LF or his agents" and/or 10% commission "of the hammer price of any item sold at auction." The contract does not identify any additional payment terms. It is undisputed that the contract does not confer exclusive rights, onto plaintiff or its agents, to sell

the artwork. The contract was terminated by the defendant Tom Shivers on or about January 12, 2022. *See* NYSCEF Doc. 26.

### **Summary Judgment Standard**

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

### **Discussion**

#### *Amend Complaint*

For the sake of clarity, the court will first address plaintiff's cross motion to amend its complaint. Defendants oppose.

Pursuant to CPLR 3025 (b), "[a] party may amend his or her pleading, . . . , at any time by leave of court . . . [and] [l]eave shall be freely given upon such terms as may be just including the granting of costs and continuances." The Court of Appeals recognizes that "[a]s a general rule, 'leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . , and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court.'" *Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015] (internal citation omitted).

Preliminarily, the court notes that plaintiff failed to submit a red lined or highlighted copy as required to “clearly show[ing] the changes” from the original pleading to the new proposed pleading. CPLR § 3025(b). Notwithstanding that deficiency, granting plaintiff’s application would be futile. The proposed amended complaint and the original complaint contain the same factual allegations and are in the same ways deficient in alleging the trade libel cause of action. Moreover, the court notes that a cause of action for accounting was added, but as will be discussed below, as with the other causes of action allowing the amendment would be futile. Accordingly, the portion of plaintiff’s cross-motion that seeks to amend the complaint is denied.

*Defendants’ Motion for Summary Judgment and Plaintiff’s Cross-Motion*

Plaintiff seeks damages based on the six causes of action<sup>1</sup> alleged in its verified complaint. The first cause of action contends that Shivers breached the contract by refusing to use the auction house secured by plaintiff then securing the services of Sotheby’s<sup>2</sup> to sell items from defendants’ collection. Defendants contend that nothing in the contract provided the plaintiff with exclusive rights to sell the artwork, thus even assuming the allegations in the complaint are true Shivers actions, of obtaining Sotheby’s cannot be deemed a breach of the contract.

In opposition, plaintiff contends that the language in the contract, that it retain 10% “of the hammer price of any item sold at auction” has been breached because defendants sold multiple items through an auction held by Sotheby’s on March 23, 2022, well after the contract was terminated.

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<sup>1</sup> For the purposes of these motions the court will only refer to the original complaint, as will be discussed below the amendments proposed by plaintiff are futile.

<sup>2</sup> The matter was previously discontinued as against defendant Sotheby’s. *See* NYSCEF Doc. 41.

As to the first cause of action the court finds that defendant has established its entitlement to judgment as a matter of law and plaintiff has failed to raise a triable issue of fact. As stated above, the contract was terminated in January 2022, there is not one sentence in the contract that indicates that any one provision will outlast the termination of the entire contract. Based on the clear, unambiguous terms of the contract plaintiff is not entitled to any commission of items sold by Sotheby's at the auction held on March 23, 2022, or any future auctions. To find that plaintiff would be entitled to a commission would render the termination of the contract to have no effect. Accordingly, defendants' motion to dismiss the first cause of action is granted.

The second and third causes of action allege quasi-contractual claims, unjust enrichment and quantum meruit, by the Zukerman and CFM defendants, based on the work done by plaintiff. In support of its motion for summary judgment defendants contend that these quasi-contractual causes of action are duplicative and not applicable when there is a contract that governs the underlying dispute. Defendants cite to multiple cases that stand for the proposition that even when as against a non-party to a contract, when there is a contract that governs the particular subject matter, quasi contract claims are barred, *see Air Atlanta Aero Engineering Ltd. v SP Aircraft Owner I, LLC*, 637 F. Supp. 2d 185, 196 (S.D.N.Y. 2009); *Beth Israel Med. Ctr. v Horizon Blue Cross and Blue Shield of New Jersey, Inc.*, 448 F.3d 573, 587 (2d Cir. 2006).

In opposition, plaintiff fails to distinguish the cases cited. Rather, it appears that plaintiff is seeking to be compensated for work despite the absence of that language in the contract. The contract provides that plaintiff's compensation is contingent on items sold. The contract is silent as to plaintiff's entitlement to compensation regarding items that are not sold. As such the court rejects plaintiff's contentions that it is entitled to compensation for "hundreds of hours spent itemizing and valuing the collection of art and valuables belonging to the defendants." The

court finds that defendants have established entitlement to judgment as a matter of law and plaintiff's second and third causes of action are dismissed.

The fourth and fifth causes of action as against Shivers are breach of implied covenant of good faith and fair dealing and trade libel, alleging that Shivers made false and defamatory statements about the plaintiff. As to the fourth cause of action defendants contend that its retaining Sotheby's as an auction house was not a breach of the implied covenant of good faith and fair dealing because plaintiff did not have the exclusive right to sell the artwork. In opposition, plaintiff contends that the fact that defendants refused to engage with any auction house chosen by plaintiff then failed to pay the commission of what was sold deprived plaintiff the benefit of his bargain. The court does not agree. Defendants conduct did not prevent plaintiff from obtaining the benefit of the terms of the contract as it was still able to sell the artwork on its own and had the sale of the items occurred while the contract was still in effect it would have been entitled to its 10% of the hammer price. Accordingly, the court finds that defendants have established entitlement to judgment as a matter of law as to the fourth cause of action and plaintiff has failed to raise a triable issue of fact.

As to the fifth cause of action, plaintiff has failed to adequately plead a cause of action. Plaintiff's complaint, the proposed amended complaint and the affirmation in opposition to defendants' motion are deficient to allege a cause of action for trade libel. Plaintiff does not plead "the particular words complained of" CPLR § 3016. Accordingly, plaintiff's fifth cause of action sounding in trade libel is dismissed.

The sixth cause of action for injunctive relief as against all defendants, plaintiff seeks a court order to enjoin the defendants from removing the contents from the premises, enjoin the defendants from offering any of the items from the premises for sale or auction and enjoin the

defendants from transporting any of the items from the premises outside of the jurisdiction of this court. Plaintiff has failed to establish entitlement to injunctive relief. As this court has determined that defendants' motion for summary judgment is granted in its entirety, plaintiff's sixth cause of action is dismissed.

Further, although not pled in its original complaint, plaintiff's cross motion seeks an accounting for the artwork sold by Sotheby's to determine the final "hammer price" and the amount allegedly owed to plaintiff. As discussed above, the court finds that the plain terms of the contract do not entitle plaintiff to a percentage of the "hammer price" of items sold at auction in perpetuity, as the items were sold and may continue to be sold well after the termination of the contract. Defendants have however pled in its second counterclaim a demand for an accounting and have established entitlement thereto. Further, plaintiff has not opposed that portion of defendants' motion. As such, the portion of plaintiff's motion that seeks an accounting is denied and the portion of defendants' motion that seeks an accounting is granted.

As to the portion of defendants' motion that seeks summary judgment on its third counterclaim, the return of artwork possessed by plaintiff, that portion is granted without opposition. Plaintiff does not dispute that it is still in possession of artwork owned by defendants, nor does plaintiff allege that it has a legal right or authority to maintain possession of the items.

The court has reviewed plaintiff's remaining contentions and finds them unavailing. Accordingly, it is hereby

ADJUDGED that defendants' motion for summary judgment is granted; and it is further ORDERED that plaintiff is return to defendants all artwork still in its possession; and it is further

ORDERED that plaintiff is to submit an accounting to defendant for all artwork sold not more than 60 days following the service of this Order with notice of entry; and it is further

ORDERED that the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

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4/27/2023

DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: