SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK **PART** 11M

Justice

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ARTINS AG,

Plaintiff,

- v -

AIDEN FINE ARTS INC.,ANDRE SAKHAI, JOHN DOES, 1-10

Defendant.

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INDEX NO. 650572/2023

MOTION DATE N/A, N/A

MOTION SEQ. NO. 001 002

AMENDED DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 42, 43, 44, 45, 46, 47, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 41, 48, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82

were read on this motion to/for DISMISS.

Upon the foregoing documents, Plaintiff's motion for summary judgment is granted.[1] This action arises out of the Defendants' breach of contract relating to the purchase and auction of an Anna Weyant Work ("Work 3"). Plaintiff (Artins AG) now moves under CPLR. § 3212 for summary judgment against Defendants (Aiden Fine Arts Inc. doing business as The Art Collection, Inc., Andre Sakhai, and John Does, 1-10). Additionally, Defendants' motion to dismiss for failure to state a claim is granted.

FACTS

In February of 2022, Plaintiff and Harmony Collection Limited (HCL) agreed to become equal partners of an Obá Work ("Work 1"), with each party having a 50% ownership interest in

[1] The Court would like to thank Madison Huberman for her assistance in this matter.

the work. On February 17, 2022, Plaintiff purchased Work 1 and invoiced HCL on February 21, 2022. Plaintiff's invoice provides that HCL is a 50% owner as follows: "Partner at 50% of USD 90'000.-: USD45'000." Plaintiff and HCL orally agreed following Plaintiff's purchase of Work 1 that it would remain at Plaintiff's storage facility. Both parties' objective in jointly owning Work 1 was to subsequently resell it with the proceeds thereof to be split evenly between Plaintiff and HCL following their respective ownership interest percentages. On or about March 3, 2022, HCL sold half of its interest in Work 1, that is 25% of Work 1, to AFTC. Plaintiff did not know of this transaction until Mourot's email to Plaintiff's counsel on January 13, 2023.

In April 2022, Plaintiff and HCL agreed to become partners concerning an Echakhch Work ("Work 2"), with Plaintiff owning a 2/3 share of Work 2 and HCL owning a 1/3 share. On April 2, 2022, HCL allegedly purchased Work 2 and, on or about April 5, 2022, invoiced Plaintiff. HCL's invoice provides that Plaintiff is a 2/3 owner of Work 2 as follows: "Artins AG purchased 66,66% of the artwork." Plaintiff paid HCL, and HCL voluntarily transferred possession to Plaintiff. The parties' objective in jointly owning Work 2 was to subsequently resell it with the proceeds thereof to be split 2/3 to Plaintiff and 1/3 to HCL per their respective ownership interest percentages. On or about April 25, 2022, HCL sold half of its interest in Work 2 to AFTC (Both HCL and AFTC have 16.67% interest). Plaintiff did not find out about this until Mourot's email to Plaintiff's counsel on January 13, 2023.

In or about May 2022, Defendant, Aiden Fine Arts Inc. doing business as The Art Collection, Inc. (AFTC), Plaintiff (Artins AG), and non-party Harmony Collection Limited (HCL) discussed jointly owning a work of the artist Anna Weyant. The parties discussed purchasing the work, subsequently reselling the work, and sharing the proceeds. In or about May 2022, Defendant AFTC represented to Plaintiff and HCL that the then-owner of Work 3 was

willing to sell it to AFTC for $606,000.00. Following discussions between the parties, the parties agreed that they would each purchase a 1/3 ownership interest in Work 3. The parties also agreed that AFTC would maintain possession of Work 3 until it was resold. AFTC issued Invoice no. 1806, dated May 25, 2022, to Plaintiff for $202,000.00, representing Plaintiff's 1/3 ownership interest in Work 3. Plaintiff wire transferred AFTC the money on May 26, 2022.

On or about September 22, 2022, AFTC entered into an auction agreement to auction Work 3 at Phillips London's 20th Century & Contemporary Art Evening Sale, scheduled for October 14, 2022. Plaintiff, AFTC, and HCL were to split the proceeds of the sale of Work 3 at the auction in accordance with their respective ownership interests. On October 14, 2022, Work 3 sold for £268,800.00 British Pounds. Following the auction, Phillips paid AFTC the sum of £268,800.00 British Pounds in or around the second half of November 2022.

On January 10, 2023, Plaintiff's counsel sent a letter to Defendant Sakhai c/o Defendant AFTC demanding Plaintiff's 1/3 of the Phillips Sale proceeds, i.e., the sum of $109,22.40 (using the exchange rate of USD$1.21 as of 1/10/23). Despite Plaintiff's repeated requests to Defendant AFTC to pay Plaintiff 1/3 of the sale proceeds of Work 3, AFTC has not sent Plaintiff any money.

On January 13, 2023, Plaintiff received an email response to Plaintiff's counsel's January 10, 2023 letter from Mourot (principal of HCL) confirming that Defendant Sakhai is in possession of the proceeds from the sale of Work 3 but will not give Plaintiff the money until Plaintiff transfers joint ownership of Works 1 and 2.

STANDARD OF REVIEW – SUMMARY JUDGMENT

Pursuant to CPLR § 3212, a plaintiff can move for summary judgment when "there is no genuine issue to be resolved at trial." *Andre v. Pomeroy*, 35 N.Y.2d 361, 364 (1974). CPLR §

3212 directs the court to grant a motion for summary judgment "'if, upon all the papers and proof submitted, the cause of action * * * shall be established sufficiently to warrant the court as a matter of law directing judgment in favor of any party.' Normally, if the facts are uncontested summary judgment is appropriate." *Id.*

STANDARD OF REVIEW – DISMISSAL

Pursuant to CPLR § 3211(a)(7), a motion to dismiss "is properly granted if the pleading fails to state a cause of action and is, therefore, defective on its face." *Urban Holding Corp. v. Haberman*, 162 A.D.2d 230, 230 (1990). The court "must accept the pleadings as true and give the Plaintiff the benefit of all favorable inferences which must be drawn from the pleadings." *373-381 PAS Assoc., L.L.C. v. Ocean Mgt. Corp.*, 2022 N.Y. Misc. LEXIS 9094, at *4 (2022).

Pursuant to CPLR § 3211(a)(3), a motion to dismiss on jurisdictional grounds should be granted when "the party asserting the cause of action" lacks the legal capacity to sue.

DISCUSSION

Defendant's Counterclaims

The first issue is whether to dismiss Plaintiff's claims on jurisdictional grounds. Under New York Bus. Corp. Law § 1312, "a foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state." The burden is on the Defendants to prove that "Plaintiff's business in New York was so systematic, permanent, continuous and regular as to manifest continuity of activity in *Audemars Piguet Holding S.A. v. Swiss Watch Int'l, Inc.*, 46 F. Supp. 3d 255, 285 (S.D.N.Y. 2014). In order for BCL § 1312 to apply, "the intrastate activity of a foreign corporation [must] be permanent, continuous, and regular…[and]

it does not apply when a company's activities in New York are 'merely incidental to its business in interstate and international commerce.'" *Id.*

Here, the Defendants have submitted no evidence that Plaintiff is engaged in a systematic course of doing intrastate business in New York. There is no evidence offered that Plaintiff systematically, regularly, continuously, and/or permanently conducts business in New York. While Plaintiff conducted business with Defendants who are New York corporations, the activities in New York were incidental to the acquisition and auction of Work 3. Therefore, Plaintiff's claim is not dismissed on jurisdictional grounds.

The next issue is whether to dismiss Plaintiff's claims for failing to state a claim. This is related strictly to Plaintiff's claim against Defendant Sakhai. Plaintiff alleges that Defendant Sakhai is an alter ego of Aiden Fine Arts Inc. To make an alter ego claim, Plaintiff must show that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Morris v. State Dep't of Taxation & Fin.,* 82 N.Y.2d 135, 141 (1993). At the pleading stage, the standard to be applied concerning an alter ego claim is whether the plaintiff "pled [the element] in a non-conclusory manner." *2406-12 Amsterdam Assoc's. v. Alianza*, 136 A.D.3d 512 (1st Dep't 20160. A complaint which seeks to "pierce the corporate veil should be upheld unless it can be said that it 'is totally devoid of solid, nonconclusory allegations.'" *Bd. Of Managers of Arches v. Hicks & Warren*, 2007 WL 4394823, at * 7 (Kings Cnty. Sup.Ct. 2007) (internal citations omitted).

Here, Plaintiff fails to make a solid, conclusory allegation that Defendant Sakhai abused the corporate form. Plaintiff does not demonstrate how Defendant Sakhai exercised complete domination of Aiden with respect to the purchase and auction of Work 3. While Plaintiff states

that Defendant Sakhai and his father own Aiden, he does not demonstrate how Defendant Sakhai in particular had complete domination of the company. Further, Plaintiff fails to show that Defendant Sakhai, if he dominated the company, used the company to commit fraud or a wrong resulting in the Plaintiff's damages. Therefore, Plaintiff's claim against Defendant Sakhai is dismissed for failure to state a claim.

Number of Transactions

The second issue is whether the purchase of each work is a separate transaction or if the purchase of the three works is one transaction. With respect to Work 1, Plaintiff and HCL agreed to purchase the work in February of 2022 as partners with each party retaining a 50% ownership interest. There is no support that the purchase of Work 1 is related to the purchase of either Work 2 or Work 3. With respect to Work 2, Plaintiff and HCL agreed to purchase the Work in April of 2022 with Plaintiff retaining a 2/3 ownership interest and HCL retaining a 1/3. There is no support that the purchase of Work 2 is related to the purchase of either Works 1 or 3. With respect to Work 3, Plaintiff, HCL, and AFTC agreed to purchase the work in May 2022 as partners with each party retaining a 1/3 ownership interest. There is no indication that the purchase of Work 3 is related to Works 1 and 2. Therefore, the purchase of the works are three separate transactions. Since the purchase of Work 3 is not part of the same transaction as Work 1 or 2, Plaintiff is entitled to their share of the sale proceeds of Work 3.

Joint Ventures

The next issue is whether the transactions of Works 1 and 2 were joint ventures between HCL and Plaintiff. The plaintiff has the burden to prove that the parties manifested an intent to be associated as joint venturers, that there was a "mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill or knowledge, a measure of

joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses[.]" *Slabakis v. Schik*, 164 A.D.3d 454, 455 (1st Dep't 2018). According to New York Law, "[a]n indispensable [element] of [a joint venture] is a mutual promise or undertaking of the parties to share in the profits of the business and submit to the burden of making good the losses[.]" *Id.* While "the mere purchase of something, to be paid for by two or more persons who divide the purchase between them, does not spell out a joint business or partnership. ***But if the purchase is made with the intention of reselling, it is well settled that such persons are partners whether their relationship contemplates one adventure or a series of them***." *R.C. Gluck & Co. v. Tankel,* 24 Misc. 2d 841 (New York Cnty. Sup. Ct. 1960), aff'd, 12 A.D.2d 339 (1st Dep't 1961) (emphasis supplied); *Boyarsky v. Froccaro*, 125 Misc. 2d 352, 358 (Nassau Cnty. Sup. Ct. 1984) ("While a joint purchase of land does not make the owners copartners, it is well-settled that a partnership may be created by an agreement relating to a single transaction in the sale or purchase of land and such a partnership is created where the lands are bought jointly for speculation, each party to share in the profits") (emphasis supplied). Additionally, whether a joint venture occurs "may be inferred from the totality of the parties' conduct in performance." *Calcagno v. Graziano*, 200 A.D.3d 1248, 1252 (3d Dep't 2021). Both parties do not have to "exercise the same degree of management control" of the work to be considered joint venturers. *Richbell Info. Servs. v. Jupiter Partners, L.P.*, 309 A.D.2d 288, 299 (1st Dep't 2003).

Here, Plaintiff and HCL purchased Works 1 and 2 separately by combining their resources to acquire the art. Plaintiff purchased Work 1 while HCL purchased Work 2. Plaintiff retained a 50% ownership interest in Work 1 and a 66.66% ownership interest in Work 2. With respect to joint control over the works, HCL voluntarily agreed that Plaintiff would retain possession of the works until their sale. Upon the sale of Work 1, both Plaintiff and HCL would

receive 50% of the proceeds, even if the work was sold at a loss. Following the sale of Work 2, Plaintiff would receive 66.66% of the proceeds with HCL receiving 33.34% of the proceeds as agreed upon. HCL sold AFTC a share of the proceeds, not an ownership interest in the work.

Based on the totality of the parties' conduct in the performance of purchasing Works 1 and 2, Plaintiff has proved that they are joint ventures. Therefore, Defendants' counterclaims for conversion of Work 1, conversion of Work 2, unjust enrichment, and replevin are dismissed.

Accounting

The next issue is whether Plaintiff is entitled to an accounting. Under New York law, an accounting is only available within fiduciary-type relationships when a books and records review is insufficient to determine damages. To obtain an accounting, "a plaintiff must show either a fiduciary or confidential relationship with the defendant. . . Further, an action for an accounting is inapposite where a party has also brought a damages suit for breach of contract because the party can obtain any necessary information through discovery." *Russell Pub. Grp., Ltd. v. Brown Printing Co.*, No. 13 CIV. 5193 SAS, 2014 WL 1329144, at *4 (S.D.N.Y. Apr. 3, 2014) (quotations omitted).

Plaintiff is not entitled to a complete accounting of Work 3. A fiduciary relationship exists "'between two [people] when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation'" *EBCI, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 19 (N.Y. 2005), quoting Restatement [Second] of Torts 874, comment a. A fiduciary relationship does not arise "where parties deal at arm's length in conventional business transactions. However, a fiduciary relationship may arise where the parties to a contract specifically agree to such a relationship, or if "'one party's superior position or superior access to confidential information is so great as virtually to require the other party to repose trust and

confidence in the first party.'" *Pension Committee of University of Montreal Pension Plan v. Bank of America Securities*, LLC, 592 F.Supp.2d 608, 624 (S.D.N.Y. 2010) Here, Plaintiff did not agree to a fiduciary relationship with Defendants and there is no information to conclude that Defendants had a superior position or superior access to confidential information that is so great as to require Plaintiff to repose trust and confidence in Defendants.

Motion to Intervene

The last issue is Defendant's motion to allow HCL to intervene. Under New York law, "Parties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared[.]" CPLR 1003; *see also Maestracci v. Helly Nahmad Gallery, Inc.*, 155 A.D.3d 401, 404, 63 N.Y.S.3d 376, 379 (1st Dep't 2017) (upholding lower court's decision to grant plaintiff leave to add a co-plaintiff under CPLR 1003, and noting that § 1003 gives a court "wide latitude and [is] to be liberally construed"). Additionally, New York law provides that any person may intervene in an action as of right where "the action involves the disposition or distribution of . . . property and the person may be affected adversely by the judgment." CPLR § 1012.

While HCL is a party to all three separate joint ventures, Works 1 and 2 have not been sold. HCL is not adversely affected here as its ownership rights are not affected by the judgments affecting the three works. HCL still retains a 50% ownership interest in Work 1 and a 33.34% interest in Work 2. Concerning Work 3, HCL has a 33% ownership interest in the proceeds of the sale. Therefore, Defendants' motion to allow HCL to intervene is denied.

DECISION

Accordingly, it is hereby,

ORDERED that Plaintiff's claim against Defendant Sakhai is dismissed: and it is further and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining Defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website); and it is further

ORDERED that Plaintiff's motion for summary judgment against the remaining Defendants is granted, ; and it is further,

ORDERED that an assessment of damages against said Defendants is directed, and it is further

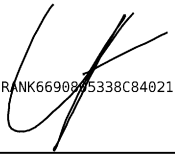
ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the General Clerk's Office, who is directed, upon the filing of a note of issue and a certificate of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website; and it is further

ORDERED that Plaintiff's request for a complete accounting of Work 3 is denied; and it is further

ORDERED that Plaintiff's motion to dismiss Defendants' counterclaims is granted, and it is further

ADJUDGED that Defendants' motion to allow HCL to intervene is denied.



10/6/2023
DATE

LYLE E. FRANK, 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