

Sobel v Contra Prods. LLC

2023 NY Slip Op 33525(U)

October 5, 2023

Supreme Court, New York County

Docket Number: 651977/2022

Judge: Lyle E. Frank

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

MICHAEL SOBEL,

Plaintiff,

- v -

CONTRA PRODUCTIONS LLC, STEVEN MAASS

Defendant.

-----X

INDEX NO. 651977/2022

MOTION DATE 06/07/2023, 07/27/2023

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 58, 59

were read on this motion to/for DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 51, 52, 53, 54, 55, 56, 57, 60

were read on this motion to/for DISMISS

Defendants move to compel various documents and responses related to discovery, motion sequence 002, and plaintiff moves to dismiss the defendants' counterclaim for declaratory relief, motion sequence 003. The defendants then cross-moved to amend their answer to add different counter-claims. Each motion is opposed. For the reasons set forth below, defendants' motion to compel is denied, and plaintiff's cross-motion to dismiss is granted; and defendants' motion to amend is denied.

Background

This case arises out of an alleged breach of warranty of authenticity and a claim of fraudulent inducement. Shortly after the death of artist Richard Hambleton in late 2017, plaintiff,

1 The Court would like to thank Eric Chubinsky for his assistance in this matter.

Michael Sobel, purchased what were allegedly authentic Hambleton paintings from an event run by defendants, Steven Maass at Contra Productions LLC.

Plaintiff commenced this action for breach of warranty of authenticity alleging that the paintings are allegedly worthless forgeries. Plaintiff also brings a claim of fraudulent inducement, alleging that the painting were originally purchased by defendants from a well-known art forger, and that defendants concealed this information from the plaintiff before the sale.

Defendants asserted a counterclaim for declaratory relief, arguing that plaintiff's claims are meritless, and that plaintiff, after not receiving viable offers for the paintings, purposefully made fraudulent misrepresentations of the paintings to force a rescission of the purchase. Plaintiff has since cross-moved to substitute the declaratory judgment for three new counterclaims. The plaintiff also opposes this amendment, in essence arguing that the amendment would be futile because the counterclaims cannot survive a motion to dismiss.

At issue in defendants' motion to compel is the way the plaintiff became aware of these paintings potentially being forgeries. Defendants seek to compel plaintiff to divulge information regarding his counsel's "trusted contact" that he knows from being "very well connected in the art world." *See* Exhibit C. Plaintiff argues that this information is protected by attorney-client privilege and that plaintiff has provided the name of its expert that will testify as to the disputed artwork.

Discussion

Motion to Compel

"In determining whether a communication is protected by the attorney-client privilege, 'the critical inquiry is whether, viewing the lawyer's communication in its full content and

context, it was made in order to render legal advice or services to the client.” *Gilbert v Off. of the Governor*, 170 AD3d 1404, 1405 [3d Dept 2019] (quoting *Spectrum Sys. Int’l. Corp. v Chemical Bank* 78 NY2d 371, 379 [1991]). “[I]nasmuch as facts are the foundation of legal advice, the attorney-client privilege protects communications between an attorney and his or her client that convey facts relevant to a legal issue under consideration, even if the information contained in the communication is not privileged.” *Gilbert* 170 AD 3d at 1406.

It is true that CPLR § 3101(a) requires that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action.” CPLR § 3101(a). However, the CPLR also provides that “[u]nless the client waves the privilege, an attorney ... or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be ... compelled to disclose such communication, in any action ...” CPLR § 4503(a).

Here, the Court finds that the plaintiff attorney’s information is protected by attorney-client privilege. Plaintiff attorney’s contacts in the art world provided information that prompted counsel to bring this action in the first place. Therefore, the Court finds that these facts provided to the plaintiff formed the foundation of counsel’s legal advice given to the plaintiff. Further, the Plaintiff attorney’s communication was made for the purpose of rendering legal services to the client, such as bringing this action, even though the communications were prior to bringing he action, as he investigation and communications by counsel were made specifically to bring an action if found to be warranted. Thus, the Court finds these communications to be protected by attorney-client privilege.

Even if this information was not protected by privilege, there is an issue of relevance.

The pertinent information in this case is whether the paintings are forgeries. The question of who led plaintiff to believe that these paintings are forgeries is not relevant to whether the paintings are forgeries or not. Thus, defendants' motion to compel is denied.

Motions to Amend/Dismiss

“When assessing a motion to dismiss a complaint or counterclaim pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept as true all facts as alleged in the pleading, accord the pleader benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *V. Groppa Pools, Inc. v Massello*, 106 AD3d 722, 722—23 [2d Dept 2013]. “

Here, the Court finds that, even giving the defendants the benefit of every possible inference, the defendants have not stated a proper cause of action in its original counter-claim, since attempted to be withdrawn, nor in its proposed amended counterclaims. As the plaintiff in essence conceded the declaratory judgment counterclaim should be dismissed by moving to amend to remove this counterclaim, the Court will only address the Counterclaims in the proposed amended answer.

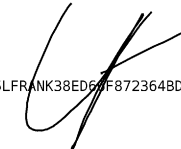
The first counterclaim, that of tortious interference, is entirely conclusory and insufficient. The allegations are that the plaintiff told gallery owners that the painting in question was a fake. No such gallery owners are identified, nor does the plaintiff identify that the plaintiff was conducting business with any such gallery owners. The second counterclaim must also fail, as the only contract that has been discussed in this action is the one between the parties in 2018, which simply had to do with the selling of the artwork from the defendants to the plaintiff.

While there is discussion in the defendant’s answer that there were discussions in 2020 and 2021, there has never been any allegation that such were contracts. As such, the covenant of good faith and fair dealing is not triggered. The Court also agrees with plaintiff that the third counterclaim must fail, as there appears to be no dispute that it is not relevant to the instant action. As such, the Court finds that granting leave to amend the answer and counter-claims is futile.

Accordingly, it is hereby

ADJUDGED that defendants’ motion to compel, is denied; and it is further

ADJUDGED that plaintiff’s motion to dismiss the counterclaim is granted, and defendant’s cross-motion to amend is denied.


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10/5/2023
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE