

Litwer v O'Hara

2024 NY Slip Op 30864(U)

March 12, 2024

Supreme Court, New York County

Docket Number: Index No. 656027/2020

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH **PART** **14**

Justice

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SUSAN LITWER and GERALD PRINTZ, as
Preliminary Co-Executors of the
Estate of Ruth O'Hara,

Plaintiff,

INDEX NO. 656027/2020

MOTION DATE 03/08/2024

MOTION SEQ. NO. 002

- v -

JONATHAN O'HARA, JONATHAN O'HARA FINE ART INC.,

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 68, 69, 70, 71, 72

were read on this motion to/for SUMMARY JUDGMENT.

Plaintiffs' motion for summary judgment is denied.

Background

This case concerns the O'Hara family business: art dealing. Plaintiffs contend that Ruth O'Hara ("Decedent") was a renowned art dealer who sold famous pieces for many decades until her death on December 7, 2019. They observe that she was survived by her two sons, defendant Jonathan O'Hara and Steven O'Hara. Plaintiffs maintain that for the last decade of her life, Decedent was in a joint venture with Jonathan along with his business (defendant Jonathan O'Hara Fine Art Inc.).

They allege that Decedent would first recoup the cost of acquiring the artwork and the remaining profits would be split between Decedent and defendants. Plaintiffs claim that Jonathan failed to pay Decedent her fair share of the proceeds from the venture's art sales by using the proceeds to purchase other works of art and sometimes titling these pieces in his name

or in his business' name. Plaintiffs insist that Jonathan was directed not to do this but ignored these instructions. They contend that an accounting is necessary to determine the full extent of defendants' debt to Decedent's estate. Plaintiffs insist that Jonathan was told he could not sell any artwork held by the joint venture after his mother's passing but he did anyway. They claim that he must pay \$9,152,817.

In opposition, defendants observe that plaintiffs did not even address any of their affirmative defenses in their moving papers and so they failed to meet their burden for summary judgment. They also argue that plaintiffs' first claim seeks \$9,152,817 but the exact nature of this claim is unclear. Defendants insist that it is not labeled as a breach of contract, account stated or any other readily ascertainable cause of action. They observe that the motion is not supported by an affidavit and so it should be denied.

Defendants argue that the Court cannot consider NYSCEF Doc. No. 57, labeled as a 2019 reconciliation of the joint venture, as plaintiffs failed to describe where this exhibit came from, who prepared it or the basis for the numbers included in it. They insist that Jonathan was never shown this document at his deposition despite plaintiffs' argument to the contrary.

Defendants insist that plaintiffs' second cause of action for an accounting should also be denied as they did not identify a single sale artwork made by defendants after December 31, 2019. They observe that Jonathan testified that he did not sell any artwork related to the joint venture after the aforementioned date.

In reply, plaintiffs contend they proved they are entitled to recover the more than \$9 million they seek. They insist they did not have to address defendants' boilerplate affirmative defenses and that their exhibits are admissible pursuant to their attorneys' affirmation. Plaintiffs argue that the reconciliation document, NYSCEF Doc. No. 57, was maintained by Decedent's

bookkeeper and provided to defendants. Plaintiffs insist that this exhibit was attached to the complaint and was shown to Jonathan at his deposition. They claim he established its authenticity. Plaintiffs maintain that, in any event, this document should be deemed admissible under the business records except to the rule against hearsay. They also attach the affidavit of Decedent's bookkeeper in reply.

Discussion

To be entitled to the remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The Court denies the motion. As an initial matter, defendants correctly observed that plaintiffs did not address any of defendants' affirmative defenses in their moving papers. Plaintiffs' explanation in reply, that these defenses are obviously without merit, does not provide a basis upon which this Court can dismiss them. It was plaintiffs' burden in the moving papers to make some sort of argument about the affirmative defenses.

The Court also denies the motion on the ground that plaintiff failed to include an affidavit from someone with personal knowledge of the facts in the moving papers. "A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit" (CPLR 3212[b]).

Turning to the merits, plaintiffs did not show that they are entitled to summary judgment on their first cause of action which demands the \$9,152,817. Plaintiffs did not meet their burden to substantiate where they derived this amount. The closest plaintiffs get is the aforementioned reconciliation document, NYSCEF Doc. No. 57. But there was no proper foundation laid for the admissibility of this document in the moving papers. As noted above, there was no affidavit submitted by plaintiffs from someone with personal knowledge to verify the authenticity of this document. Nor did plaintiffs properly establish that this document is admissible under the business records exception.

"[T]o establish a foundation for the admission of a business record, the proponent of the record must satisfy the requirements identified in the statute. First, the proponent must establish that the record be made in the regular course of business—essentially, that it reflect a routine,

regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business. Second, the proponent must also demonstrate that it be the regular course of such business to make the record essentially, that the record be made pursuant to established procedures for the routine, habitual, systematic making of such a record. Third, the proponent must establish that the record be made at or about the time of the event being recorded—essentially, that recollection be fairly accurate and the habit or routine of making the entries assured” (*Bank of New York Mellon v Gordon*, 171 AD3d 197, 205, 97 NYS3d 286 [2d Dept 2019] [internal quotations and citations omitted]).

Plaintiffs failed to satisfy any of these requirements. The affirmation submitted by plaintiffs’ attorney merely offers the conclusory assertion that this document is “a true and correct copy of the agreed-upon reconciliation of amounts due Decedent” (NYSCEF Doc. No. 54, ¶ 5). Nothing is submitted about how this document was created, who created it, or even when it was created. Plaintiffs’ attempt to correct this error in reply through the affidavit of Decedent’s bookkeeper is improper as plaintiffs cannot satisfy their burden for the first time in reply.

Plaintiffs’ attempt to cite to the deposition of Jonathan does not compel the Court to grant the motion. At his deposition, Jonathan did not agree that he owes \$9,152,817 (NYSCEF Doc. No. 56 at 46). He noted that “I think this is your number” (*id.*). The Court also observed that defendants’ contest that Jonathan was shown the reconciliation document attached to plaintiffs’ moving papers; they insist he was shown a different document. The Court cannot make a determinative finding as to which party is correct on these papers.

Plaintiffs also insist that this document is admissible because it was attached to their complaint. But the complaint was not verified nor does attaching a document to a complaint suddenly make it admissible; a proper foundation must be laid.

For the reasons described above the Court also denies plaintiffs' request for summary judgment on their accounting cause of action as they did not submit an affidavit from someone with person knowledge to substantiate their burden on this claim. Allegations made by their attorney in a memorandum of law does not suffice. In any event, Jonathan raised an issue of fact that he sold anything after he was instructed not to at his deposition (NYSCEF Doc. No. 56 at 86-87).

The Court observes that defendants also ask for affirmative relief in their opposition. They demand that this Court search the record and grant them summary judgment on the accounting cause of action and that the Court order the parties to go to "alternative dispute resolution." Both requests are denied. Defendants could have made a cross-motion but they did not. Including a single line in opposition is not a proper basis for this Court to grant summary judgment.

And this Court cannot force parties to go to mediation or some other alternative dispute resolution. While this case could certainly benefit from taking these steps (defendants allege that Jonathan is the single largest beneficiary of his mother's estate), the Court cannot order parties to pursue that route.

Accordingly, it is hereby

ORDERED that plaintiffs' motion for summary judgment is denied.

3/12/2024

DATE



ARLENE P. BLUTH, 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: