O'Hayon v Sendowski
2024 NY Slip Op 35686(U)
January 5, 2024
Supreme Court, Orange County
Docket Number: Index No. EF004818-2019
Judge: Sandra B. Sciortino
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To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE
---X
ALBERT O'HAYON,
Plaintiff,

-against-

OREN SENDOWSKI,
Defendant.
---X

DECISION AND ORDER
INDEX NO.: EF-004818-2019
Motion Date: 10/13/2023
Sequence No. 2

SCIORTINO, J.

The following papers numbered 1 to 19 were read on defendant's unopposed motion for summary judgment:

PAPERS	NUMBERED
Notice of Motion/Affirmation (Spiegelman)/Exhibits A-L/ Defendant's Memorandum of Law/Affidavit of Defendant/ Affidavit (Nowatka) with Exhibits A-B	1 - 19

Background and Procedural History

This is plaintiff's third action for injunctive relief, damages, treble damages and replevin, arising out of the purchase, possession and alleged intent to subsequently sell certain Andy Warhol paintings. A prior action, under Index Number EF004071-2018, was dismissed without prejudice by Decision and Order of this Court dated August 6, 2018. (NYSCEF 54) A second action, under Index Number EF008727-2018, was dismissed without prejudice by Decision and Order dated January 19, 2019. (NYSCEF 55) This most recent matter was commenced on June 20, 2019, by the electronic filing of a Summons and Verified Complaint. Defendant was served at his place of work, pursuant to CPLR 308(2), on July 23, 2019, and subsequent mailing.

The factual background as alleged by plaintiff may be summarized from the Complaint

(NYSCEF 53): Plaintiff claimed to have been employed in the field of fine arts, purchasing, selling and appraising paintings and other artwork, for thirty years. In 2015, plaintiff purchased the first of two Andy Warhol paintings for approximately $156,000. At an unidentified date in 2015, plaintiff and defendant agreed that defendant would pay plaintiff 50% of the purchase price, and when the painting was eventually sold, they would share the profits equally.

The parties subsequently jointly purchased a second painting in 2015 for $130,000. The parties allegedly agreed to hold both paintings until they appreciated to 125% of the purchase value. The paintings would then be sold and the profits divided equally. It was agreed that, until a sale, defendant would store, house and market the paintings.

Plaintiff claimed that an April 2016 appraisal purportedly showed the value of the two paintings to be $700,000. Plaintiff then demanded that the paintings be sold. According to plaintiff, defendant refused to do so and withheld the paintings from the plaintiff. Defendant also refused to give plaintiff any information about the location or condition of the artwork despite many attempts and offers on plaintiff's part. Eventually, defendant stopped communicating with plaintiff.

The complaint stated six causes of action: (1) request for a temporary restraining order and preliminary injunction; (2) conversion; (3) breach of contract; (4) misrepresentation; (5) breach of implied contract; and (6) fraud.

In August 2019, defendant moved to dismiss the action. By Decision and Order dated October 22, 2019 (NYSCEF 59), the motion was granted as to the first, second, fourth and sixth causes of action. It was denied as to the third and fifth causes of action. The sole remaining causes of action are for breach of contract and breach of implied contract.

Defendant's Verified Answer and Counterclaim (NYSCEF 60) was filed on November 29, 2019. Plaintiff's Reply was filed on January 3, 2020. (NYSCEF 61). Defendant's Answer denies knowledge and information sufficient to form a response as to the date and details of plaintiff's purchase of "Painting 2988" but does not deny that plaintiff purchased it (NYSEF 17 ¶5). Of further note is the defendant's response to the allegation in paragraph 7 of the complaint. Plaintiff alleged that "plaintiff and defendant agreed that defendant would pay plaintiff fifty percent of the purchase price and upon the subsequent sale of #2988, the parties would share the profits equally." The defendant denied the allegation, "except to the extent that the defendant paid for 'Painting 2988' as referenced in the Complaint." (NYSCEF 17 ¶7). The same denial and exception is given in response to plaintiff's allegations in paragraph's 8 and 9 of his purchase and defendant's subsequent reimbursement for the purchase of "Painting 2989" (Id. at ¶ 8 and 9).

Both parties were deposed on June 16 and 17, 2021. (See NYSCEF 62) On February 24, 2023, plaintiff served a document dated December 20, 2022, entitled "Art Appraisal For Insurance Purposes." (NYSCEF 63) Plaintiff's Note of Issue (NYSCEF 64) was filed on April 4, 2023.

Motion for Summary Judgment

By Notice of Motion filed June 5, 2023, defendant seeks summary judgment dismissing the complaint pursuant to CPLR 3212. Defendant argues that the oral agreement alleged by plaintiff is invalid and unenforceable. Defendant asserts in the alternative that, even if an agreement could be proven, it would not meet the legal standards for a joint venture or partnership, which defendant contends can be the only agreement alleged by the facts.

Defendant describes plaintiff's allegations of a venture as the purchase of two paintings; holding of the paintings until the value appreciated by 25% more than the purchase price, and, upon sale, sharing of the proceeds. However, defendant points out, plaintiff did not allege that he ever had any control over the paintings, which have remained in the sole possession of defendant. Moreover, plaintiff alleges that *defendant* was to sell the paintings once they appreciated to the agreed-upon point. Plaintiff, according to his own allegations, played no part in that portion of the enterprise, and therefore fails to establish joint control.

Furthermore, The alleged agreement made no provision for allocation of losses, in the event the paintings decreased in value. The failure to require the sharing of loss as well as profit further underminds the claim of a partnership or joint venture.

Defendant argues that the alleged contract is silent on its length or duration. It is thus presumed, under the Statute of Frauds, that it cannot be performed in one year. Moreover, performance is dependent on the will of a third-party buyer. As such, the alleged agreement falls under the Statute of Frauds, and the absence of a writing precludes enforcement.

Nor, according to defendant, can plaintiff show there was a breach, even if it is assumed that a contract existed as increased value has not been shown. The only evidence produced by plaintiff purporting to show the increased value of the paintings is a "For Insurance Purpose" appraisal attached to the complaint. In support of his lack of proof of increased value argument, defendant relies on the plaintiff's deposition, in which plaintiff testified that a "For Insurance Appraisal" is "laughable" and cannot be used to establish value. To reliably establish value, a much more detailed, lengthy and expensive appraisal would be required. (NYSCEF 62 at pp 92-94)

Defendant attaches the affidavit of Walter Nowatka (NYSCEF 67), the appraiser who prepared the documents upon which plaintiff relies. Nowatka avers that he only performs insurance appraisals. He has never conducted a market value appraisal, nor is he qualified to do so. He performed two insurance appraisals at plaintiff's request, in 2016 and 2022. (NYSCEF Docs. 68 and 69) More importantly, Nowatka states that the appraisals, provided by plaintiff in discovery, have been altered. The signature at the bottom of the April 2016 appraisal is not his; nor did he ever address a document to defendant. The values on the 2016 appraisal were provided to him by plaintiff, and he did no independent research.

In 2022, plaintiff asked Nowatka to do a second appraisal, dropping the value of the painting by $200,000. Nowatka complied. Once again, Nowatka avers that the signature on that appraisal is not his, and the second and third pages of the appraisal were also not put there by him. At best, the insurance appraisals contained unverified art valuation information, based on information provided by plaintiff.

Defendant contends that, because no other evidence of the market value of the paintings was produced, plaintiff has failed to make a prima facie showing of breach of contract. Finally, defendant asserts that, if a breach of contract claim is barred by the Statute of Frauds, no cause of action for breach of implied contract may be found.

Under these circumstances, defendant argues he has established his prima facie case for summary judgment.

Opposition

On September 6, 2023, counsel for plaintiff wrote the Court (NYSCEF 70), seeking additional time to submit opposing papers, and claiming he did not receive e-notifications of the filing. He asked the Court to take no action on the motion until he heard from defendant's counsel.

The Court heard nothing further and no opposing papers were ever filed.

DISCUSSION

For the reasons which follow, defendant's motion is granted in part and denied in part.

On a motion for summary judgment, the movant 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. (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Alvarez v. Prospect Hosp.*, 68 NY 2d 320 [1986]) Summary judgment shall be granted where, upon all the papers and proofs submitted, the cause of action or defense is sufficiently established to warrant the court as a matter of law, in directing judgment in favor of any party. (Zuckerman, 49 NY 2d at 558) However, summary judgment is a drastic remedy, and is appropriate only when there is a clear demonstration of the absence of any triable issue of fact. (*Piccirillo v. Piccirillo*, 156 AD2d 748 [2d Dept 1989], citing *Andre v. Pomeroy*, 35 NY2d 361 [1974]) The function of the Court on such a motion is issue finding, and not issue determination. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]) The Court is not to resolve issues of fact or determine credibility, but merely to determine whether such issues exist. (*Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005])

Ambiguities must be resolved in favor of the non-moving party. (*Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept 1995]; *Pinto v. Walt Whitman Mall, LLC*, 175 AD3d 541, 544 [2d Dept 2019]) Where there is any doubt about the existence of a material and triable issue of fact, summary judgment must not be granted. (*Anyanwu v. Johnson*, 276 AD2d 572 [2d Dept 2000])

<u>Partnership/Joint Venture</u>

The relevant factors in determining whether a partnership exists are: (1) the parties' intent, whether express or implied; (2) whether there was joint control and management of the business; (3) whether the parties shared both profits and losses; and (4) whether the parties combined their property, skill or knowledge. (*Leonard v. Cummons*, 196 AD3d 886 [3d Dept 2021]) A joint venture requires: (1) an agreement manifesting the intent of the parties to be associated as joint venturers; (2) a contribution by the co-venturers to the joint undertaking, such as a combination of property, financial resources, effort, skill or knowledge, some degree of joint proprietorship and control of the enterprise; and (4) a provision for sharing of profits and losses. (*Alper Restaurant, Inc. v. Catamount Development Corp.*, 137 AD3d 1559, 1561 [3d Dept 2016])

Here, there is no evidence that the parties exercised joint control and management of the paintings. Defendant avers, and plaintiff does not contest, that, since the paintings were delivered, he has retained them continuously. Nor is there any evidence that the parties agreed to share losses as well as profits. "An undertaking to share in profits without submitting to the burden of making good the losses renders such an agreement a nullity under partnership law." (*Slabakis v. Schik*, 164 AD3d 454 [1st Dept 2018]

The Court finds there was no oral agreement to form a partnership or joint venture.

<u>Breach of Contract</u>

However, the Court's analysis does not end there. While there is no contract for a joint venture, in the Decision and Order dated October 22, 2019 (NYSCEF 15), this Court previously held that the Statute of Frauds was inapplicable to the contract at bar, and defendant's previous motion to dismiss was denied on those grounds. Neither a Notice of Appeal, nor a motion to reargue that point was filed.

As stated above, defendant's Answer (NYSCEF 17) does not deny, but rather denies knowledge and information sufficient to form a belief, that plaintiff purchased the first painting. The Answer acknowledges that he paid plaintiff for them "as referenced in the complaint." The affidavit of defendant (NYSCEF 66) submitted in support of the instant motion denies that the parties had a partnership, joint venture or contract; but, as in his Answer, makes no definitive statement that ***he*** paid for the paintings, and when:

<u>Par. 5</u>: Mr. O'Hayon, as an art dealer, acted as an intermediary to arrange the purchase of the paintings.

<u>Par. 6</u>: "After the paintings were purchased, I traveled to Europe, at my own cost, to pick up the paintings, and brought them back to the United States. Mr. O'Hayon paid none of those expenses or fees.

In his affidavit, defendant fails to squarely address plaintiff's claim that plaintiff purchased the first painting, and defendant reimbursed him for one-half of that cost. He also does not definitively deny the the claim that the second painting was purchased by them together. Defendant could have provided documentary evidence of payment, but has not done so. That failure raises, at the very least, material issues of fact regarding the identity of the actual purchaser of the paintings, the understanding of that person regarding the ownership of them, and the intentions of both parties regarding the disposition of them, if any.

It is well-established that the failure of a moving party to tender sufficient evidence to eliminate any material issues of fact mandates a denial of summary judgment. (*Winegrad v. New York University Medical Center*, 64 NY 2d 851, 853 [1985])

For all of the reasons outlined herein, defendant's motion is granted solely to the extent of finding the parties did not enter into a joint venture or partnership. The balance of the motion is denied, as defendant fails to eliminate all material issues of fact concerning a breach of contract with respect to the purchase and sale of the paintings.

Breach of Implied Contract

Defendant's motion for summary judgment on this claim is denied, for the same reasons the prior motion to dismiss was denied. Under New York law, quasi-contract claims may survive dismissal where there is a dispute as to the validity of a governing contract. (*Ellington Credit Fund, Ltd.*, 837 F. Supp. 2d at 202) Defendant's motion for summary judgment is denied by reason of the existence of issues of fact precluding a finding that there was (or was not) a valid and binding contract. Until and unless there is a determination that there is a valid and binding contract between the parties, the cause of action survives. (*Id.*) While plaintiff may not assert a cause of action for equitable relief to circumvent the Statute of Frauds, the Court has already found, in the November 2019 Decision that the contract alleged by plaintiff is not within the Statute of Frauds. If plaintiff is able to establish it would be against good conscience for defendant to retain sole ownership in property which defendant does not deny he purchased, an equitable claim may lie. (See, Bent v. St. John's University, New York, 189 AD3d 973 [2d Dept 2020])

Failure to Oppose

Plaintiff offers no opposing arguments. However, where the moving party fails to make his prima facie showing, the motion must be denied, regardless of the sufficiency (or even the absence) of opposing papers. (*Alvarez v. Prospect Hosp.*, 68 NY 2d 320, 324 [1986])

Conclusion

On the basis of the foregoing, defendant's application for summary judgment is granted to the extent that the claim that a partnership or joint venture is dismissed.

The claim of breach of contract for failure to sell the paintings is also dismissed.

All other relief sought and not addressed herein is denied.

This matter is scheduled for an in-person status conference on January 23, 2024 at 9:15 am.

The foregoing constitutes the decision and order of the court.

Dated: January 5, 2024
Goshen, New York

ENTER:

HON. SANDRA B. SCIORTINO, J.S.C.

TO: *Counsel of record via NYSCEF*