SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
PRESENT: HON. ROBERT A. BRUNO, J.S.C.

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MARK COHEN,

Plaintiff,

-against-

ALLAN DAMPF,

Defendant.

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TRIAL/IAS PART 20
Index No.: 018594/10
Motion Date: 01/06/12
Motion Sequence: 001, 002

DECISION & ORDER

Papers Numbered

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In October of 2006, the plaintiff Mark Cohen, a jeweler, and the defendant Alan Dampf, a dentist, entered in an art transaction pursuant to which plaintiff traded, two pencil-signed, limited edition Andy Warhol prints in even exchange for two, undated/untitled Marc Chagall watercolor paintings. The parties, long-time friends and neighbors, had engaged in purchase and/or barter-type art transactions for some 30 years prior to the October 2006 exchange.

The plaintiff contends that prior to the trade, the defendant allegedly assured him that the two Chagalls were authentic paintings. The plaintiff claims that defendant was an experienced art merchant and trader. Defendant denies these assertions and contends that he informed the plaintiff only that the paintings were "attributed" to Chagall, not that they were definitively authenticated, Chagall originals.

Some years after the plaintiff acquired the Chagalls, he took them to Sotheby's to have them examined and was informed that they were not painted by Chagall, but rather, were "flat-out fakes" (Cohen Dep., 142-145).

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In October of 2010, the plaintiff commenced the within action as against defendant (Pltff's Exh., "A"). The plaintiff's verified complaint alleges in substance that the two Warhol prints possessed a value in 2006 of approximately $100,000.00; that the defendant is an art "merchant" as defined by, *inter alia*, Article 11 of the Arts and Cultural Affairs Law; that the defendant misrepresented the original and authenticated status of the watercolors; and that, the plaintiff, as a mere novice, reasonably relied on both the defendant's statements and the documents he provided, which allegedly attested to the lineage and originality of the two watercolors (Ballato Aff., Exhs., "D").

Based on the foregoing, the plaintiff has interposed five causes of action sounding in fraud, reasonable reliance, unjust enrichment, and the defendant's alleged breach of express and implied warranties in his purported capacity as an art dealer.

The defendant has answered, denied the material allegations of the complaint and interposed various affirmative defenses. Disclosure has been conducted and depositions have been held, although the parties have accused each other of failing to comply with each other's discovery demands and/or withholding or destroying evidence.

The plaintiff now moves for an order, *inter alia*, (1) striking the defendant's answer or otherwise sanctioning him; or (2) alternatively, compelling him to provide further discovery; and (3) for the imposition of sanctions based on the defendant's claimed spoliation of evidence (CPLR §3126, §3124).

The defendant has opposed the application and cross moved for summary judgment dismissing the complaint, or alternatively, for an order compelling the plaintiff to respond to discovery demands he has served.

The parties' respective motions are granted to limited extent indicated below.

It is settled that the striking of an answer is a drastic remedy which is inappropriate absent a clear showing that the movant's failure to comply with discovery demands is willful, contumacious, or in bad faith (*Laskin v. Friedman,* 90 AD3d 617; *Hoi Wah Lai v. Mack*, 89 AD3d 990; *Thompson v. Dallas BBQ*, 84 AD3d 1221; *Nunez v. Long Island Jewish Medical Center Center-Schneider Children's Hosp.*, 82 AD3d 724. The Supreme Court has broad discretion in the supervision of discovery, including the extent to which spoliation sanctions may be warranted (*Conte v. County of Nassau*, 87 AD3d 558; *Constantino v. Dock's Clam Bar and Pasta House*, 60 AD3d 612 ; *see also, Jamindar v. Uniondale Union Free School Dist.*, 90 AD3d 610).

With these principles in mind, and mindful of the strong public policy favoring resolution of cases on their merits (*L & L Auto Distributors and Suppliers Inc. v. Auto Collection, Inc.*, 85

AD3d 734, 736), the Court declines to exercise its discretion by imposing the drastic discovery sanction sought by the plaintiff, *i.e.*, striking the defendant's answer (*Abbadessa v. Sprint, supra,* 291 AD2d 363, 364; *Brennan v. McCarthy*, 255 AD2d 477, 478). Although the record supports the inference that the defendant's document production has been less than complete in certain instances, after considering all the relevant circumstances, the Court agrees that the parties should be afforded a time-limited opportunity to finally produce any outstanding documents or materials which have yet to be disclosed (*Moore v. Eyzenberg*, 290 AD2d 542; *Brennan v. McCarthy, supra,* 255 AD2d 477, 478; *Delaney v. Automated Bread Corp.*, 110 AD2d 677, 678; *Branker v. Nassau County*, 90 AD2d 816, 817; *DeJoy v. L & T Tavern Corp.*, 89 AD2d 613, 614 *cf., Wolper v. LaGuardia Medical Group, P.C.*, 143 AD2d 830).

More specifically, the parties shall produce any outstanding documents and materials within 30 days of the date of this order (*Branker v. Nassau County, supra*, 90 AD2d 816, 817). In light of the delays which have already ensued, the failure to establish compliance with the Court's directive may subject the defaulting party to sanctions, including the striking of pleadings if warranted. The parties are forewarned in this respect that evasively framed, boiler plate-type objections and/or conclusory assertions of unavailability belied by the factual record, will not suffice (*e.g., Arts4All, Ltd. v. Hancock*, 54 AD3d 286.

Similarly, and upon exercising its broad discretion in imposing spoliation sanctions (*Utica Mut. Ins. Co. v. Berkoski Oil Co.*, 58 AD3d 717, 718), the Court finds that plaintiff has not sustained his burden of demonstrating that the loss or destruction of evidence. Here, the defendant's personal computer fatally compromised his ability to prosecute the action by leaving him "prejudicially bereft" of the means to prove his case (*Laskin v. Friedman, supra,* 933 NYS2d 872; *Jenkins v. Proto Prop. Servs., LLC,* 54 AD3d 726, 726–727 *see also, Scordo v. Costco Wholesale Corp.*, 77 AD3d 725, 727; *Fossing v Townsend Manor Inn, Inc.*, 72 AD3d 884, 885; *Utica Mut. Ins. Co. v. Berkoski Oil Co., supra,* 58 AD3d 717, 718).

Finally, that branch of the defendant's cross motion for summary judgment dismissing the complaint is denied. Viewing the evidence "in the light most favorable to the plaintiff (*Fundamental Portfolio Advisors, Inc. v. Tocqueville*, 7 NY3d 96, 106 [2006]; *Mosheyev v. Pilevsky*, 283 AD2d 469) and in light of the parties' materially conflicting allegations, the Court finds that triable issues of fact have been presented with respect to the plaintiff's claims, including his assertions that the defendant allegedly and falsely warranted and represented that the paintings were genuine Chagall watercolors and that by virtue of his involvement in the art trade, the defendant was an art merchant within the meaning of, *inter alia*, the Arts and Cultural Affairs Law.

The matter, however, shall be set down for a conference before the undersigned, during which the Court shall consider, *inter alia*, any outstanding issues or disputes relating to the conduct of discovery between the parties, including the plaintiff's claim that he is entitled to a continuation

of the defendant's deposition.

The Court has considered the parties' remaining contentions and concludes that they do not warrant an award of relief beyond that granted above.

Accordingly, it is,

ORDERED that the motions by the plaintiff, Mark Cohen, and the defendant, Allan Dampf, for, *inter alia,* discovery and/or spoilation sanctions, or alternatively, for an order compelling further disclosure of stated items, are granted to the extent that the parties shall produce all outstanding documents and materials within 30 days of the date of this order, and it is further,

ORDERED that the branch of the cross motion by the defendant which is for summary judgment dismissing the plaintiff's complaint is denied, and it is further,

ORDERED the matter shall be set down for a conference before the undersigned on April 12, 2012, at 9:30 am, during which the Court shall consider, *inter alia*, any outstanding issues or disputes relating to the conduct of discovery between the parties.

All matters not decided or requests for relief not granted herein are hereby DENIED.

The foregoing constitutes the Decision and Order of this Court.

Dated: March 6, 2012
Mineola, New York

ENTER:

Hon. Robert A. Bruno, J.S.C.