SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ *Justice* **PART** 13

ANDREW FRANKLIN,

Plaintiff,

-against-

PEGASUS CREDIT COMPANY, LLC, ART CAPITAL GROUP, LLC, IAN S. PECK, and MODERN ART SERVICES, LLC,

Defendants.

INDEX NO. 650346/17
MOTION DATE 02-08-17
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on this motion pursuant to CPLR §6301 and §6313 for injunctive relief:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits ____cross motion ____	5 - 7
Replying Affidavits ____	8 - 9

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiff's motion pursuant to CPLR §6301 and §6313, is granted. Defendants motion filed under Motion Sequence 002, pursuant to CPLR §6301 and §6313, seeking injunctive relief, is granted only as to preventing plaintiff from transferring, selling or in any way alienating any of the collateral associated with the secured loan. The remainder of the relief sought in Motion Sequence 002, is denied.

On October 13, 2016, plaintiff, an art dealer, entered into an Arranger Agreement with Modern Art Services, LLC, (hereinafter referred to individually as "MAS"). On the same date plaintiff entered into a Loan and Security Agreement for $1,100,000.00, with Pegasus Credit Company, LLC (hereinafter referred to individually as "Pegasus") as the lender and with MAS, using artwork as collateral. Plaintiff entered into the Loan and Security Agreement as a means of obtaining more favorable interest rates, refinancing, and paying off two pre-existing loans held by Borro L 1 Inc. and New York Loan Company. Ian S. Peck, the president of Pegasus and MAS, signed the agreements on behalf of both entities (Aff. in Opp., Exh. A). Art Capital Group LLC, an entity co-owned by Ian S. Peck, was used by Pegasus and MAS to store, maintain and hold the pledged artworks identified as collateral.

Plaintiff provided two pieces of artwork as the collateral for the loan and alleges that the remaining additional collateral held on the pre-existing loans, upon payoff, was to be released and pledged to defendants. Plaintiff alleges that defendants advanced only $110,151.00, totaling approximately 10% of the secured loan, and never fully funded the remaining amount. Plaintiff also alleges that the written Loan and Security Agreement never stated that the funding would be in tranches, or that full funding first required the entire collateral pool to be physically delivered to the defendants.

Defendants allege that Pegasus advanced plaintiff $142,167.00, but because they paid for additional interest, fees and expenses that required payment before the release of funds, the amount he actually received was $110,300.00. Defendants claim the pre-existing loan held by New York Loan Company had a total payoff of $91,570.00 and plaintiff sought an additional $18,500.00, all of which was paid by October 27, 2016. They also claim that plaintiff has retained at least two pieces of the artwork from the pre-existing loan that was to be used as collateral after the payout. On November 1, 2016,

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Pegasus filed UCC-1 Financing Statements with the New York Department of State perfecting security interests in the collateral pool, including all of the artwork.

On January 20, 2017, plaintiff commenced this action by Summons with Notice, alleging the nature of this action is for promissory estoppel, unjust enrichment and a declaratory judgment regarding the parties respective rights and obligations under the secured loan agreement. On February 7, 2017, defendants under NYSCEF Docket # 45, filed a "Notice of Appearance and Counterclaims," the counterclaims were for breach of contract and replevin. On February 8, 2017 under NYSCEF Docket #53, plaintiff filed a Complaint, asserting causes of action for fraud, promissory estoppel, unjust enrichment, conversion, tortious interference with business relations and seeking a declaratory judgment, pursuant to CPLR §3001, that the secured loan is invalid and defendants have no rights to the artworks identified as collateral.

Defendants argue that this action should be dismissed because pursuant to the forum selection clause in the agreements plaintiff is required to commence his action in the State of Delaware.

The Loan and Security Agreement signed by plaintiff and Ian Peck on behalf of Pegasus and MAS, in Section 9.3 titled: "Governing Law," states in relevant part:

> "(a) The Loan Documents shall be construed and enforced in accordance with the laws of the State of Delaware, without regard to principles of conflict of laws.
>
> (b) Any judicial proceeding by the Borrower against the lender involving directly or indirectly, any matter or claim in any way arising out of, related to or connected with the Loan Documents, shall be brought only In a court of competent jurisdiction sitting in the State of Delaware. Borrower accepts, generally and unconditionally, the non-exclusive jurisdiction of the aforesaid courts, and irrevocably agrees to be bound by any judgment rendered thereby in connection with the Loan Documents.
>
> (c) Nothing herein shall affect the right to serve process in any manner permitted by law or shall limit the right of the Lender to bring proceedings against Borrrower in the courts of any other jurisdiction. Borrower waives any objection to jurisdiction and venue of any action instituted under the Loan Documents and shall not assert any defense based on lack of jurisdiction or venue or based upon forum non conveniens."
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> (Mot. Seq. 002, Peck Aff., Exh. A)

Paragraph 17 of the Arranger Agreement, titled "Consent to Jurisdiction: Venue" states the same jurisdictional provisions, permitting MAS to commence a lawsuit "in any jurisdiction" while restricting the plaintiff to "any state or federal court of competent jurisdiction sitting in the State of Delaware, as appropriate" (Mot. Seq. 002, Peck Aff., Exh. A).

Forum selection clauses are deemed prima facie valid. The enforcement of contractual forum selection clauses is an established policy of the New York Courts. The forum selection clauses are not to be set aside unless it is demonstrated that enforcement is, "unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes be deprived of his or her day in Court" (Sterling Nat. Bank as Assignee of NorVergence, Inc. v. Eastern Shipping Worldwide, Inc., 35 A.D. 3d 222, 826 N.Y. S. 2d 235 [1st Dept. 2006]). A distinction is made between mandatory provisions binding the parties to a forum and permissive provisions that amount to "service of suit clauses" that do not bar actions in a forum of choice, or consideration of a forum non conveniens application in the selected forum. A contract clause conferring jurisdiction which provides a guaranteed

forum may not deprive the right to sue in another jurisdiction as long as personal jurisdiction is obtained over the defendant (Columbia Cas. Co. v. Bristol-Myers Squibb Co., 215 A.D. 2d 91, 635 N.Y.S. 2d 173 [1st Dept. 1995]).

The forum selection clauses stated in the Loan and Security Agreement and the Arranger Agreement are permissive as to the lender, allowing the maintenance of actions "in the Courts of any other jurisdiction." Although the clauses applying to plaintiff are stated as mandatory, they are capable of being interpreted as permissive as long as personal jurisdiction can be obtained over the defendants. Defendants have conceded they reside and do business in New York, and the agreements and artwork were entered into in New York, establishing that jurisdiction can be obtained over the defendants (See Defendants,"Notice of Appearance and Counterclaims,"(NYSCEF Docket # 45) and U.S. Merchandise, Inc. v. L & R Distributors, Inc., 122 A.D. 3d 613, 996 N.Y.S. 2d 83 [2nd Dept., 2014]).

Alternatively, plaintiff's allegations of the entire contract being fraudulent ab initio would render the forum selection clause void (DeSola Group, Inc. v. Coors Brewing Co., 199 A.D. 2d 141, 605 N.Y.S. 2d 83 [1st Dept., 1993]). In applying the clauses separately, the defendants will be permitted to maintain jurisdiction in New York. The dismissal of plaintiff's causes of action and compelling him to seek relief in Delaware results in two actions simultaneously conducted in different jurisdictions and is an unreasonable application of the forum selection clauses, warranting denial of the dismissal relief (Merchandise, Inc. v. L & R Distributors, Inc., 122 A.D. 3d 613, supra and 3H Enterprises v. Bennett, 276 A.D. 2d 966, 715 N.Y.S. 2d 90 [3rd Dept., 2000]). To the extent that defendants seek to apply the choice of law provisions in the parties' contracts, this Court is capable of rendering determinations that rely on the Laws of the State of Delaware.

Plaintiff's motion pursuant to CPLR §§ 6301 and 6313 seeks injunctive relief to restrain the defendants from transferring, selling or otherwise disposing of any of the artwork associated with the secured loan and currently in the defendants possession.

Defendants oppose plaintiff's motion and under Motion Sequence 002, pursuant to CPLR §§ 6301 and 6313 seek injunctive relief requiring the immediate marshaling and turnover of missing collateral artwork from plaintiff, and a restraining order preventing plaintiff from transferring, selling or in any way alienating any of the collateral associated with the secured loan and identified in the November 1, 2016 UCC-1 Financing Statements filed with the New York Department of State (Mot. Seq. 002, Peck Aff., Exh. F).

A movant seeking a stay or injunction, is required to show, "(1) the likelihood of ultimate success on the merits; (2) irreparable injury to him absent granting of the preliminary injunction; and (3) that a balancing of the equities favors his position" (Doe v. Axelrod, 73 N.Y. 2d 748, 532 N.E. 2d 1272, 536 N.Y.S. 2d 44 [1998] and Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 N.Y. 3d 839, 833 N.E. 2d 191, 800 N.Y.S. 2d 48 [2005]). . An injunction maintains the status quo until a full hearing can be had on the merits (Residential Board of Managers of the Columbia Condominium v. Alden, 178 A.D. 2d 121, 576 N.Y.S. 2d 859 [1st Dept., 1991]).

Plaintiff's arguments that he has the likelihood of success on the merits because defendants do not intend to fully fund the loan and irreparable injury if defendants liquidate the artwork in their possession because it is "one of a kind," have merit. It is plaintiff's contention that the artwork in defendants possession is valued at an amount that would be more than sufficient to secure the advance, interest and fees. Plaintiff has established that the balancing of the equities are in his favor because liquidation results in his losing the artwork forever, and injunctive relief is needed to maintain the status quo pending a final determination.

Defendants seek injunctive relief arguing that there is a high likelihood of success on the counterclaims for breach of contract and replevin and that the balance of the equities are in their favor because of loss of the bargained for security and contract terms. Defendants allege they will be irreparably injured if a financially unstable plaintiff declares bankruptcy. Defendants have established entitlement to a restraining order preventing plaintiff from transferring, selling or in any way alienating any of the collateral associated with the secured loan and identified in the November 1, 2016 UCC-1 Financing Statement, pending the resolution of this action and for purposes of maintaining the status quo. Defendants have not established entitlement to the injunctive relief requiring the immediate marshaling and turnover of missing collateral artwork from plaintiff prior to a resolution of this action.

Accordingly, it is ORDERED that plaintiff's motion pursuant to CPLR §6301 and §6313, seeking to restrain defendants from transferring, selling or otherwise disposing of any of the artwork associated with the secured loan, is granted, and it is further,

ORDERED, that PEGASUS CREDIT COMPANY, LLC, ART CAPITAL GROUP, LLC, IAN S. PECK, and MODERN ART SERVICES, LLC, are restrained from transferring, selling or otherwise disposing of any of the artwork associated with the secured loan, currently in their possession, and it is further,

ORDERED, that Defendants motion filed under Motion Sequence 002, pursuant to CPLR §6301 and §6313, seeking injunctive relief, is granted only to the extent that ANDREW FRANKLIN is restrained from transferring, selling or in any way alienating any of the collateral associated with the secured loan, and it is further,

ORDERED, that the remainder of the relief sought in Motion Sequence 002, seeking an Order requiring the immediate marshaling and turnover of missing collateral artwork from plaintiff, is denied.

ENTER:

MANUEL J. MENDEZ,
J.S.C.

Dated: February 16, 2017

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE