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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 SAFFLANE HOLDINGS, LTD., et al.,

4 Plaintiffs,

5 v.

11 CV 1679 (MHD) (DLC)

6 GAGOSIAN GALLERY,

7 Defendant.

8 -----x

9
10 New York, N.Y.
11 January 9, 2012
12 2:30 p.m.

12 Before:

13 HON. MICHAEL H. DOLINGER

14 Magistrate Judge

15 APPEARANCES

16 AARON RICHARD GOLUB, ESQUIRE, PC
17 Attorneys for Plaintiff Safflane Holdings, Ltd.
18 and Robert Wylde
19 BY: NEHEMIAH S. GLANC, ESQ.

20 WITHERS BERGMAN LLP
21 Attorneys for Defendant Gagosian Gallery
22 BY: BRIAN DUNEFSKY, ESQ.
23 DARA HAMMERMAN, ESQ.

24 SNR DENTON US LLP
25 Attorneys for Defendant Jan Cowles
BY: DAVID R. BAUM, ESQ.

CHARLES COWLES, Pro Se

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1 (In open court)

2 THE COURT: What is the current posture of this case?
3 And by "this case," let me make it clear I'm referring to the
4 Safflane lawsuit against Gagosian, etc.

5 MR. GLANC: Nehemiah Glanc for Safflane and Robert
6 Wylde from Richard Golub's office. The matter is being
7 settled. I think the only item left is an assignment of our
8 claims, plaintiffs' claims, against Charles Cowles, assigning
9 those claims to Gagosian Gallery, which we are in the midst of
10 negotiating, and hopeful we should have that done this week.
11 Other than that, the matter is settled.

12 THE COURT: I had thought that these terms had
13 previously been agreed to, including the assignment of whatever
14 claims Safflane has against Mr. Cowles to Gagosian. This has
15 not been reduced to a stipulation?

16 MR. GLANC: We're in the midst of doing that, Judge.

17 THE COURT: How complicated can an assignment be?

18 MR. GLANC: Because we have an indemnification
19 provision somewhere, discussing an indemnification provision.
20 That's the only outstanding matter.

21 THE COURT: What does the case involve in terms of
22 discovery and other proceedings?

23 MR. GLANC: In terms of discovery, that was, I
24 believe, both -- I think all sides completed document
25 discovery, if I'm correct. And depositions, there were two

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1 depositions that were taken. And then the matter settled.

2 THE COURT: Except it hadn't completely settled. I
3 mean, I'm used to statements or representations in this case
4 from various counsel that are, shall we say, not always precise
5 and occasionally not quite accurate. But I'm somewhat
6 surprised, given the fact that there were explicit
7 representations made to me that this case had settled except
8 with regard to claims against Mr. Cowles and that that was
9 being assigned, as part of the settlement, to Gagosian, and now
10 suddenly none of this has happened.

11 MR. GLANC: It has. The stipulation of dismissal is
12 being signed. I think it's even being filed.

13 THE COURT: OK. So there's a stipulation of dismissal
14 that dismisses the claims of Safflane and Wylde against
15 Gagosian?

16 MR. GLANC: Yes.

17 THE COURT: So they're done. And so at this point,
18 the only thing left is claims by Safflane against Mr. Cowles,
19 right?

20 MR. GLANC: Correct.

21 THE COURT: And am I correct in understanding that at
22 a certain point Judge Cote entered a default against
23 Mr. Cowles?

24 MR. GLANC: Correct.

25 THE COURT: Currently, your client either is going to

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1 have to pursue its remedies against Mr. Cowles by way of an
2 inquest or we'll dismiss those claims. When are you prepared
3 to do that?

4 MR. GLANC: What we're going to do is, we're going to
5 sign that claim against Mr. Cowles.

6 THE COURT: You have a week to do that. Otherwise you
7 can show up here next week. We will set a date and time for
8 you to do an inquest. This is ridiculous.

9 Harriet, what does our schedule look like in the next
10 couple weeks?

11 THE CLERK: Thursday, January 19, we're open all
12 morning. Tuesday the 17th we're open at 2 p.m.

13 THE COURT: Which date would you like?

14 MR. GLANC: We'll pick the 19th, Judge.

15 THE COURT: OK. 19th, 10 a.m., inquest.

16 Are you going to proceed by affidavit or by live
17 witnesses?

18 MR. GLANC: I'm not sure, Judge. Again, we were
19 almost -- we are going to have our assignment done. That was
20 the last --

21 THE COURT: Except that it's not done. You were going
22 to have it done a long time ago. And we're moving forward.

23 Are you going do it by affidavit, or are you going to
24 do it by live witness, assuming you haven't assigned the claim
25 by then?

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1 MR. GLANC: I need to discuss it with my client. I
2 cannot make that decision myself.

3 THE COURT: OK. You have until the close of business
4 tomorrow to inform the Court in writing whether you want to
5 proceed by affidavit or by live witness.

6 By the way, is Gagosian represented here today?

7 MR. DUNEFSKY: Yes.

8 THE COURT: You're taking this all in?

9 MR. DUNEFSKY: I am.

10 THE COURT: OK. So in the interim, the claims get
11 assigned to Gagosian and Gagosian will appear on the 19th. OK?

12 MR. DUNEFSKY: I could tell you, if that is the
13 case --

14 THE COURT: That's the case.

15 MR. DUNEFSKY: -- we would presume to proceed by
16 affidavit as opposed to live witnesses.

17 THE COURT: What is the nature of the claims that are
18 being talked about at this time?

19 MR. DUNEFSKY: It's Safflane's claim against Cowles on
20 the underlying proceeding for breach of contract, essentially,
21 and the measure of damages we would propose is the difference
22 between what Safflane recovered from Gagosian and the fair
23 market value of the painting at the time of the inquest. I
24 think it's as simple as that.

25 THE COURT: The one specific painting.

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1 MR. DUNEFSKY: Correct, the Tansey.

2 THE COURT: The Tansey. And is it the case that,
3 whatever the settlement was, that involved a payment of funds?
4 Parenthetically, as I recall, there were two paintings of
5 issue. Was there an allocation of amount to each separate
6 painting?

7 MR. DUNEFSKY: Not in the settlement agreement.

8 THE COURT: So are you going to have to then somehow
9 prove what portion of the total amount that was paid is
10 attributable to the paintings?

11 MR. DUNEFSKY: I presume we would. And we made an
12 argument on that basis in connection with our other default
13 that we moved for. It's in those papers. I could discuss it
14 with you now, or we're happy to present it next week. But we
15 have a theory as to what it should be.

16 THE COURT: If, as appears to be the case, the
17 application for damages on the Safflane claim is going to be
18 made by affidavit, that would be due, of course, the 19th, as
19 we have said. Any response would be due by the 26th, one week
20 later.

21 What day of the week is the 19th?

22 THE CLERK: Thursday.

23 THE COURT: Thursday, OK.

24 And then any reply would be due January 30.

25 Now, you alluded to a motion, as I understand it, for

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1 a default judgment, which is pending on behalf of Gagosian. Is
2 this correct?

3 MR. DUNEFSKY: That's correct.

4 THE COURT: And that's also directed at Mr. Cowles.

5 MR. DUNEFSKY: That's correct.

6 THE COURT: And to what extent and in what respect do
7 the claims for which the default is being sought differ from
8 the claims that we've referred to as the Safflane claims?

9 MR. DUNEFSKY: The measure of damages would be
10 different. In the matter Gagosian v. Cowles, default, Gagosian
11 is seeking the amount it paid as damages, plus its attorney's
12 fees. That would not be included in the measure of damages in
13 the proceeding that brings us here today.

14 THE COURT: I should mention, I have not raised this
15 issue before, I haven't had the parties in front of me in this
16 context, but it is my understanding that although in this case
17 the parties that appeared in the case have consented to my
18 jurisdiction, that to the extent that there is a default
19 application against a defaulting defendant who has not
20 consented, that I am not in a position to enter judgment and
21 that, therefore, whatever decision I would render would be in
22 the form of a report and recommendation. If you have a
23 different understanding of the law on this point, obviously you
24 are free to submit any learning that you have on this point to
25 me. You should certainly do that by the 19th.

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1 MR. DUNEFSKY: I take it you prefer it in advance so
2 you're not wasting your time, potentially, on the 19th?

3 THE COURT: Well, either way, I'm going to end up
4 making an initial decision. If I had the jurisdiction to do it
5 myself without a report and recommendation it would be a final
6 decision. Otherwise it's going to be a report and
7 recommendation to Judge Cote.

8 MR. DUNEFSKY: I understand.

9 THE COURT: But either way, I'll deal with it. So
10 obviously if you can get it in before the 19th, that would be
11 fine. Otherwise, we'll work with what we get.

12 MR. DUNEFSKY: Understood.

13 THE COURT: When we get it. But at least it will be
14 here by the 19th.

15 Are there any other matters that we should address at
16 this time?

17 MR. DUNEFSKY: I don't believe so. By order it's
18 clear that this was a conference to discuss what's going to
19 happen at the inquest. I believe your Honor has identified all
20 the issues that should arise on the 19th. That's it from our
21 perspective.

22 THE COURT: Anything else?

23 MR. BAUM: Your Honor, David Baum for Jan Cowles. I
24 wanted to introduce Mr. Charles Cowles to the Court.

25 THE COURT: Greetings and salutations.

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1 MR. BAUM: As your Honor is aware, I merely noted that
2 although these parties may want to proceed by affidavit and
3 your Honor noted a response date for that affidavit, I don't
4 know if Mr. Cowles wants to actually appear in person in
5 connection with those affidavits, or if he wanted to submit
6 replies. I thought the matter might be discussed with
7 Mr. Cowles and the Court.

8 THE COURT: Well, Mr. Cowles, it's up to you. What's
9 your wish at this point procedurally speaking?

10 MR. COWLES: Well, I'm sorry, I'm not an authority on
11 this, but I just wish the whole thing would disappear.

12 THE COURT: I have no doubt that that wish is
13 typically shared by defendants in many cases. Alas, we are not
14 magicians here and so the case is not about to disappear, at
15 least as we see it today.

16 MR. COWLES: I believe the painting is now back at the
17 museum.

18 MR. GLANC: No, it is not, your Honor.

19 THE COURT: What is the status of the painting? I had
20 understood that it was to be returned sometime in late
21 December.

22 MR. GLANC: Within 30 days of late December, I
23 understand.

24 THE COURT: So that would extend to late January.

25 MR. GLANC: Yes, sir.

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1 MR. COWLES: Do we have a settlement agreement?

2 THE COURT: If, Mr. Cowles, you want to resolve any
3 matters that you have with the various other parties in this
4 litigation, obviously, you are free to attempt to do so. You
5 should discuss that separately with the attorneys after today's
6 session if they're available and see if, by dint of an effort
7 on your part, you can make the rest of the case disappear.
8 That's between you and the attorneys.

9 MR. COWLES: And do I have to ask about a settlement
10 agreement?

11 THE COURT: Do you have to ask? I don't know what you
12 mean by asking about it.

13 MR. COWLES: Do we have a settlement agreement?

14 THE COURT: Are you asking whether you have a
15 settlement agreement with any of the other parties?

16 MR. COWLES: Right.

17 THE COURT: Have you entered into a settlement
18 agreement, to your knowledge?

19 MR. COWLES: Not to my knowledge, no.

20 THE COURT: In that case I don't think you have a
21 settlement agreement. Settlement agreements come when both
22 sides agree to terms of. If you haven't agreed to terms,
23 there's no settlement agreement with you.

24 MR. BAUM: Your Honor, I can probably act as an
25 interpreter for a moment. I believe what Mr. Cowles is asking,

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1 as he has asked me, is, he wanted the settlement agreement
2 between them so he knows what he is being demanded to repay
3 them for.

4 THE COURT: OK. I follow that.

5 MR. DUNEFSKY: There is a settlement agreement
6 attached to our motion for default judgment.

7 THE COURT: OK.

8 MR. BAUM: No, it's not. Your Honor, it has not
9 been -- it's submitted to the Court, but I do not believe it
10 was provided to the parties. I believe it was sealed.

11 MR. DUNEFSKY: Your Honor, Mr. Baum by his own
12 admission is not representing a party here, and he happens to
13 be wrong about this, so I take issue with his speaking about
14 this.

15 MR. COWLES: We represent a party, your Honor.

16 THE COURT: Mr. Baum, I --

17 MR. COWLES: Sorry, your Honor.

18 THE COURT: I know your desires in this matter and
19 I'll deal with them eventually.

20 Mr. Dunefsky, when you served a copy of the default
21 motion on Mr. Cowles, did you include a copy of the settlement?

22 MR. DUNEFSKY: We did, yes. Absolutely.

23 THE COURT: Good. So at this point, what we will look
24 for is, on the 19th, assuming that the assignment is finally
25 finalized, we will look for Gagosian to be submitting whatever

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1 papers it does, and serve a copy, obviously, on Mr. Cowles, and
2 at that point Mr. Cowles will have the week to respond to it.
3 And two days, then, for a reply. And in the interim, I will
4 endeavor to address the motion for a default judgment by
5 Gagosian's own behalf.

6 Anything else at this point?

7 MR. COWLES: I don't think so, no.

8 THE COURT: OK. And as I said, if you think you can
9 settle whatever claims are pressed against you by -- I assume
10 it's likely to be Gagosian alone, although for the moment part
11 of it is Safflane -- you are free to do so. Indeed, I would
12 encourage it. Do what you can.

13 MR. COWLES: I'm not aware that they have actually
14 asked me for anything.

15 THE COURT: OK. You may want to take a little bit of
16 time to discuss with Mr. Cowles.

17 MR. DUNEFISKY: We're always happy to try to work
18 things out and avoid the Court's involvement if we can.

19 THE COURT: OK. Go in peace.

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