UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAFFLANE HOLDINGS, LTD. and ROBERT WYLDE,

Plaintiffs,

-against-

GAGOSIAN GALLERY, INC. and CHARLES COWLES,

Defendants.

THE METROPOLITAN MUSEUM and JAN COWLES,

Plaintiffs,

-against-

SAFFLANE HOLDINGS, LTD. and ROBERT WYLDE,

Defendants.

ORDER

11 Civ. 1679 (DLC)(MHD)

11 Civ. 3143 (DLC)(MHD)

MICHAEL H. DOLINGER
UNITED STATES MAGISTRATE JUDGE:

Since October 31, 2011, the court has been inundated with no less than ten letters from counsel for various parties in these two consolidated cases.[1] All were triggered by an application by a

[1] These include the following: letters dated Oct. 31, Nov. 1, Nov. 3 (two letters), and Nov. 4, 2011 from David R. Baum, Esq.; letters dated Nov. 1, Nov. 2 (two letters), and Nov. 3, 2011 from Aaron Richard Golub, Esq.; and a Nov. 3, 2011 letter from Hollis Gonerka Bart, Esq.

plaintiff in one of these cases -- Ms. Jan Cowles -- seeking a court ruling that, in the event of a settlement of Metropolitan Museum v. Safflane Holdings, Ltd., 11 Civ. 3143 and/or Safflane Holdings, Ltd. v. Gagosian Gallery, Inc., 11 Civ. 1679, she will not be precluded from asserting unrelated claims in an as-yet unfiled, future lawsuit.[2] The apparent trigger for Ms. Cowles's demand for such a ruling is her attorney's anticipation, based on alleged comments by another party's counsel, that if Ms. Cowles files such a separate future suit -- probably in state court -- the defendant in that case may seek its dismissal on the basis that two scheduling orders entered in the current litigation in May and June 2011 preclude the assertion by Ms. Cowles of her anticipated claims. The short answer to this request is that Ms. Cowles seeks an advisory ruling, and we are precluded from offering such relief.

As the Second Circuit has recently observed: "[t]here may be no more unambiguous limitation on the power of the federal courts than that proscribing the entry of advisory opinions." Crawley v. United States, 417 F. App'x 94, 95 (2d Cir. April 5, 2011). This follows from the constitutional limitation on the authority of

[2] Because we have already so ordered a stipulation of dismissal in the Safflane action, we consider this request only with respect to any potential future settlement in the Metropolitan Museum action.

federal courts to "case[s] or controvers[ies]," and hence "'a federal court [lacks] the power to render advisory opinions.'" U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 446 (1993) (brackets in original) (quoting Preiser v. Newkirk, 422 U.S. 395, 401 (1975)).

Parties are of course free, when settling a lawsuit, to include in their agreement specific provisions either preserving or waiving the assertion in future litigation not only of claims already asserted in the case being settled, but also of claims that, while not yet asserted, existed at the time of the settlement. Neither of these scenarios, however, is found here. Rather, Ms. Cowles is in effect seeking to have this court impose a term in a possible settlement agreement by issuing a ruling addressing a hypothetical set of claims and an equally hypothetical motion to dismiss in a future lawsuit -- a ruling that would otherwise have to be made by a different court if and when Ms. Cowles files suit on such claims. Regardless of what we might think of the hypothesized future defense, this we cannot do. See, e.g., Jennifer Matthew Nursing & Rehab. Ctr. v. U.S. Dep't of Health & Human Servs., 607 F.3d 951, 956-57 (2d Cir. 2010) (court may not

issue rulings to head off or enable future claims) (citing cases).[3]

In the cascade of correspondence that we have received, we find another request, this time by the Gagosian Gallery, that we expunge from "the record" a reference by Ms. Cowles's attorney to the terms of a settlement in the Safflane action, and that it order Ms. Cowles's counsel not to disclose such terms in the future. The attorneys' letters to the court are not actually part of the court file, and hence there is no "record" at present to expunge. In any event Gagosian's application, insofar as it targets either prior correspondence or future statements by Ms. Cowles's attorney, fails because it is necessarily premised on the contention that Ms. Cowles's lawyer is bound by a confidentiality agreement between the parties in the Safflane case. Gagosian fails, however, to offer any basis for the implication that Ms. Cowles's counsel is bound by the terms of any such agreement. In this respect we note that the settlement agreement in question was between the litigants in the

[3] To the extent that Ms. Cowles argues that the court should simply expound on the impact of its own prior orders, that does not avoid the problem. Scheduling orders speak for themselves and are not impregnated with unstated intentions regarding their impact on possible, but as-yet unarticulated, claims. At present the possible claims to which Ms. Cowles adverts have not been framed in any pleading in any court, nor has any defense theory as to the viability of such claims been presented in a cognizable form; their viability can only be tested once the claims have been asserted and only by the court in which they are invoked.

Safflane case, to which Ms. Cowles was not a party, and Gagosian proffers no evidence that Ms. Cowles (by her attorney-in-fact) or her counsel was a signatory to that agreement or was otherwise bound by a separate confidentiality requirement.[4]

Finally, we observe that, imbedded in some of the letters to the court, are accusations by counsel for Safflane of misconduct on the part of Ms. Cowles's attorney. We have had occasion before to remark on the unfortunate tendency of counsel to litigate by ad hominem attack, but in any event he proffers no meaningful basis to infer misconduct by his adversary, much less offers a reason for the court to undertake satellite hearings to examine any lawyer's performance of his ethical obligations in these contentious lawsuits.

Dated: New York, New York
November 7, 2011

MICHAEL H. DOLINGER
UNITED STATES MAGISTRATE JUDGE

[4] If this gap in evidence is attributable to inadvertence by counsel, Gagosian will be free to make a more substantial application to keep any description of settlement terms under seal.

Copies of the foregoing Order have been mailed today to:

Aaron Richard Golub, Esq.
Aaron Rich Golub, Esquire, PC
34 East 67th Street
3d Floor
New York, New York 10065

Hollis Anne Bart, Esq.
Withers Bergman, LLP
430 Park Avenue
New York, New York 10022

David Robert Baum, Esq.
SNR Denton US LLP (NY)
1221 Avenue of the Americas
New York, New York 10020

John D. Winter, Esq.
Patterson, Belknap, Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036