

**Cowles v Gagosian**

2012 NY Slip Op 33156(U)

August 22, 2012

Supreme Court, New York County

Docket Number: 650152/12

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X

JAN COWLES,

Plaintiff,

Index No.  
650152/12

-against-

LARRY GAGOSIAN, GAGOSIAN GALLERY, INC.,  
and THOMPSON DEAN,

Defendants.

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**Charles Edward Ramos, J.S.C.:**

Defendants Larry Gagosian (LG) and Gagosian Gallery, Inc. (Gagosian) (together, defendants) move to dismiss certain causes of action in the amended complaint (complaint) of plaintiff Jan Cowles, pursuant to CPLR 3211 (a) (7).

**Background<sup>1</sup>**

This action for conversion and replevin arises out of the alleged wrongful taking and sale of a work of art by the iconic American artist Roy Lichtenstein.

The plaintiff, Jan Cowles, is a long time collector of fine art works, and at ninety-three years old, has been incapacitated for several years. Since her deterioration, Mrs. Cowles has been represented by Lester Marks, who acts as her duly appointed attorney-in-fact. Defendant LG is a major international art dealer with galleries in New York and throughout the world.

According to the complaint, Mrs. Cowles' son, Charles Cowles, himself an art dealer and gallery owner in New York City,

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The allegations are taken from the Amended Complaint, and are assumed to be true for the purposes of this motion.

suffered large financial losses in 2008 and as a result, was in a desperate financial condition. Unbeknownst to Mrs. Cowles, in October 2008, Charles cosigned to Gagosian for sale two major art works from Mrs. Cowles's personal collection, and secreted the sales proceeds. At issue in this action is one of the art works cosigned to Gagosian, entitled the *Girl in Mirror*, by Roy Lichtenstein (the Work), which is an epoxy enamel on metal, and is numbered as one from eight in the same edition. Another *Girl In Mirror* in the same edition had been sold in 2007 for over \$4 million. Mrs. Cowles alleges that in the current market, it is worth more than \$5 million.

In an effort to sell the Work, Gagosian shipped it to London for an exhibition at Frieze, an art fair, in the middle of October 2008. Around the same time, a Gagosian employee prepared a condition report stating that the Work is in "excellent condition overall" (Amended Complaint, ¶ 18). A few days later, Gagosian shipped the Work back to its gallery in New York, accompanied by a customs invoice which valued it at \$4.5 million (Amended Complaint, ¶ 19). In June 2009, Gagosian again shipped the Work overseas to Switzerland for viewing at a prestigious art fair, and back to its gallery in London (Amended Complaint, ¶¶ 18-19).

According to the complaint, LG became acutely aware of Charles's desperate financial condition, and saw an opportunity to turn a huge profit for Gagosian and make a quick sale by

coaxing defendant Thomas Dean into making an outrageously low offer to purchase the Work. In an email dated July 15, 2009 LG writes to Dean:

"Seller [Charles] now in terrible straights and needs cash. Are you interested in making a cruel and offensive offer? Come on, want to try?" (Exhibit A, annexed to the Baum Aff.).

On August 3, 2009, Gagosian purported to sell the Work for only \$2 million to Dean, and retained an astounding \$1 million in commission, despite representing to Charles at the time of the consignment that it would not be sold for less than \$3 million, with Charles to receive no less than \$2.5 million, and Gagosian to receive a commission of \$500,000 (Amended Complaint, ¶¶ 15-16).

In October 2009, Gagosian shipped the Work to Dean, with an accompanying condition report which noted that it was in "overall good condition."

From the time she discovered that the Work had been sold without her knowledge and consent, Marks, on behalf of Mrs. Cowles, has demanded detailed accounts of the transaction. Upon investigation, Marks learned that LG purportedly represented to Charles that multiple buyers declined to purchase the Work because it was badly damaged, and ultimately convinced Charles to accept the below-market sale price of \$1,000,000 for that reason (Amended Complaint, ¶ 27). Gagosian maintains in this litigation that the Work sold for a relatively low amount because it was indeed damaged. Mrs. Cowles disputes that the Work was damaged,

and points to several invoices and condition reports that Gagorian had prepared in an effort to sell the Work which noted its good condition.

Mrs. Cowles served an amended complaint in February 2012, asserting causes of action against defendants for conversion, replevin, fraud, breach of fiduciary duty and unjust enrichment, and includes a request for punitive damages.

### **Discussion**

#### **I. Fraud and Breach of Fiduciary Duty**

Defendants move to dismiss the cause of action for fraud on the grounds that it arises from a breach of contract, and Mrs. Cowles fails to adequately allege that Charles justifiably relied on an alleged misrepresentation as a matter of law. According to defendants, Charles is himself an art dealer and had access to the same information and resources concerning the condition of the Work, and could have verified the truth of LG's statements.

The Court rejects the argument that Mrs. Cowles is attempting to convert a breach of contract cause of action into one sounding in tort. The fraud cause of action is not premised upon Gagorian's breach of a contractual duty to pay Charles or Mrs. Cowles the sales price. Rather, it is based upon allegations that Gagorian improperly induced Charles to agree to a below-market sale premised upon misrepresentations concerning the condition of the Work and its present value. Whereas LG originally promised Charles to sell the Work for no less than \$3

million with a \$500,000 commission, LG fabricated that the Work had been damaged in order to justify a below-market sales price, while doubling Gagosian's own commission, netting \$1 million out of the \$2 million sale price. Such allegations sufficiently state a cause of action for fraud (see *Cristallina v Christie, Manson & Woods Intl.*, 117 AD2d 284, 292-94, 297 [1<sup>st</sup> Dept 1986]).

The Court is also not persuaded that the element of reasonable reliance is lacking as a matter of law. Where a sophisticated plaintiff enjoys access to critical information but fails to take advantage of that access, New York courts are particularly disinclined to entertain causes of action for fraud (*Dragon Inv. Co. II LLC v Shanahan*, 49 AD3d 403, 404 [1<sup>st</sup> Dept 2008]). However, where the facts allegedly misrepresented were within the exclusive knowledge of the defendant, or where one party's superior knowledge of essential facts renders the transaction without disclosure inherently unfair, a sophisticated plaintiff's reliance on the defendant's misrepresentations is not unreasonable as a matter of law (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 155 [2010]). Ultimately, the question of what constitutes reasonable reliance is fact-intensive and contextual (*Id.*)

Mrs. Cowles alleges that defendants concealed every aspect of the dishonest transaction from Charles, including Gagosian's own \$4.5 million valuation of the Work, the information given to Dean concerning Charles's desperate financial situation, the

reason behind the very low offer, and the extent of Gagosian's commission. In addition, defendants never disclosed Gagosian's own condition reports, which noted that the Work was in "excellent condition overall" (Amended Complaint, ¶ 42).

The contention alone that, because Charles is himself a gallerist who should have verified the condition of the Work and not rely upon defendants' representations, is not dispositive. An inspection of the Work would not have permitted Charles to ascertain the material aspects of the transaction that defendants concealed, and which allegedly rendered the sale unfair. Because determining whether Charles was entitled to rely upon defendants' representations turns on resolving factual issues, it is not suited for disposition on defendants' motion to dismiss aimed at the sufficiency of the pleadings.

Mrs. Cowles also sufficiently alleges a cause of action for breach of fiduciary duty. A legal duty, and thus, tort liability, can be imposed by law on "professionals, common carriers and bailees" irrespective of their contractual duties, for failure to exercise reasonable care. "In these instances, it is policy, not the parties' contract, that gives rise to a duty of care" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 551 [1992]). In addition, misfeasance, or defective performance, has traditionally been regarded as a tort rather than a breach of contract (*Id.*).

Gagosian, as an agent acting on behalf of its consignor, had a fiduciary duty to act in the utmost good faith and in the interest of Charles, its principal, throughout their relationship (*Cristallina*, 117 AD2d at 292). LG purportedly disclosed to the buyer, Dean, that Charles was in "terrible straits" and invited him to make a "cruel and offensive offer" in order to take advantage of Charles and capitalize on his misfortune, while concealing information that was material to his interests. These allegations describe conduct that would constitute a breach of fiduciary duty, and ultimately present a factual question as to whether Gagosian acted in a manner commensurate with its skill and expertise, and properly discharged its duty of care (see *Cristallina*, 117 AD2d at 292-94).

## II. Unjust Enrichment

Defendants move to dismiss the cause of action for unjust enrichment on the ground that the extent of Gagosian's commission is a component of the consignment agreement with Charles. Although the existence of a valid and enforceable contract governing a certain matter will preclude recovery for unjust enrichment claims that arise out of a similar matter, here, there is a bona fide dispute as to the existence of an enforceable contract (see *Nakamura v Fujii*, 253 AD2d 387, 390 [1<sup>st</sup> Dept 1998]). Moreover, even in the absence of a dispute as to the enforceability of the consignment agreement, Mrs. Cowles sufficiently alleges that Gagosian earned its fifty percent

commission by its dishonest brokerage of the Work at Charles's expense. These allegations sufficiently state a cause of action for unjust enrichment (*Balance Return Fund Ltd. v Royal Bank of Canada*, 83 AD3d 429, 431 [1<sup>st</sup> Dept 2011]).

### III. Punitive Damages

Defendants move to strike the demand for punitive damages as to the causes of action for conversion, fraud, and breach of fiduciary duty for failure to allege wrongful conduct that amounts to a pattern, or that it was directed at the public generally.

Where the transaction at issue is a private one, punitive damages are only available where there is a showing of conduct exhibiting a conscious disregard of rights or a high degree of moral turpitude (*Hartford Acc. & Indem. Co. v Village of Hempstead*, 48 NY2d 218 [1979]; *Mountain Creek Acquisition LLC v Intrawest U.S. Holdings, Inc.*, 96 AD3d 633 [1<sup>st</sup> Dept 2012]). Assuming the allegations as to defendants' misconduct as true for the purposes of this motion, the Court concludes that the complaint pleads the requisite allegations of recklessness and conscious disregard of rights, and in this instance, the determination as to whether punitive damages are warranted should be left for the trier of fact (*Nardelli v Stamberg*, 44 NY2d 500, 503 [1978] ["Whether to award punitive damages in a particular case, as well as the amount of such damages, if any, are primarily questions which reside in the sound discretion of the

original trier of facts"]; see also *Cristallina*, 117 AD2d at 297; *Bishop v 59 West 12<sup>th</sup> Street Condominium*, 66 AD3d 401, 401 [1<sup>st</sup> Dept 2009]).

Accordingly, it is

ORDERED that the motion to dismiss the amended complaint is denied; and it is further

ORDERED that defendants are directed to serve an answer to the amended complaint within 20 days after service of a copy of this order with notice of entry.

Dated: August 22, 2012

ENTER:



J. S. C.

**CHARLES E. RAMOS**