Protetch v MPI Galleries LLC
2015 NY Slip Op 30079(U)
January 22, 2015
Supreme Court, New York County
Docket Number: 651443/13
Judge: Joan A. Madden

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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MAX PROTETCH and TROUT CREEK FINE ART, INC.,

Plaintiffs,

-against-

MPI GALLERIES LLC and EDWIN MEULENSTEEEN,

Defendants.

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JOAN A. MADDEN, J.:

In this action involving the sale of a New York art gallery and the ownership of certain art works, plaintiffs move for an order pursuant to CPLR 3212 granting summary judgment on their breach of contract claims seeking declaratory relief, specific performance, money damages and attorney's fees. Defendants oppose the motion and cross-move for summary judgment on their counterclaim for declaratory relief.

Plaintiff Max Protetch ("Protetch") is the former owner of the art gallery, Max Protetch Inc. (the "Corporation"), known as the Max Protetch Gallery, located at 511 West 22nd Street, New York, New York; Trout Creek Fine Art, Inc. is his wholly owned corporation. Pursuant to a Stock Purchase Agreement ("SPA") dated September 28, 2009, Protetch sold the gallery to defendants MPI Galleries LLC and its principal Edwin Meulensteen. Specifically, defendants agreed to pay Protetch the sum of $1,500,000, in exchange for the shares of the Corporation, the use of the Corporation's name and the name Max Protetch Gallery, its telephone number and website, the lease to the gallery space in Chelsea, the gallery's good-will and its relationships

with artists represented by the gallery. Pursuant to the express terms of the SPA, the parties acknowledged that the "Corporation does not own any art work" and "all art work in possession, custody or control of the Corporation is either owned by Seller [Max Protetch, individually], Trout Creek or the consignor to the Corporation, as the case may be." Thus, under the SPA, defendants did not acquire any ownership interests in the art works owned by plaintiffs. However, the parties executed a separate Consignment Agreement dated February 24, 2010, by which plaintiffs consigned the art works to defendants for a period of three years, commencing on February 24, 2010 and ending on October 1, 2012. The Consignment Agreement required defendants to pay plaintiffs "80% of the Retail Value" in the case of a consignment sale, and required defendants to return the consigned art works to plaintiffs within 30 days of the consignment end date, unless otherwise agreed in writing.

The parties are now disputing the ownership of particular art works known as artists' proofs; some of the artists' proofs are in defendants' possession and others have not been returned to plaintiffs. The parties agree that artists' proofs are "[c]opies of editioned work (artworks that exist in multiple, e.g. cast sculptures, lithograph prints, digital art, etc.) that exist beyond the declared edition size." The crux of the parties' dispute is the interpretation of section 8(a) of the SPA which provides in its entirety as follows:

> 8. Prototypes; Artists Proofs.
> a. Seller [Max Protetch] shall retain the right to receive prototypes and/or artists' proofs in accordance with separate agreements with such artists, provided such agreements were executed prior to the Closing Date. A list of all such agreements shall be delivered to Purchaser by Seller at the Closing. Any prototypes and/or artists' proofs received by Seller after the Closing Date, which are not the subject of any prior agreements as aforesaid shall be property of the Corporation.

Plaintiffs contend that pursuant to the plain meaning of the SPA, defendants must return all art works that plaintiffs consigned to them under the Consignment Agreement, including all artists' proofs in existence as of the Closing Date. Plaintiffs argue that section 8(a) of the SPA was designed to deal with the specific problem of artists' proofs delivered to the gallery after the Closing Date, and was not intended to deal with any art work that existed as of the Closing Date. Plaintiffs assert that under the Consignment Agreement, Protetch consigned essentially his entire art collection to defendants for three years, with defendants receiving a 20% commission on any consigned art work they sold; and the Consignment Agreement expired by its terms on October 1, 2012 and designated October 31, 2012 as the deadline by which defendants were required to return all consignment artworks to plaintiffs. Plaintiffs allege defendants returned most but not all of the consigned art works.

Defendants, on the other hand, argue that section 8(a) of the SPA was intended to cover all artists' proofs in existence at the time of the SPA Closing Date, and since plaintiffs admit they did not disclose at the closing, any agreements with artists concerning artists' proofs, all artists' proofs in existence at the time of the Closing Date "reverted" to defendants and plaintiffs "waived" any rights they may have had to those artists' proofs.

The parties' agree that the foregoing dispute involves issues of contract interpretation. They also agree that the SPA is not ambiguous, and that the ordinary and natural meaning of section 8(a) is dispositive.

Where, as here, the terms of a contract are straightforward, clear and unambiguous, its interpretation presents a question of law for the court, and the parties' intent must be found within the four corners of the agreement, giving a practical interpretation to the language

employed and reading the contract as a whole. See Ellington v. EMI Music, Inc, 24 NY3d 239 (2014); White v. Continental Casualty Co, 9 NY3d 264, 267 (2007). "The words and phrases used by the parties must, as in all cases involving contract interpretation, be given their plain meaning." Brooke Group v. JCH Syndicate 488, 87 NY2d 530, 534 (1996). Moreover, clear contractual language does not become ambiguous merely because the parties argue different interpretations. See Riverside South Planning Corp v. CRP/Extell Riverside, LP, 60 AD3d at 67. The court is obligated to interpret a contract so as to give meaning to all terms, so a contract should not be interpreted in a way that would leave any of its provisions without force or effect. See Excel Graphics Technologies, Inc v. CFG/AGSCB 75 Ninth Avenue, LLC, 1 AD3d 65 (1st Dept 2003), lv app dism 2 NY3d 794 (2004); 350 East 30th Parking, Ltd v. Board of Managers of 350 Condominium, 280 AD2d 284 (1st Dept 2001). A court may not, in the guise of interpreting a contract, add or excise terms, or distort the meaning of those used to make a new contract for the parties. See Riverside South Planning Corp v. CRP/Extell Riverside, LP, 13 NY3d 398 (2009). Moreover, "evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing." Riverside South Planning Corp v. CRP/Extell Riverside, LP, 60 AD3d 61, 68 (1st Dept), aff'd 13 NY3d 398 (2009) (quoting WWW Assocs, Inc v. Giancontieri, 77 NY2d 157 [1990]).

Applying the foregoing principles, the court concludes that the clear and express terms of section 8(a) of the SPA support the interpretation advanced by plaintiffs. The plain meaning of the language employed establishes that under section 8(a) artists' proofs acquired by plaintiffs *after* the execution of the SPA and *after* the Closing Date belong to defendants, unless plaintiffs have a separate prior agreement with the artist. It is well establish that when reviewing a

contract, particular words should be considered, not as if isolated from the context, but in the light of the obligations as a whole and the intention of the parties manifested thereby." Kolbe v. Tibbetts, 22 NY3d 344 (2013) (quoting Riverside South Planning Corp v. CRP/Extell Riverside, LP, 13 NY3d at 404). In the first sentence of section 8(a), the use of the phrase "retain the right to receive" unambiguously denotes receipt in the *future*, and is consistent with the balance of the provision which clarifies plaintiff's ownership rights as to any artists' proofs received in the future after the Closing Date.

Defendants' proposed interpretation that since plaintiffs concede they have no written agreements with artists, they waived their rights to the artists' proofs they acquired before they executed the SPA and those artists' proofs "reverted" to defendants, improperly seeks to add words to the agreement that conflict with its most natural and sensible reading. See Kolbe v. Tibbetts, supra at 354. Defendants admit that pursuant to the SPA, they purchased the corporation and the shares of Max Protetch, Inc., acquired the gallery lease and name, and acquired the right to continue to sell "Gallery art" as a consignee. While defendants argue that the SPA is silent as to "who controls" the artists' proofs, nothing in the SPA indicates that the artists' proofs in existence at the time the SPA was executed were to be treated differently from any art works in existence at that time which were simply consigned to defendants. Notably, as quoted above, section 4(g) of the SPA explicitly states that "[i]t is expressly acknowledged by the parties hereto that the Corporation [Max Protetch, Inc.] does not own any artwork; all art work in possession, custody or control of the Corporation is either owned by Seller [Max Protetch, individually], Trout Creek or the consignor to the Corporation as the case may be." Defendants' additional arguments regarding the fabrication costs associated with artists' proofs, likewise

conflict with the clear and express terms of section 8(a) of the SPA.[1]

Based on the foregoing, the court concludes that plaintiffs are entitled to summary judgment on their First and Second Causes of Action for a declaration that under sections 8(a) and 4(g) of the SPA, all art works including all disputed artists' proofs that are subject of this motion, belong to plaintiffs and defendants are required to return them to plaintiffs. To the extent defendants' cross-motion and plaintiffs' reply papers raise issues as to specific works of art or artists' proofs, the foregoing declaration is sufficient to resolve those issues.

Plaintiffs are also entitled to summary judgment on their third cause of action for breach of contract against defendant MPI, LLC. Plaintiffs seek the final installment of $30,000 due and owing for a consigned painting by David Reed that was sold to the Minneapolis Institute of Art. Defendants concede plaintiff is entitled to the $30,000 payment, but object that based on the Consignment Agreement, only MPI, LLC, and not Meulensteen personally, is responsible for remitting payment for the sale of consigned art work. In reply, plaintiffs assert they are entitled to a judgment against Meulensteen, "derivatively" as "sole manager" and "alter ego" of MPI, LLC. Plaintiffs, however, have not produced any evidentiary proof to support such assertion. Also, while defendant Meulensteen submitted an affidavit stating that he expected the $30,000

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[1]Although extrinsic evidence and not dispositive, it is noteworthy that defendant's attorney, Thomas Kass, who drafted sections 8(a) and 4(g) of the SPA, testified that section 8(a) "deals with separate agreements between the seller and the particular artists and that he's [Max Protetch] retaining his right to receive those artists' proofs, I guess in the future assuming he had signed those agreements prior to the closing and 4(g) deals with the fact that there is no actual art work as part of the deal [and] that the art work is owned not by the corporation but owned by Trout Creak or Max individually." Attorney Kass explained that "8(a) deals with a right to receive artists' proofs in the future . . . [and] doesn't seem to me to be inconsistent with 4(g). . . . 8(a) is dealing with a right to receive prototypes and artists' proofs in the future and 4(g) is dealing with the actual art work that the corporation owned at the time of the transaction."

balance to be paid to plaintiffs "by the time this motion is argued," the parties have yet to advise the court that any payment was made. Plaintiffs, therefore, are entitled to money judgment against MPI, LLC in the sum of $30,000, together with interest from October 1, 2012. In accordance with the attorney's fees provision in the Consignment Agreement, plaintiff is also entitled to an award of reasonable attorney's fees against defendant MPI, LLC.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted with respect to the First and Second Causes of Action, and is granted only in part with respect to the Third Cause of Action; and it is further

ORDERED, ADJUDGED AND DECLARED that pursuant to sections 4(a) and 8(g) of the Stock Purchase Agreement, all consigned art works, including all disputed artists' proofs that are the subject of this motion, belong to plaintiffs Max Protetch or Trout Creek Fine Art, Inc., and within 20 days of the date of this decision, order and judgment defendants shall return to plaintiffs all consigned art works, including all disputed artists' proofs that are the subject of this motion, if not already returned; and it is further

ORDERED that with respect to the Third Cause of Action, the Clerk is directed to enter judgment in favor of plaintiffs Max Protetch and Trout Creek Fine Art, Inc., and against defendant MPI Galleries LLC, in the sum of $30,000, together with interest as computed by the Clerk at the statutory rate from October 1, 2012; and it is further

ORDERED plaintiffs are entitled to an award of reasonable attorney's fees in connection with the portion of the Third Cause of Action against MPI Galleries LLC, and an inquest of assessment of damages shall be held to determine the amount of such fees; and it is further

ORDERED that the portion of the Third Cause of Action against defendant Edwin Meulensteen is severed and shall continue; and it is further.

ORDERED that defendants' cross-motion is denied in its entirety; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on January 29, 2015 at 11:00 a.m., in Room 351, 60 Centre Street.

DATED: January 22, 2015

ENTER:

HON. JOAN A. MADDEN
J.S.C.