Thome v Alexander & Louisa Calder Found.
2018 NY Slip Op 30871(U)
May 9, 2018
Supreme Court, New York County
Docket Number: 152721/2017
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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THOME, JOEL,

Plaintiff,

-against-

THE ALEXANDER AND LOUISA CALDER FOUNDATION, et ano,

Defendants.

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DECISION AND ORDER
Index No.: 152721/2017

Mot. Seq. Ns.:001

O. PETER SHERWOOD, J.:

In motion sequence 001, defendants move for summary judgment under CPLR 3212. For the following reasons, defendants' motion is granted in its entirety and the complaint is dismissed.

I. BACKGROUND

Plaintiff is the owner of a certain theatrical stage set purportedly created by, or under the supervision of, the famed sculptor Alexander Calder (the "Work"). The Work itself, as defined by plaintiff, is comprised of four elements: "(a) a large steel sculpture composed of pieces which move during the performance; (b) a version one-third smaller, (c) a maquette of the sculpture, and (d) an archive of original documents, some of which bear Calder's signature" (complaint ¶ 11, NYSCEF Doc. No. 5). After evaluating works such as the one plaintiff possesses, defendant The Alexander and Louisa Calder Foundation (the "Foundation") determines whether that work will receive a registration number. Plaintiff contends these registration numbers are an "essential" indicator of that work's marketability (*see id.* ¶ 16). Defendant Alexander S. C. Rower ("Rower") is Calder's grandson and, purportedly, the executive director of the Foundation (*id.* ¶ 5; answer ¶ 5).

The parties have a long history of litigation relating to plaintiff's efforts to obtain a registration number for the Work, which eventually lead to a settlement agreement whereby the Foundation issued three registration numbers (for the full-scale sculpture, the two-thirds scale sculpture, and the maquette) and a description of those works prepared by the Foundation (*see* aff of William F. Cavanaugh, Jr. ["Cavanaugh aff"], exhibit 7 [the "Settlement Description"]).

Plaintiff retained Luis Cancel as an agent, who in turn approached several organizations to offer the Work for sale. One of these organizations was Phillips Auction House ("Phillips"), who during a March 24, 2016 teleconference with Cancel, agreed to accept the maquette on consignment to sell at an upcoming auction set for May 2016 (*see* complaint ¶ 62). In the same teleconference, representatives for Phillips indicated that they planned to contact either the Foundation or Rower himself in the following days to, among other things, "make sure that we're . . . all on the same page" (*see* aff of Luis Cancel ["Cancel aff"], exhibit D at 2). A few days later, Phillips informed Cancel that it would no longer accept the consignment. Plaintiff subsequently brought this action asserting three causes of action against defendants: (1) tortious interference with contract and fiduciary relation (relating to the maquette), (2) interference with prospective advantage (relating to the Work as a whole), and (3) product disparagement (relating to the maquette).

Prior to the filing of the complaint in this action, Judge Kornreich authorized pre-complaint discovery limited to documents and e-mails sent between Phillips and the Foundation in regard to the maquette and depositions of three key individuals (*see* Cavanaugh aff, exhibit 9). Following completion of that discovery, defendants now move for summary judgment on all claims.

II. DISCUSSION

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof

in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see Zuckerman v City of New York, supra; Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259 [1970]).

Lastly, "[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin*, 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

Defendants have made a prima facie for dismissal with respect to all causes of action. Specifically, the depositions of Alexis Marotta of the Foundation and Rachel Rosan of Phillips both describe a roughly five-minute conversation between the two that occurred shortly after representatives from Phillips indicated to Cancel that they would contact the Foundation regarding the Work (*see* Cavanaugh aff, exhibit 11 at 25, exhibit 12 at 24-25). Rosan testified that the two "spoke about the work, and she told me that the work had been viewed before, and she read me, I believe she read me the cataloging for the work which determined that they were recreations" and that the two "did discuss the fact that an 'A' number represented an application number and not an authentication number" (*id.*, exhibit 11 at 25). Marotta's full testimony of the conversation is as follows:

> "[Rosan] indicated that they were approached. They were offered the maquette, and she had indicated that the work had a litigious past. So I wanted to just be sure that she knew that there were not issues at the moment and the most recent lawsuit had been settled, and in that settlement there was a description, a written description produced. So I talked to her just to make sure that she had that document and she had an accurate description of the works that were being offered. And, at that point she had a question because it came up that the works were recreations which is not something that's normally described when work has an application number and it's been issued, too, previously,

> and I confirmed to her that the description that she had was accurate, and she kind of expressed some hesitation that they were recreations, and I was sure to tell her. I couldn't advise her further than what the description – th[an] the description she had in front of her, and then I did let her know that we have examinations coming up, if it's something that we should be expecting, to just let us know."

(*id.*, exhibit 12 at 24-25). Shortly before this conversation, Rosan sent a brief email reaching out to Marotta (*id.*, exhibit 10). No evidence of a separate communication between defendants and Phillips, apart from the forgoing, was produced (*see also id.*, exhibit 13 [disposition testimony of RowerJ).

Additionally, the affidavit of John McCord of Phillips attests to the reasoning behind Phillips' decision not to proceed with the consignment. In relevant part, McCord states that:

> "11. In the correspondence that I received from Luis Cancel, the artwork in question was described as a 'recreation' and not a work of art by Alexander Calder, along with two other works of the same title, each in two larger scales (2/3 scale and full scale). This correspondence describes in detail that Alexander Calder authorized recreations of these two large scale stage sets. It does not specify that these recreations are intended to be artworks by Calder, and it specifically omits any mention of Calder authorizing the production of the Maquette. The correspondence then specifies that an assistant at Perls Gallery, Walter Hatke, was hired by the Philadelphia Composer's Forum to make a tabletop model of the stage set. According to the correspondence, Calder was to 'review the décor' with Joel Thorme, however the artist passed away before doing this.
> 12. The above description of the history of this recreated Maquette, provided by Luis Cancel, implies that this is not an artwork by Calder, and is instead what I would describe as 'in the style of' or 'after' the artist. Items of this kind have no significant resale value for Phillips, therefore we decided internally to not proceed with the consignment."

(*Id.*, exhibit 14 ¶¶ 11-12).

The forgoing establishes a prima facie showing of defendants' non-interference. Accordingly, defendants have met their initial burden with respect to the first two causes of action. Additionally, because product disparagement requires proof of a false statement (*see Newport Serv. & Leasing, Inc. v Meadowbrook Distrib. Corp.*, 18 AD3d 454, 455 [2d Dept 2005]), defendants have also met their burden with respect to the third cause of action.

Plaintiff did not address his claim for product disparagement in his opposition papers and, thus, has abandoned that claim (*see e.g. Musillo v Marist Coll.*, 306 AD2d 782, 784 [3d Dept 2003]).

With respect to the two remaining claims, plaintiff relies on the timing of Phillips' withdrawal, Luis Cancel's affidavit, and transcripts of Cancel's teleconferences with Phillips, all in an effort to raise credibility issues. In short, plaintiff attempts to show that Phillips' stated reasons for their withdrawal are pretextual, since Phillips received no additional information regarding the Work between the time it first expressed interest and when it withdrew. Plaintiff contends that the true reason Phillips withdrew was due to defendants' interference and that Phillips is concealing this fact for fear of the power of the Foundation and Rower have over those who wish to sell Calder's works.

The evidence on which plaintiff relies do not raise issues of credibility. Rather, it adds support to McCord's description of the reasoning behind Phillips' decision to withdraw. Plaintiff contends that "nothing was revealed [after Phillips expressed interest] that had not been known earlier" (affirmation of Richard A. Altman ¶ 14), but Cancel's affidavit and supporting exhibits demonstrate otherwise. Cancel attests that, in marketing the Work, he "prepared a detailed a comprehensive brochure on the [Work] and [its] history" (aff of Luis Cancel ["Cancel aff"] ¶ 4; *see also id.*, exhibit A [the "Brochure"]). The Brochure describes the history behind the Work's fabrication, paraphrasing language from the Settlement Description, but not mirroring that language. Critically, the Settlement Description contains information not disclosed in the brochure, such as the fact that the recreations were made "from July through October 1976, while Calder was in France" and that "Calder was scheduled to review the decor with Joel Thome in New York in November of 1976" but that on "the day of [the] appointment, Thome received news of Calder's death and the scheduled review never occurred." As to these important details, the Brochure does not reveal that Calder was abroad during the period of fabrication, and states only that "Mr. Thome was scheduled to take Calder to be photographed with the sets on November 11, 1976," omitting that the appointment was also to be Calder's opportunity to review the Work (Brochure at 5). The Settlement Description was not conveyed to Phillips until, in the March 24, 2016 teleconference, when Cancel read the description at McCord's request (*see* Cancel aff, exhibit D at 2-3). Immediately after Cancel finished reading the Settlement Description, McCord stated "So, it's one thing; so are they saying that . . . so the maquette was not made by – the maquette was made by . . . somebody . . . else . . ." (*id.* at 3). Shortly thereafter, McCord asked "did he see it? Was he ever able to actually see the maquette or the stage sets?" to which Cancel replied "I do not know the answer to that question" (*id.* at 3).

The call finished with Cancel stating he would forward the email containing the Settlement Description to Phillips (*id.* at 8-9).

Later, after Phillips withdrew, representatives from Phillips expressed the same concerns as being the basis for the withdrawal. McCord, in a March 29, 2016 call with Cancel, stated that "we can't stand behind it as, as a Calder given the language that, that you supplied us in the, these emails," and later in the same call, that:

> "I'm really focusing on the correspondence that you supplied us with from the Calder Foundation – which is really what I, what we will have to go from. And that's stating that it's a recreated work made by somebody at the gallery and not by Alexander Calder, is what we're . . . is really the sticking point"

(Cancel aff ¶ 13). On a March 30, 2016 call with Cancel, Arnold Lehman of Phillips expressed that "one of the questions is – how much was he involved in this? Did he actually ever see it – because of when he died?" (*id.* ¶ 16).[1]

Although Cancel states in his affidavit that it "was obvious to [him] in these last two conversations that both Mr. Lehman and Mr. McCord were not telling me the complete truth about what had happened," his offered basis for this conclusion is that "[t]here was nothing concealed from Phillips at any time" (Cancel aff ¶ 17). As noted above, that basis is not supported by the record. Moreover, this conclusion amounts to inadmissible opinion evidence which may not be relied upon in opposition to defendants' motion (*see Grey v United Leasing Inc.*, 91 AD2d 932, 933 [1st Dept 1983] [permitting witness to give opinion on key liability issue was prejudicial error; "the general rule of law is that witnesses must state facts within their knowledge and not give their opinions or their inferences . . . The primary reason for the exclusion of opinion evidence is that it invades the province of the jurors as triers of facts"]).

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[1] In a call with Cancel on the preceding day, Lehman also stated that "it's not John who's taking the narrow view. I mean, it is – the conversation that we had with the Foundation, I mean they're taking the narrow view and are expressing that to John" (Cancel aff ¶ 15). However, nothing in this excerpt, or the other transcripts show that Lehman is referring to a conversation, other than the one described above, or to defendants having conveyed information or opinions beyond what was expressed in the Settlement Description.

For a claim of tortious interference with a contract, plaintiff must show defendants' intentional procurement of the third-party's breach without justification (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]); *Kronos, Inc. v AVX Corp.*, 81 NY2d 90 [1993]). For a claim of tortious interference with prospective business relations, plaintiff must show that defendants "act[ed] with the sole purpose of harming the plaintiff or us[ed] wrongful means (*Advanced Global Tech. LLC v Sirius Satellite Radio, Inc.*, 15 Misc 3d 776, 779 [Sup Ct, NY County 2007] *aff'd as mod.* 44 AD3d 317 [1st Dept 2007]). Accordingly, even if Lehman's comment could be read as suggesting that the Foundation gave an interpretation of the Settlement Description, it would not demonstrate defendants' interference sufficient to support either of the remaining causes of action.

For the same reason, plaintiff may not rely on Cancel's assertions that "Mr. Rower and the Foundation had killed the deal" (Cancel aff ¶ 17).

Plaintiff also opposes the motion on the basis that he should be allowed further discovery under CPLR 3212 (f) (*see* mem of law in opposition at 1-2). However, plaintiff fails to identify what, if any, discovery might enable plaintiff to successfully oppose the motion. Thus, this argument as well is insufficient to satisfy plaintiff's burden (*see e.g. Rodriguez v Gutierrez*, 138 AD3d 964, 968 [2d Dept 2016] [to "defeat a motion for summary judgment based on outstanding discovery, it is incumbent upon the opposing party to provide an evidentiary basis to suggest that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were in the exclusive knowledge and control of the moving party"]).

For the forgoing reasons, it is hereby

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed in its entirety with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: **May 9, 2018**

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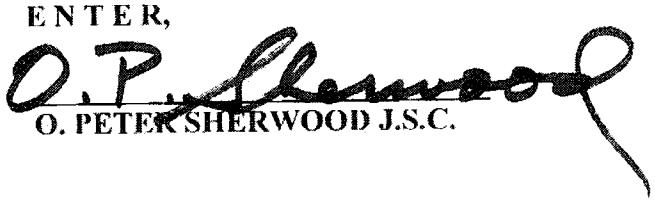

O. PETER SHERWOOD J.S.C.