

**Mayor Gallery Ltd v Agnes Martin Catalogue
Raisonne LLC**

2018 NY Slip Op 32161(U)

August 30, 2018

Supreme Court, New York County

Docket Number: 655489/2016

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL PART 48

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 THE MAYOR GALLERY LTD,

Plaintiff,

- v -

THE AGNES MARTIN CATALOGUE RAISONNE LLC, ARNOLD
 GLIMCHER, TIFFANY BELL, MEMBERS OF THE
 AUTHENTICATION COMMITTEE OF THE AGNES MARTIN
 CATALOGUE RAISONNE, JOHN DOE, JOHN DOE, JANE DOE,
 JANE DOE, JANE DOE,

Defendants.
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INDEX NO. 655489/2016

MOTION DATE 05/02/2018

MOTION SEQ. NO. 003

DECISION AND ORDER

MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 72, 73, 74, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91
 were read on this motion to/for AMEND/MODIFY DECISION/ORDER/JUDGMENT

Plaintiff moves, pursuant to CPLR 2221, for leave to reargue the part of this court's April 3, 2018 decision and order (Prior Order)¹ which granted defendants' request for attorneys' fees, costs, and expenses, and which severed and referred to a special referee the issue of the reasonable value of those fees, costs, and expenses. Plaintiff requests that, upon reargument, the court: (1) modify the Prior Order "to limit defendants [sic] recovery of Legal Fees solely to those incurred in connection with defending against the contract claims advanced in the First Amended Complaint, thereby excluding from the recovery, [sic] all Legal Fees incurred by defendants in connection with the tort claims"; and (2) "[c]larify the [Prior] Order so as to bar

¹ The April 3, 2018 decision and order granted defendants' motion to dismiss plaintiff's first amended complaint, motion sequence number 001 (see NYSCEF Doc. No. 66).

defendants from recovering Legal Fees incurred relating to defendants' activities to recover Legal Fees, *i.e.*, barring an award of 'fees-on-fees.' "

The court refers to, and incorporates, the Prior Order, in which the factual and procedural background for this action is set forth in detail.

In defendants' memorandum of law in support of their motion to dismiss the first amended complaint (FAC), they requested an award of legal fees pursuant to paragraphs 9 and 10 of the Examination Agreements entered variously by plaintiff and the four art collectors to whom plaintiff sold certain art works. In its memorandum of law in opposition to the motion to dismiss, plaintiff responded that the "request for an immediate award of attorneys' fees, based on ¶ 10 of the Examination Agreement" should be denied because "the only Examination Agreement signed by and therefore binding on plaintiff relates to *Day & Night*. Therefore, all claims for attorneys' fees arising from work performed by attorneys on all the tort causes of action . . . are not available against plaintiff." Plaintiff further responded that "there are issues of fact relating to whether the attorneys' fee provision is unconscionable and contrary to public policy and therefore unenforceable, resolution of which cannot be determined on defendants' motion to dismiss."²

In Part III of the Prior Order, the court made the following determination as to the request for attorneys' fees:

² In further support of this prong of its opposition to an award of attorneys' fees, plaintiff referred to pages 10-12 of the same memorandum, in which it argued, in pertinent part, that paragraph 10 of the Examination Agreement is substantively unconscionable inasmuch as that provision "requires payment of defendants' fees – whether or not defendant [sic] prevails on the claim" (emphasis in original).

"Plaintiff agreed, as clearly provided in Plaintiff's [Examination] Agreement: 'In the event [that plaintiff] make[s] a legal claim of any kind against AMCR and/or the AMCR Companies and Personnel, [plaintiff] will be fully responsible for payment of any and all reasonable legal fees, costs, and expenses . . . of AMCR and the AMCR Companies and Personnel' (ex. B, ¶ 10). Contract provisions such as this are enforceable in New York (*see generally Breed, Abbott & Morgan v Hulko*, 139 AD2d 71 [1st Dept 1988], *aff'd* 74 NY2d 686 [1989])" (NYSCEF Doc. No. 66 at 24 [first alteration added]).

On that basis, the court granted defendants' request, and severed and referred "[t]he issue of reasonable attorneys' fees" (*id.*).

Discussion

As an initial matter, although defendants' do not raise this issue in their opposition, plaintiff's motion for leave to reargue is procedurally defective in that plaintiff failed to attach a copy of the Prior Order or the papers submitted in connection with the underlying motion (defendants' motion to dismiss, motion sequence number 001) (CPLR 2214 [c]; *Biscone v JetBlue Airways Corp.*, 103 AD3d 158, 179-180 [2d Dept 2012] [holding that denial of motions to renew and reargue is appropriate in e-filing actions where movant fails to submit the underlying motion papers], *lv dismissed* 20 NY3d 1084 [2013]). Indeed, plaintiff does not submit even a party affidavit or attorney affirmation with this motion to reargue.³ Accordingly, the court exercises its discretion to deny plaintiff's motion to reargue on the basis that its supporting papers are insufficient,

³ Apart from its attorney's memoranda of law, the sole document submitted by plaintiff in support of this motion is an exhibit denoted "Copy of Contract" in the electronic filing system (*see* NYSCEF Doc. No. 73).

particularly because the underlying motion papers in this action were heavily redacted as electronically filed, and the court no longer retains the unredacted chamber's copies (CPLR 2214 [c]).

Furthermore, there is no basis upon which leave to reargue should be granted. A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221 [d] [2]). The asserted misapprehensions of fact or law claimed by plaintiff on this motion are that the court misconstrued paragraph 10 of the Examination Agreement as entitling defendants to "open-ended recovery of attorneys' fees"; however, the court did not overlook plaintiff's arguments in the underlying motion. Moreover, plaintiff's assertion that the court overlooked plaintiff's arguments in the underlying motion because the court was "misled by defendants [sic] failure to include the opening two sentences of ¶ 10 in their [memorandum of law in support of the underlying motion]" is baseless; the court considered every sentence of every provision in the Examination Agreements, and the court's reference to and quote from paragraph 10 in connection to the attorneys' fees ruling specifically cites exhibit B to plaintiff's FAC, not to any memorandum of defendants.

Contrary to plaintiff's assertions in this motion, the court, after consideration of each argument advanced by the parties, granted defendants' request for attorneys' fees under paragraph 10 of plaintiff's Examination Agreement. There were no matters of fact or law overlooked or misapprehended; the court severed, and referred to a Special Referee to hear and report, the issues of the reasonable value of attorneys' fees, costs,

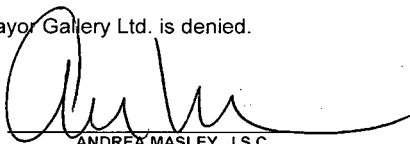
and expenses to which defendants are entitled under paragraph 10 of the plaintiff's Examination Agreement.

Plaintiff's further contention that, upon reargument, the court "should clarify [the Prior] Order to direct the Special Referee to exclude from any fee award time expended by defendants' seeking fees, i.e., 'fees-on-fees,' " is not appropriate for a motion to reargue as the issue of fees-on-fees is raised for the first time in this motion (see *Foley v Roche*, 68 AD2d 558, 567-568 [1st Dept 1979]).

Finally, to the extent that the issues raised in this motion were severed and referred to a Special Referee, those matters should be addressed, under CPLR 3104 (c), in the proceedings before the Special Referee.

Accordingly, it is

ORDERED that the motion of plaintiff The Mayor Gallery Ltd. is denied.



ANDREA MASLEY, J.S.C.

8/30/2018
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: