SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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BOYD SULLIVAN

Plaintiff,

- v -

CHRISTIE'S FINE ART STORAGE SERVICES, INC.,

Defendant.

INDEX NO. 160733/2014

MOTION DATE 08/13/2018

MOTION SEQ. NO. 003

DECISION AND ORDER

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HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 91
were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

In this action alleging, among other things, breach of contract, defendant Christie's judgment in its favor dismissing the lost profits claim of plaintiff Boyd Sullivan in the amount of $10,655,000 and declaring plaintiff's recoverable damages to be no more than $37,000.

In his complaint Sullivan alleges that CFASS materially breached the written Managed Storage Agreement and Loss Damage Liability Acceptance Agreements executed by the parties in May and October 2012. Pursuant to those agreements, CFASS, as bailee, agreed to store three pieces of original watercolor works of art owned by Sullivan and created by nonparty Alberto Vargas, entitled "Mara Corday or Pin-Up Girl,"

"Beauty and the Beast," formerly known as "Ziegfeld Girl with Mask," and "Miss America

Sullivan purchased the works of art in September 2012 for a combined purchase

e. Conte and Sullivan formed a joint venture to produce and market limited-edition high-quality reproductions of the original works of art and sell them to the public. The joint venture is memorialized in a written Deal Memo, a Contract to Create a Limited Edition for each artwork, and a Contract for the Sale of Artwork for each artwork, executed in 2012 by Sullivan and Conte.

Sullivan shipped the works of art to a CFASS warehouse located in Brooklyn, New York, near the East River in an area designated as a Flood Zone A area. The works of art were received at the warehouse on October 10, 2012. On October 29, 2012, Superstorm Sandy hit the New York City metropolitan area, damaging the CFASS warehouse and some of the art stored inside.

Sullivan alleges that CFASS breached the Managed Storage Agreement and Loss Damage Liability Acceptance Agreements by negligently failing properly to store and protect the works of art from Superstorm Sandy and failing to inspect the works of art and mitigate damage after the storm passed. Sullivan further alleges that, as a result, the "Beauty and the Beast" and "Miss America" pieces sustained serious and irreparable damage. The "Mara Corday" piece was not damaged.

On those allegations, Sullivan asserts in the complaint causes of action for negligence, gross negligence, negligent misrepresentation, breach of contract/bailment, and breach of contract/non-performance. He seeks to recover actual and compensatory damages in the amount of $11,055,000, including profits lost because the damaged works of art can no longer be reproduced by the joint venture, together with punitive damages. Sullivan also seeks to void the Managed Storage Agreement and Loss Damage Liability Acceptance Agreements.

In the answer, CFASS denied all allegations of material wrongdoing and asserted affirmative defenses, including that Sullivan's alleged damages cannot exceed the $200,000 property value that Sullivan declared on the relevant Loss Damage Liability Acceptance Agreements, and that the consequential damages Sullivan seeks are not recoverable under the terms of the relevant agreements and applicable law.

On this motion CFASS first contends that Sullivan lacks standing to assert a demand for lost profits because he does not hold the copyright to the works of art. CFASS next contends that Sullivan may not recover lost damages on his claims.

In opposition, Sullivan contends that CFASS has waived any affirmative defense based on lack of standing and that, in any event, he does have standing. Sullivan also contends that there are multiple genuine triable issues of material fact regarding the value of the damaged works of art sufficient to preclude partial summary judgment as to damages.

Standing

To defeat a defendant's lack-of-standing argument, the plaintiff need not "affirmatively establish its standing, but only to raise a triable issue of fact as to its standing" (*DLJ Mtge. Capital v Mahadeo*, 166 AD3d 512, 513 [1st Dept 2018], citing *Deutsche Bank Trust Co. Ams. v Vitellas,* 131 AD3d 52, 59-60 [2d Dept 2015]).

Here, Sullivan has demonstrated his standing to sue, by showing his ownership of the damaged works of art, his execution of the Managed Storage Agreement, and his membership in the joint venture. Contrary to CFASS's contention, the fact that Conte retained ownership of the relevant copyrights to the works of art (*see* Contracts for the Sale of an Artwork ¶ 7; Contracts to Create a Limited Edition ¶ 3) does not divest Sullivan of standing. Prior to the date of loss, Conte agreed to license the use of the relevant copyrights to the Joint-Tenancy Vargas Limited Edition Print Business entity, of which Sullivan is a 50% partner (*see* Deal Memo at 1).

The Deal Memo further provides that "the terms of the [copyright] license shall be drawn by [Conte's] Licensing Legal Counsel once the 4 final images for the first run are finalized by the Equity Partners" (Deal Memo at 1).[1] Contrary to CFASS's contention, that language does not divest Sullivan of standing as a matter of law, but merely raises triable issues regarding his standing to sue for lost profits.

[1] The four final images are listed in the Deal Memo as, "Beauty and the Beast" and "Miss Universe," to be contributed by Sullivan, and "Ziegfeld Girl" and "Girl in lack Bathing Suit with Phone," to be contributed by Conte.

Lost Profits

CFASS contends that, pursuant to the parties agreements, Sullivan may not recover lost profits as damages. In opposition, Sullivan contends that triable issues exist sufficient to preclude summary judgment on the damages issue.

On a breach of contract claim, a party "may not recover damages for lost profits unless they were within the contemplation of the parties at the time the contract was entered into and are capable of measurement with reasonable certainty (*Ashland Mgt., Inc. v Janien*, 82 NY2d 395, 403 [1993]). "The law . . . requires only that damages be capable of measurement based upon known reliable factors without undue speculation" (*id.*, citing Restatement [Second] of Contracts § 352). "[T]he damages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach" (*Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986]).

Additionally, where a contract is silent on the subject of lost profits, "courts, employing a common sense approach, must determine what the parties intended by considering the nature, purpose and particular circumstances of the contract known by the parties . . . as well as what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made" (*Awards.com v Kinko's, Inc.*, 42 AD3d 178, 183-184 [1st Dept 2007] [internal quotation marks omitted], citing *Kenford Co. v County of Erie*, 73 NY2d 312, 319 [1989]).

Here, the terms and conditions clauses set forth in the Limited Damages Liability Acceptance Agreements for the works of art do not directly discuss lost profits, but the relevant language show that the lost profits damages was not contemplated at the time of the agreements' execution. Specifically, the terms and conditions clauses state that the parties agreed that "CFASS' liability for loss or damage, by any cause, including negligence, is limited to the actual cash value of lost or damaged property, but in no event may the actual cash value of the property subject to a given claim exceed the declared value" (Limited Damages Liability Acceptance Agreement terms & conditions ¶ 3). This language plainly shows an intent to disclaim recovery of lost profits.

Further, the evidence Sullivan submitted on this motion does not raise any triable issues regarding whether CFASS knew or had any basis upon which to reasonably contemplate that the works of art were intended for reproduction, marketing, and sale with an alleged net profit of more than $10 million. Although the Managed Storage Agreement's limitation of liability provision was held unenforceable by this court's order dated March 2, 2016, nowhere in that Agreement do the parties reference the joint venture or that, in the Limited Damages Liability Acceptance Agreements, Sullivan advised CFASS that the works of art had a maximum value of $200,000 or more.[2]

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[2] Whether the parties orally discussed the existence of Sullivan's joint venture with Conte is irrelevant. The Limited Damages Liability Acceptance Agreements set forth merger clauses that provide, in relevant part, that "[t]his Agreement embodies the entire understanding of the parties and supersedes all prior agreements between the parties. There are no promises, terms, conditions or obligations, oral or written, express or implied, relating to the subject matter of this Agreement other than those contained in this Agreement" (Limited Damages Liability Acceptance Agreements ¶ 29).

Finally, the evidence submitted demonstrates that Sullivan's potential consequential damages are not capable of measurement with reasonable certainty. Sullivan testified that he was not in the businesses of publishing, promoting works of art, distributing works of art, or marketing limited editions (*see* Sullivan Oct. 25, 2017 dep tr at 31, lines 5-15). He testified that he had no experience in marketing Vargas works of art or in a project like the joint venture and had not earned any income from any sources of marketing, purchasing, or trading works of art (*see id*. at 18, lines 7-16; at 111, lines 16-24). He also testified that he and Conte did not have a firm business or marketing plan, although he did have marketing ideas for the subject works of art and other Vargas pieces (*see id*. at 117, lines 16 to 122, line 5). Sullivan testified that he and Conte had no pre-sales and had not approached any collectors with the news of the joint venture (*see id*. at 123, lines 5-10).[3]

The joint venture between Sullivan and Conte is a new business, created in 2012, the same year in which the bailment occurred, and has no track record of previous profits. When a new business venture is involved, "a stricter standard is imposed for the obvious reason that there does not exist a reasonable basis of experience upon which to estimate lost profits with the requisite degree of reasonable certainty" (*Kenford Co. v County of*

[3] In addition, the record is devoid of any evidence that Conte has any experience in reproducing or marketing prints of artwork created by Vargas or any other artist. While there is evidence that, in 2011, Conte contracted with nonparty The Beanstalk Group (UK) Limited (Beanstalk), an established marketing company, to market a selection of Vargas' images in the wearing apparel categories, that agreement was terminated after only nine months and yielded only $1,800 in gross income (*see* Letter Agreement between Beanstalk and Conte).

Erie, 67 NY2d at 261; *Digital Broadcast Corp. v Ladenburg, Thalmann & Co., Inc.*, 63 AD3d 647, 648 [1st Dept 2009]).

Sullivan's sworn testimony also demonstrates that the future of the joint venture is questionable, even had the works of art not been damaged. He testified that "[o]ther than prints that had been done by the [Vargas] family years ago, this process is at a standstill" (*id*. at 15, lines 23-24) because he was unable to fund the printmaking and marketing process and because he and Conte have "moved apart in terms of our personal lives, in terms of the endeavors that we're in" (*id*. at 16, lines 1-15; at 43, line 14 to 46, line 8). Sullivan also testified that, "without [Conte's] presence in doing the things together, I'm not able to" invest the necessary time (*id*. at 44, lines 8-12).

s show that the parties did not contemplate lost profits as a measure of damages, and Sullivan's demand for lost profits is too speculative and incapable of being proven with any reasonable certainty, that branch of

motion for partial summary judgment dismissing the demand for lost profits is granted.

For the same reasons, partial summary judgment on Sullivan's lost profits demands made in connection with the gross negligence and breach of bailment claims is granted in favor of CFASS and those demands are dismissed.

Next, CFASS seeks to cap the recoverable fair market value of the damaged artworks at $37,000, the amount Sullivan paid Conte for the artworks, or at $200,000, the value declared by Sullivan and the amount CFASS that previously offered to pay Sullivan in settlement of the dispute.

In opposition, Sullivan contends that, at minimum, he is entitled to the combined appraised value of $400,000 and relies primarily on the appraisal report issued on April 13, 2018 by his expert witness, Tony Pernicone, ASA, owner of Avanti Fine Arts, Dealers, Appraisers and Auctioneers (the Pernicone report).

The standard measure of damages when property is damaged, but not destroyed, "is the difference between the market value before the damage and the market value after" (*Interested Underwriters at Lloyds v Third Holding Corp.*, 88 AD2d 863, 863 [1st Dept 1982]). "Where property is totally destroyed, the measure of damages is its reasonable market value immediately before destruction" (*Reed v Cornell Univ.*, 138 AD3d 816, 818 [2d Dept 2016] [internal quotation marks and citation omitted]).

Upon review, the Pernicone report is of little value in determining the value of the works of art, both before and after the damage. Pernicone's finding of a $400,000 combined insurance replacement value lacks proper evidentiary foundation and, instead, is based on mere speculation and conjecture. For example, in the Pernicone report, which was prepared solely for insurance valuation purposes, Pernicone admits with respect to both subject works of art that he "did not personally inspect the subject work of [the]

appraisal," but that "[i]t is his understanding that the art was decimated, and for all purposes, destroyed" (*see* Pernicone report at 12). Pernicone further admits that he "cannot attest to the condition of the work, personally . . . [but has] been told the art was in excellent condition prior to the damage suffered during storage" (*id.*). He also admits that "[o]bviously without physically seeing the work, the [value] quotes are subjective" (*id.* at 22).

Similarly, the expert opinion proffered by Simeon Lipman, a pop culture specialist and appraiser, is of little probative value. In his February 8, 2013 email to Catherine Parker, AVP, a Christie's account manager, Lipman opines that one of the pieces sustained more damage than the other, and that both could be restored, although not to their original value. However, Lipman does not provide any basis for his conclusions.

Despite CFASS's argument, I cannot find, as a matter of law, that the fair market value of the works of art is equal the combined $37,000 that Sullivan paid Conte for the works of art. Sullivan testified that the purchase prices he paid Conte were well below fair market value and considered the consulting and financing services that Sullivan expected to provide to Conte regarding the marketing of the prints (*see* Sullivan dep tr at 56, line 19 to 58, line 4). This testimony raises an issue of fact as to the fair market value of the works of art sufficient to defeat summary judgment on the issue.

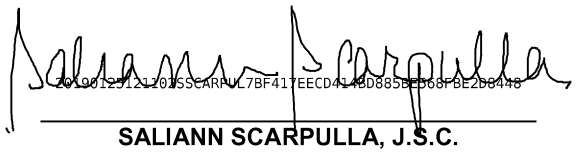
In accordance with the foregoing, it is

ORDERED that the motion of defendant Christies Fine Art Storage Services, Inc. is granted to the extent that partial summary judgment on the lost profits demands

asserted in all the causes of action is granted in favor of defendant and against plaintiff Boyd Sullivan; and it is further

ORDERED that the lost profits demands are severed and dismissed, and the balance of the claims shall continue; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 208 at 60 Centre Street on February 27, 2019, at 2:15 p.m.



1/25/2019
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE