

Sotheby's, Inc v Nature Morte LLC

2019 NY Slip Op 32956(U)

October 7, 2019

Supreme Court, New York County

Docket Number: 655636/2017

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

SOTHEBY'S, INC,

Plaintiff,

- v -

NATURE MORTE LLC, ANATOLE SHAGALOV,

Defendant.

-----X

INDEX NO. 655636/2017

MOTION DATE 04/30/2019, 05/09/2019

MOTION SEQ. NO. 014 015

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 014) 278, 279, 280, 281, 282, 283, 284, 290, 292, 293, 294, 295, 296, 297, 298, 299

were read on this motion to/for STRIKE CASE FROM CALENDAR

The following e-filed documents, listed by NYSCEF document number (Motion 015) 285, 286, 287, 288, 289, 291, 300, 301, 302, 303, 304, 305, 306, 307, 309, 310, 311, 312

were read on this motion to/for AMEND CAPTION/PLEADINGS

Upon the foregoing documents and for the reasons set forth on the record (10/3/2019), (1) Nature Morte LLC and Anatole Shagalov's (the Defendants) motion (Mtn. Seq. 014) to strike the note of issue is denied except to the extent that the Defendants may serve a demand for trial by jury within 7 days of this decision and order and Sotheby's Inc. (the Plaintiffs) shall provide an affidavit to Defendants again affirming that it does not have an unredacted copy of the requested document and that upon information and belief third parties Max Lang and Lio Malco also do not have any such unredacted copy within 7 days of this decision and order and (2) the Defendants' motion to amend their answer (Mtn. Seq. 015) is denied.

The Relevant Facts and Circumstances

The Plaintiff commenced this action on August 31, 2017 for breach of contract and an account stated (NYSCEF Doc. No. 1, ¶¶ 17-39). The Plaintiff alleges that the Defendants failed to pay for a work of fine art after placing the highest bid for the work at auction (*id.*, ¶¶ 7-11).

Pursuant to a so-ordered stipulation, dated March 13, 2019, the parties agreed that the end of fact disclosure would occur within 14 days of March 13, 2019 – *i.e.*, by March 27, 2019 (NYSCEF Doc. No. 276). The court also ordered the Plaintiff to file note of issue (**NOI**) by April 30, 2019. To the extent that the Defendants indicated that they intended to file an amended answer, the court instructed the Defendants to file a motion requesting leave to file such amended answer on or before April 3, 2019 (NYSCEF Doc. No. 300, ¶ 7).

When the time period elapsed for Defendants to file a motion seeking leave to file the amended answer, inasmuch as discovery was complete, and in accordance with the court's prior order, the Plaintiff filed NOI on April 8, 2019 and requested a trial without jury (NYSCEF Doc. No. 277). The Defendants did not file a jury demand within 15 days after service of the NOI, as per CPLR § 4102 (a). The Plaintiff then appeared at the agreed upon April 25, 2019 status conference. The Defendants did not appear and neither notified the Plaintiff, nor the court that the Defendants could not appear in advance, at the time, or even after the time, of such scheduled status conference (NYSCEF Doc. No. 300, ¶ 10). As a courtesy, the court adjourned the status conference until June 11, 2019 (NYSECF Doc. No. 308).

On April 29, 2019, the Defendants filed their motion to strike the NOI and extend the time to serve a demand for jury trial (Mtn. Seq. 014). Notwithstanding the fact that the notice of motion (Mtn. Seq. 014) did not request leave to file an amended answer, the Defendants requested leave to file an amended answer.

Motion Sequence 014 (Defendants' Motion to Strike the Note of Issue and Extend Their Time to Serve a Demand for Trial by Jury)

The Defendants argue that the NOI should be stricken because certain discovery remains outstanding. More specifically, the Defendants seek an unredacted copy of a certain document (NYSCEF Doc. No. 281). The request does not provide a basis to vacate the note of issue. This document was discussed at the March 13, 2019 conference. At that time, the Plaintiff advised that it did not have an unredacted copy of the document but would ask third parties, Mr. Lang and Mr. Malco, whether they had any such unredacted copy. In opposition to the motion, the Plaintiff produced email correspondence unequivocally demonstrating that it requested the document and that Mr. Lang and Mr. Malco indicated that they did not have an unredacted copy (NYSCEF Doc. No. 306). In an abundance of caution, the Plaintiff is nevertheless directed to provide the Defendants with an affidavit attesting to the same within 7 days of this decision and order. The motion is otherwise denied except that Defendants' may serve a demand for trial by jury within 7 days of this decision. Failure to file such demand shall result in waiver. For the avoidance of doubt, to the extent that the notice of motion does not request leave to file an amended answer, that request is denied in this motion.

Motion Sequence 015 (Defendants' Motion to Amend their Answer)

The Defendants also move to amend their answer to add (i) the affirmative defense of unclean hands and (ii) counterclaims for violation of New York General Business Law § 349 and rescission/fraudulent inducement.

Leave to amend under CPLR § 3025 (b) is committed to the sound discretion of the trial court (*Colon v Citicorp Inv. Servs.*, 283 AD2d 193, 193 [1st Dept 2001], citing *Edenwald Contr. Co. v New York*, 60 NY2d 957, 959 [1983]). Leave to amend pleadings should be freely given unless there is prejudice or surprise resulting from the delay to the opposing party or if the proposed amendment is “palpably improper or insufficient as a matter of law” (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]).

As an initial matter, the Defendants purported to attach certain exhibits in support of its motion for leave to amend their answer (*see* NYSCEF Doc. No. 289). However, the Defendants did not timely serve these exhibits on the Plaintiff. Although the Plaintiff followed up with requests for the exhibits in two emails dated May 10, 2019 and May 28, 2019 (NYSCEF Doc. No. 301), the exhibits were not provided before the Plaintiff filed its opposition papers. The Defendants also failed to bring a motion to seal said exhibits such that these documents do not form part of the record before the court. Under these circumstances, the Defendants' motion to amend their answer is denied for failure to serve supporting documents pursuant to CPLR § 2214(b) (*see Betke v Archwood Estates, Inc.*, 266 AD2d 328, 328-329 [2d Dept 1999] [concluding that the court properly denied plaintiff's amended motion because it was not served with supporting documents]).

In addition, the Defendants' motion is also denied because its proposed amendments are palpably improper and insufficient as a matter of law. The Defendants seek to add an affirmative defense of unclean hands. However, the equitable defense of unclean hands cannot apply to this action which is exclusively for money damages (*see Manshion Joho Ctr. Co., Ltd. v Manshion Joho Ctr., Inc.*, 24 AD3d 189, 190 [1st Dept 2005]).

The Defendants also seek to assert a first counterclaim pursuant to GBL § 349 based on allegations that the Plaintiff concealed aspects of the art work provenance from the catalog description of the work offered to bidders at auction. A party who asserts a claim under GBL § 349 must allege “(1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice” (*City of NY v Smokes-Spirits.Com, Inc.*, 12 NY3d 616, 621 [2009]). The “gravamen” of such a complaint is consumer injury or harm to the public interest (*see Securitron Magnalock Corp. v Schnabolk*, 65 F3d 256, 264 [2d Cir 1995] [stating that the “critical question, then, is whether the matter affects the public interest in New York, not whether the suit is brought by a consumer or a competitor”]).

While the Defendants pled that they have suffered injury resulting from the Plaintiff's allegedly deceptive acts, there are no allegations that the wider public would be affected by the Plaintiff's behavior. Significantly, the transaction at issue concerns a specific item of art, which is unlikely to implicate the wider public interest. Thus, the Defendants' proposed counterclaim under GBL

§ 349 is without merit because there is no discernable harm to the public interest in this dispute between the Plaintiff auction house and bidder Defendants.

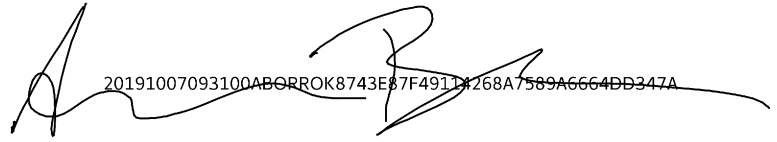
Finally, the Defendants seek to add a second counterclaim for rescission of contract and/or fraudulent inducement. As the Defendants allege fraud by omission, the complaint must also allege the existence of a fiduciary relationship that requires disclosure of the unknown facts (*see Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 42-43, 944 NYS2d 30 [1st Dept 2012]). However, the Defendants have not pled that any such fiduciary relationship exists between the parties in this case. Under these circumstances, the Defendants proposed counterclaim for fraudulent inducement fails. Consequently, the Defendants' motion to amend its answer is denied.

Accordingly, it is

ORDERED that defendants' motion to strike the note of issue (Mtn. Seq. 014) is denied except to the extent that the defendants are permitted to file a jury demand within 7 days of this decision and order and the plaintiff shall provide defendants an affidavit regarding outstanding discovery within 7 days of this decision and order; and it is further

ORDERED that defendants' motion to amend its answer (Mtn. Seq. 015) is denied; and it is further

ORDERED that the parties shall appear for a status conference at 60 Centre Street, Room 238 on November 19, 2019 at 11:30 am.


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10/7/2019
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: