

<b>Edelman Arts, Inc. v New York Art World, LLC</b>
2019 NY Slip Op 33604(U)
December 9, 2019
Supreme Court, New York County
Docket Number: 652017/2018
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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EDELMAN ARTS, INC.

Plaintiff,

- v -

NEW YORK ART WORLD, LLC D/B/A LIO MALCA,

Defendant.

INDEX NO. 652017/2018

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001,004

**DECISION + ORDER ON  
MOTION**

-----X

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 59, 63, 67, 99, 125

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124

were read on this motion for SUMMARY JUDGMENT.

This is a dispute over a failed multimillion-dollar art deal. Edelman Arts, Inc. (“Edelman Arts”) agreed to purchase a work of art from New York Art World, LLC d/b/a Lio Malca (“Malca”) and received a \$5 million invoice for the artwork. Edelman Arts refused to pay the invoice, however, explaining to Malca that the intended end-buyers of the art – to whom Edelman Arts had hoped to resell the work – no longer wanted to buy it. In Malca’s view, the invoice remained outstanding, regardless of what happened on Edelman’s end; their deal was done. To Edelman Arts, the deal was definitively off because, it asserts, Edelman Arts was merely an agent for the ultimate buyers and, in any event, the transaction was canceled within a reasonable amount of time. Each side now moves for summary judgment on their claims against

the other (*i.e.*, Edelman Arts's claim and Malca's counterclaims), each asserting that there are no material issues of fact.

For the reasons set forth below, and based on the record before the Court, it is Malca that is entitled to summary judgment.

### FACTUAL BACKGROUND

On November 18, 2016, Edelman Arts's principal, Asher Edelman, viewed an artwork by the artist Keith Haring (the "Artwork") at Malca's loft. Malca Rule 19-a Statement of Material Facts ("Malca SMF"), ¶2 (NYSCEF Doc. No. 21).<sup>1</sup> Edelman arranged the viewing because the Artwork was one of five pieces of fine art he was aiming to sell, as a set, to representatives of a Middle Eastern royal family (the "Ultimate Buyers"). *Id.*, ¶4. To that end, Edelman was accompanied at the viewing by Remko Spoelstra, another art dealer, who was allegedly representing the Ultimate Buyers' interests.<sup>2</sup> *See* Malca Resp. to Edelman Arts 19-a Statement, ¶2 (NYSCEF Doc. No. 2). At the viewing, Edelman stated that he and Malca "had a deal" for the Artwork, and that Malca should send Edelman an invoice for the purchase price of \$5,000,000. *Id.*, ¶5; *see* Edelman Arts Resp. to Malca SMF, ¶5 (NYSCEF Doc. No. 44).

A few days later, on November 21, Malca emailed an invoice for the Artwork (the "Invoice") to Edelman, with the Invoice stating that the \$5 million payment was due "upon receipt." Malca SMF, ¶¶6-7. The email attaching the Invoice requested that Edelman "[k]indly forward" his resale certificate "if all is in order with the [I]nvoice." Malca SMF, ¶8; *see*

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<sup>1</sup> Unless otherwise stated, the facts – whether drawn from the Rule 19-a statements of Malca or Edelman Arts – are undisputed. As described below, the parties' disagreements concern the legal implications of those facts.

<sup>2</sup> As discussed below, the parties dispute the details surrounding Spoelstra's introduction to Malca at the viewing.

Edelman Arts Resp. to Malca SMF, ¶8. About half an hour later, Edelman responded with a one-word email – “attached.” Malca SMF, ¶9; *see* Edelman Arts Resp. to Malca SMF, ¶9. The resale certificate (signed by Edelman and transmitted to Malca) listed Edelman as the “purchaser,” described him as “engaged in the business of Art Dealing,” and affirmed that he was “purchasing . . . [t]angible personal property for resale.” Malca SMF, Ex. I (NYSCEF Doc. No. 30). Edelman did not challenge the Invoice; did not reference any future right to cancel the Invoice; and did not condition Edelman Arts’s payment obligation on its ability to secure an ultimate buyer for the Artwork. Malca SMF, ¶¶10-11; *see* Edelman Arts Resp. to Malca SMF, ¶¶10-11.

Nonetheless, problems soon arose with Edelman’s payment of the Invoice – namely, he was not paying it. On December 15, Max Lang, a Malca associate,<sup>3</sup> wrote to Edelman inquiring “when we can definitively expect settlement of lio’s invoice.” Malca SMF, Ex. J (NYSCEF Doc. No. 31). That evening, Edelman responded by explaining that he was encountering problems with “the end buyer” (*i.e.*, the royal family or the entities representing its interests), whose payment to Edelman was “now three weeks late.” *Id.*, Ex. K (NYSCEF Doc. No. 32). Then on December 20, Edelman purported to cancel the Invoice:

As thirty days from your invoice will pass tomorrow, I need to cancel the transaction because of non payment to me. I am working on the payment and when I get it will pass on funds to you in the hope you will institute the transaction. I am also happy to enter in to a new invoice with another 30 or fewer days but legally I must cancel the outstanding one.

Edelman Arts SMF, Ex. D (NYSCEF Doc. No. 105).

Malca afforded Edelman additional time to “let [him] try to work things out” with the Ultimate Buyers. *See* Malca SMF, Ex. E (NYSCEF Doc. No. 26). But by mid-January,

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<sup>3</sup> Lang was also a part-owner of the Artwork, as discussed in Part A.3, *infra*.

Edelman still had not paid. Malca's representatives told Edelman that they were "quite distressed by the situation as [they] were counting on getting paid by [him]," but could agree "to a firm deadline for full payment . . . of [J]anuary 25." *Id.*, Ex. M (NYSCEF Doc. No. 34). That deadline came and went. In February, Malca informed Edelman that he would seek to enforce the agreement in court if Edelman still refused to pay:

You did not "promptly decline" the invoice; that was never an option or even discussed. You agreed to buy the artwork and now have refused to pay. We were patient and let you try to work things out with your "chap" . . . We sold the painting to you. That is how you wanted it and how you requested that we proceed. . . . By sending the resale certificate, you confirmed that the artwork was being sold and that you (that is "Edelman Arts, Inc." – not some chap) were the buyer. . . . If, as seems to be the case, you are simply not going to pay what you agreed to pay, then it's a matter for the courts. . . . It is neither lawful nor honorable for you, our buyer, to renege on your agreement and refuse to pay us just because your buyer (if there was one) refused to pay you.

Malca SMF, Ex. E (NYSCEF Doc. No. 26) (emphasis in original). Edelman never paid for the Artwork.

Ultimately, the Artwork was put up for auction. Following Edelman Arts's refusal to pay the Invoice, Malca, which was acting as consignor of the Artwork on behalf of the entities which owned it, transferred the Artwork to an entity called SL Fine Art. Affidavit of Lio Malca ("Malca Aff."), ¶¶8-9, 12 (NYSCEF Doc. No. 67). SL Fine Art negotiated with Christie's to secure certain consignment terms with the auction house, including a guaranteed price of \$4,000,000 for the Artwork. In November 2017, the Artwork was sold at auction by Christie's for a hammer price of \$3,500,000, resulting in Christie's paying to SL Fine Art the guaranteed price of \$4,000,000. Malca SMF, ¶23.

Edelman Arts filed a Summons and Complaint in this action on April 25, 2018, alleging that Malca was "threatening to sue" Edelman Arts under the Invoice, and seeking a series of declaratory judgments that would render the Invoice null and void. *See* Compl. ¶¶18-32

(NYSCEF Doc. No. 1). Two days later, Malca answered the Complaint and alleged counterclaims against Edelman Arts for breach of contract and account stated, seeking at least \$1 million in damages (that is, the difference between the agreed price of \$5 million and the \$4 million ultimately obtained from Christie's). *See* NYSCEF Doc. No. 4. Now, both parties move for summary judgment on their respective claims.

## LEGAL ANALYSIS

A party moving for summary judgment pursuant to CPLR 3212 must “make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *see also Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once a prima facie showing has been made, the burden then shifts to the opposing party to produce admissible evidence “sufficient to establish the existence of material issues of fact which require a trial of the action.” *Alvarez*, 68 N.Y.2d at 324.

### I. MALCA'S MOTION FOR SUMMARY JUDGMENT

#### A. Breach of Contract (Malca's First Counterclaim)

Malca is entitled to summary judgment on its claim for breach of contract. Malca has offered sufficient evidence to establish a prima facie showing of contract formation, breach, and damages, while Edelman Arts's various defenses fail to raise material issues of triable fact.

The elements of a breach of contract claim “include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages.” *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010).

The basic facts of Malca's prima facie case are not disputed. Edelman told Malca they “had a deal.” Malca sent Edelman an Invoice for the Artwork with a purchase price of

\$5,000,000, asking that Edelman reply with an executed resale certificate. Edelman promptly did so, forwarding a signed document that identifies Edelman Arts as the “purchaser” “for resale.” He accepted the terms of the Invoice without objection. Edelman Arts Resp. to Malca SMF, ¶¶5-13. Edelman Arts then breached the parties’ agreement by failing to make any payment for the Artwork. Malca SMF, ¶28. *See Kolchins v. Evolution Markets, Inc.*, 128 A.D.3d 47, 59 (1st Dep’t 2015) (“To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound. That meeting of the minds must include agreement on all essential terms.”) (internal citations omitted); *see McFadyen Consulting Grp., Inc. v. Puritan's Pride, Inc.*, 87 A.D.3d 620, 621 (2d Dep’t 2011) (“[Plaintiff] established its prima facie entitlement to judgment as a matter of law on its cause of action alleging breach of contract by establishing that after it submitted the invoices that are at issue on this appeal, [defendant] did not dispute those invoices in the manner provided in the contract and did not pay the amounts due.”); *George S. May Int'l Co. v. Thirsty Moose, Inc.*, 19 A.D.3d 721, 722 (3d Dep’t 2005) (granting summary judgment where “written contract along with various invoices . . . was sufficient to establish a prima facie case for breach of contract”).<sup>4</sup>

Edelman Arts’s defense to contractual liability rests on three separate theories: (1) that at all relevant times, Edelman was acting as an agent on behalf of a disclosed principal; (2) that Edelman canceled the Invoice; and (3) that questions over ownership of the Artwork preclude summary judgment in Malca’s favor. For the reasons described below, however, none of these arguments raise material issues of fact. *See Di Sabato v. Soffes*, 9 A.D.2d 297, 300 (1st Dep’t

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<sup>4</sup> Indeed, one of Edelman Arts’s primary defenses to Malca’s breach of contract claim – that Edelman canceled the Invoice – presumes that a binding obligation was already in place.

1959) (“If . . . the defendant fails to controvert such proof and establish by affidavits or other evidence the existence of a genuine defense, the court may find that no triable issue exists and grant summary judgment.”).

*1. Agency Relationship Does Not Shield Edelman Arts from Liability Under the Invoice*

Edelman Arts fails to show that Edelman was acting as an agent for a disclosed principal. “An agency relationship results from a manifestation of consent by one entity to another that the agent shall act on the principal's behalf and subject to the principal's control.” *Quik Park W. 57, LLC v. Bridgewater Operating Corp.*, 148 A.D.3d 444, 445 (1st Dep’t 2017). Generally speaking, “an agent for a disclosed principal will not be personally bound unless there is clear and explicit evidence of the agent’s intention to substitute or superadd his personal liability for, or to, that of his principal.” *News Am. Mktg., Inc. v. Lepage Bakeries, Inc.*, 16 A.D.3d 146, 147 (1st Dep’t 2005). “[T]he defense of agency in avoidance of contractual liability is an affirmative defense and the burden of establishing the disclosure of the agency relationship and the . . . identity of the principal is upon he who asserts an agency relationship.” *Safety Envtl., Inc., v. Barberry Rose Mgmt. Co.*, 94 A.D.3d 969 (2nd Dep’t 2012).

The evidence marshaled by Edelman Arts fails to meet that burden. “A principal-agent relationship may be established by evidence of the consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act.” *Art Fin. Partners, LLC v. Christie's Inc.*, 58 A.D.3d 469, 471 (1st Dep’t 2009) (finding “no evidence that [plaintiffs] actually acted as an agent”). Here, the record is devoid of any evidence indicating that Edelman was actually acting as an agent on behalf of a principal, disclosed or not. At his deposition, Edelman confirmed that Edelman Arts had no “written agency agreement” with



Spoelstra. Edelman Arts SMF, Ex. B at 142 (“Edelman Dep.”) (NYSCEF Doc. No. 103).<sup>5</sup> Nor is there evidence of a history between Edelman and Spoelstra which would betoken an agency relationship, as Edelman had never been involved in any art transactions with Spoelstra prior to this one. *Id.* at 11-12. *See e.g., News Am. Mktg., Inc.*, 16 A.D.3d at 147 (citing, among other things, invoices addressed to party “as agent for [defendant],” to find that party “acted as the agent for a disclosed principal”); *Schulhof v. Jacobs*, 157 A.D.3d 647, 648 (1st Dep’t 2018) (“The contract between defendant and the eventual purchaser of the artwork at issue states that defendant is acting as agent for an undisclosed principal.”); *compare with* Edelman Arts Statement of Material Facts (“Edelman Arts SMF”), ¶2 (noting conclusorily that “Defendant was aware of the identity of the principal”) (NYSCEF Doc. No. 101).

To the contrary, Edelman Arts evidently envisaged an arm’s-length resale transaction with the Ultimate Buyers. Initially, Edelman’s response to the Invoice did not “reference that payment of the purchase price was conditioned upon Edelman’s ability to secure a buyer to which it could resell the Artwork.” *Malca SMF*, ¶12; *see* *Edelman Resp. to Malca SMF*, ¶12 (noting that statement is “[u]ndisputed”). In the resale certificate that he sent to Malca, Edelman confirms that he was “purchasing . . . [t]angible personal property for resale.” An invoice to Remko Spoelstra, dated November 18, 2016, seems to confirm Edelman Arts’s intent. That invoice purports to charge Spoelstra \$6 million for the Artwork – \$1 million more than Edelman Arts was paying for it – with “[p]ayment due upon receipt of invoice.” *Malca SMF*, Ex. U (NYSCEF Doc. No. 42); *see id.*, Ex. E (February 2, 2017 email from Malca to Edelman) (“[Y]ou also sent us a copy of the invoice showing that you were also the seller of the work to ‘Remko

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<sup>5</sup> When asked if Edelman Arts normally undertakes a role as agent “pursuant to a written agreement with one of the parties,” Edelman stated, “Sometimes, yes; sometimes, no.” *Id.* at 10.  
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Spoelstra' for \$6,000,000.”). Moreover, when pressed to explain his delay in paying the Invoice, Edelman referred to problems he was encountering with the Ultimate Buyer's agents, explaining that “[t]he office of the end buyer is said to be in Zurich. . . . Their [agent?] courted us for three months to assemble the group and we have invoiced him as agent.” *Id.*, Ex. K (NYSCEF Doc. No. 32). Conspicuously absent is any indication that Edelman considered himself to be (or held himself out to be) such an agent.

The sole support for Edelman Arts's agency argument can be found in the deposition testimony of Edelman, in which he states that “Spoelstra introduced himself [to Malca] as the principal in the transaction.” Edelman Dep. at 131:20-23; *see* Edelman Arts SMF, ¶2. Assuming the truth of Edelman's testimony, it is still insufficient to raise a triable issue of fact. While “it is not the court's function on a motion for summary judgment to assess credibility,” *Belgium v. Mateo Prods., Inc.*, 138 A.D.3d 479, 480 (1st Dep't 2016), “only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment,” *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978) (granting summary judgment where “submissions simply lacked the evidentiary facts on which a meritorious defense could be made out”).

Edelman's testimony does not offer specific facts which show an agency relationship between himself and Spoelstra. “After reading all of [Edelman Arts's] submission there remains only a mystery as to what actually happened, instead of a contradictory factual version which would support [Edelman Arts's] contentions. It is not enough that a defendant deny a plaintiff's presentation in summary judgment. He must state his version, and he must do so in evidentiary form. . . . Bald conclusory assertions, even if believable, are not enough.” *Kramer v. Harris*, 9 A.D.2d 282, 283 (1st Dep't 1959).

The specific facts concerning Spoelstra's interaction with Malca are material only if Spoelstra was indeed the principal in the transaction. "Principal," in this context, denotes a legal status born of facts which evince an agency relationship; it is not a title conferred by introduction. *See Rubenstein v. Small*, 273 A.D. 102, 104 (1st Dep't 1947) ("The court is not bound by the disclaimer of partnership, joint venture or agency between the parties in determining their true relationship."). And while Edelman testified that Edelman Arts acted as an agent to buyers in other transactions, he could not point to any agreement or understanding in *this* transaction which created that legal relationship.

By choosing to structure the deal with Malca such that he could resell the Artwork at a higher price to the Ultimate Buyers, Edelman bore the risk of not being able to consummate a resale transaction with the Ultimate Buyers. Edelman Arts cannot now shift that risk onto Malca by invoking, with conclusory claims, an agency relationship.

*2. Edelman Arts's Purported Cancellation of the Invoice was Ineffective*

Edelman's next defense is similarly unavailing. Simply put, there was no basis – in contract or through conduct – for Edelman to unilaterally cancel the deal after accepting it.

First, under the plain terms of the Invoice, neither Edelman nor Edelman Arts had the right to cancel the parties' agreement after acceptance. *See Masters v. 14-22 Leonard St. Assocs. LLC*, 11 A.D.3d 380, 382 (1st Dep't 2004) (declaring "plaintiffs had no such right to cancel" under contract because "[n]owhere in [the] clause is any language indicating that plaintiffs possessed a right to cancel"). While Edelman's notice of cancellation hints at some legal right to do so – "As thirty days from your invoice will pass tomorrow, I need to cancel . . .", Edelman Arts SMF, Ex. D – Edelman testified at his deposition that he understood "there's no specific law" authorizing his cancellation. *Id.*, Ex. B at 64. Rather, it was Edelman's understanding that

“[t]radition in the industry” permitted such cancelations. *Id.* But that ill-defined concept, without more, is an insufficient basis for enforcing the cancelation. *See News Am. Mktg., Inc.*, 16 A.D.3d at 147 (rejecting defendant’s attempt to “elude established precedent” under agency law by citing “the custom and usage of the advertising industry”).<sup>6</sup>

Second, Edelman Arts has not shown that Malca consented to Edelman’s purported cancelation. According to Edelman Arts, “[t]he initial response to Asher Edelman’s email [was] not a rejection of the cancelation and led Mr. Edelman to believe that his cancelation had been accepted and understood.” Edelman Arts Resp. to Malca SMF, ¶18. As evidence of Malca’s assent, Edelman Arts points to a December 23 email in which Malca writes: “Let’s see what happens during the next couple of weeks and then take it from there.” *Id.*, Ex. A (NYSCEF Doc. No. 45). At most, that email expresses a willingness to extend Edelman’s time to pay the Invoice; it cannot reasonably be read, as Edelman Arts does, to relieve Edelman of any obligation to pay for the Artwork. Indeed, subsequent correspondence shows that neither party considered the Invoice canceled. *See* Malca Resp. to Edelman Arts 19-a Statement, Ex. 2 (Jan. 16, 2017 email from Edelman to Spoelstra) (“[This] has become an impossible situation for me which requires that I pay for these works and therefore that your client pays me.”) (NYSCEF Doc. No. 118); Malca SMF, Ex. M (January 11, 2017 email from Lang to Edelman) (“[W]e are counting on getting paid by you.”); *id.*, Ex. E (February 2, 2017 email from Malca to Edelman) (“You did not ‘promptly decline’ the invoice; that was never an option or even discussed”).

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<sup>6</sup> Objecting to an invoice “within a reasonable time” may be relevant to a claim for an account stated, *see, e.g., Ruskin, Moscou, Evans, & Faltischek, P.C. v. FGH Realty Credit Corp.*, 228 A.D.2d 294, 295 (1st Dep’t 1996), but it is not a defense where, as here, the disputed transaction was governed by an enforceable agreement that provided for no right of cancellation. As noted below, Malca’s counterclaim for an account stated is being dismissed because it is based on the same factual allegations as Malca’s counterclaim for breach of contract.

3. *Ownership of the Artwork Does Not Preclude Summary Judgment on Malca's Claim*

Edelman Arts also contends that summary judgment on Malca's claims should be denied because of alleged uncertainty surrounding ownership of the Artwork. But Edelman Arts has not raised any issues of fact concerning Malca's authority to sell the Artwork, Malca's assertion of damages, or a failure to join a necessary party.

First, while the Defendant entity ("New York Art World") was evidently not the owner of the Artwork at the time of the deal with Edelman Arts, there is no question that Defendant had authority to complete the transaction as consignor of the Artwork. Ownership of the Artwork has wended its way through several different entities. Originally, an entity called Lang Fine Art, Inc. ("LFA") – owned by Max Lang, a longtime associate of Lio Malca – purchased the Artwork in 2004 from an art gallery in Zurich. Affidavit of Max Lang ("Lang Aff.") ¶¶3, 6 (NYSCEF Doc. No. 55). LFA's ownership interest was then split two ways: an entity called Lealma, S.A. ("Lealma") bought a two-thirds interest, while a family trust administered by Lang was given the other one-third share. *Id.*, ¶¶7-8. Lio Malca, the man behind Defendant New York Art World, has an ownership interest in Lealma. Malca Aff., ¶2. The family trust and Lealma agreed that "Lealma was authorized to sell the Artwork in its sole discretion," and to "transfer Lealma's interest in the Artwork." *Id.*, ¶¶6-7. Malca – on behalf of Lealma and the trust – "consigned the Artwork to New York Art World" and "authorized New York Art World to sell the Artwork." *Id.*, ¶¶8-9. In short, the Defendant entity was fully authorized to complete a sale of the Artwork to Edelman. Lang Aff., ¶11 (averring that "[h]ad Edelman honored its purchase obligations, there is . . . no question that good title would have transferred to Edelman").

Second, Edelman Arts argues that Malca cannot claim damages because it was not the entity which received the auction proceeds on which the damages are based. As mentioned

above, Malca's damages figure in this case derives from Christie's sale of the Artwork – essentially, it is the difference between the amount Edelman was supposed to pay and the amount Christie's did pay. Following the auction, Christie's paid the \$4 million guaranteed price to an entity called SL Fine Art, not to Malca. *See* NYSCEF Doc. No. 41. This was a result of Malca, the individual, transferring the Artwork from New York Art World to SL Fine Art in order to secure “favorable consignment terms for the Artwork” at Christie's. Malca Aff., ¶12. Despite the formal change, both Malca and Lang – the co-owners of the Artwork at the time of the Edelman deal and the subsequent auction – aver that “[a]ny amounts recovered from Edelman by Malca will be paid out to the prior owners of the Artwork, in accordance with their prior ownership interests.” *Id.*, ¶13; Lang Aff., ¶12.<sup>7</sup>

Third, and finally, Edelman Arts cannot argue that Malca's motion should be denied for failure to join a necessary party. To state the obvious, Edelman Arts is the *plaintiff* in this action, so any failure to join a necessary party originates with Edelman Arts, not Malca. Even if the purported failure could be imputed to Malca, “dismissal for failure to join a necessary party should eventuate only as a last resort.” *L-3 Commc'ns Corp. v. SafeNet, Inc.*, 45 A.D.3d 1, 11 (1st Dep't 2007). Edelman Arts fails to explain why the Court should impose such a drastic penalty here when other courses of action – such as granting leave to join the purportedly necessary party, or proceeding without it – are generally available. *See, e.g., Deutsche Bank Nat. Trust Co. v. Bandalos*, 173 A.D.3d 489 (2d Dep't June 26, 2019) (granting leave to join necessary party); *27th St. Block Ass'n. v. Dormitory Auth. of State of New York*, 302 A.D.2d 155,

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<sup>7</sup> The owners' representations help put to rest Edelman Arts's purported concern that the owners will go unpaid here, forcing them to sue Edelman Arts in the future.

160 (1st Dep't 2002) (analyzing CPLR 1001(b) criteria for “determining whether justice requires an action to proceed in the absence of a necessary party”).

In sum, because Edelman Arts's defenses fail to raise a genuine issue of fact or otherwise overcome the prima facie case established by Malca's evidence, Malca's motion for summary judgment as to its breach of contract claim is Granted.<sup>8</sup>

**B. Account Stated (Malca's Second Counterclaim)**

Malca's motion for summary judgment is denied with respect to the counterclaim for account stated, and the counterclaim is dismissed, because such a claim “may not be utilized simply as another means to attempt to collect under a disputed contract.” *Sabre Int'l Sec., Ltd. v. Vulcan Capital Mgmt., Inc.*, 95 A.D.3d 434, 438 (1st Dep't 2012) (citing *Martin H. Bauman Assoc. Inc. v. H & M Int'l. Transp., Inc.*, 171 A.D.2d 479, 485 [1st Dep't 1991]); see also *Prof'l Merch. Advance Capital, LLC v. C Care Servs., LLC*, No. 13-CV-6562 RJS, 2015 WL 4392081, at \*6 (S.D.N.Y. July 15, 2015) (dismissing account stated claim *sua sponte* at summary judgment stage on finding that account stated claim was duplicative of the contract claim).

Malca's account stated claim recasts the same facts as the breach of contract claim to allege an alternative, quasi-contract theory of recovery. See Malca Answer and Counterclaims, ¶¶86-101 (NYSCEF Doc. No. 4). Because the Court finds that an enforceable contract existed between Malca and Edelman Arts, the account stated claim cannot survive as a distinct cause of action.

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<sup>8</sup> Because Malca prevails on the merits of this claim, the Court need not reach Malca's arguments about judicial estoppel and discovery abuses.

## II. EDELMAN ARTS'S MOTION FOR SUMMARY JUDGMENT

The Court's determination of Malca's summary judgment motion necessarily means that Edelman Arts's summary judgment motion, seeking to declare the Invoice "null and void" on several grounds, is denied.

Because the relief sought by Edelman Arts is a series of declarations precluding the relief sought by Malca, Edelman Arts's claims are foreclosed as a matter of law. "[W]hen a court resolves the merits of a declaratory judgment action against the plaintiff, the proper course is not to dismiss the complaint, but rather to issue a declaration in favor of the defendants." *Maurizzio v. Lumbermens Mut. Cas. Co.*, 73 N.Y.2d 951, 954 (1989); *see also* CPLR 3212(b) ("If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."); *Atiencia v. MBBCO II, LLC*, 75 A.D.3d 424, 424 (1st Dep't 2010) ("A court, in the course of deciding a motion, is empowered to search the record and award summary judgment to a nonmoving party.").

For those reasons, the Court finds that Edelman Arts is not entitled to the declaratory relief it seeks, and declares instead that the Invoice is a binding obligation on Edelman Arts.

Accordingly, it is hereby

**ORDERED** that Edelman Arts's motion for summary judgment is denied; it is further

**ORDERED** that Malca's motion for summary judgment on its counterclaims is granted as to the breach of contract claim and denied as to the account stated claim, and Edelman Arts's Complaint is dismissed; it is further

**ORDERED** that the Clerk is directed to enter judgment in favor of Malca in the sum of \$1,000,000, with interest at the statutory rate from April 25, 2018 as calculated by the Clerk in the amount of \$\_\_\_\_\_, together with costs and disbursements, as taxed by the Clerk.

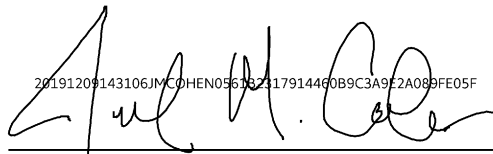


This constitutes the decision and order of the Court.

12/9/2019

DATE

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JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE