

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 RAISONNÉ LLC, ARNOLD  
GLIMCHER, MARC GLIMCHER, and TIFFANY BELL,

Defendants.

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INDEX NO. 655489/2016

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

MOTION SEQ. NO. 004

DECISION & ORDER

MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 131, 136, 137 were read on this motion to/for DISMISSAL

In its April 3, 2018 decision and order (NYSCEF 66), the court granted defendants' prior motion, motion sequence number (Motion) 001, and dismissed plaintiff's First Amended Complaint (FAC) in its entirety but permitted plaintiff leave to replead several of the dismissed claims. A Second Amended Complaint (SAC), dated April 24, 2018, was filed to NYSCEF on April 25, 2018 (NYSCEF 70). Defendants now move, pursuant to CPLR 3211 (a) (1), (a) (3), and (a) (7) in Motion 004, to dismiss the SAC.

The court incorporates here its April 3, 2018 decision resolving Motion 001 (NYSCEF 66) in which the factual background of this matter is discussed in detail. The court presumes familiarity with the action and the facts in this decision and order are limited to those that illustrate the changes between the FAC and SAC and those otherwise necessary for the court to resolve Motion 004.

The Prior Motion to Dismiss the FAC (Motion 001)

The court dismissed the FAC in its April 3, 2018 decision and order. As a threshold matter, the court narrowed the scope of its review of the FAC on the preliminary bases of plaintiff's standing to

raise its various claims. Standing to raise tort claims, such as most of those contained in the FAC and SAC, necessarily depends on whether the plaintiff has sustained an injury. In reviewing the FAC, the court determined that, at that pre-answer motion to dismiss stage, plaintiff's allegations were adequate as to injury with respect to only certain artworks and as to certain defendants; that is, the court determined that, for the purpose of analyzing Motion 001 and the FAC, it would only review the claims to the extent that they involved artworks for which plaintiff had alleged an accrued injury. In short, judicial review was warranted pre-answer and pre-discovery only where plaintiff had issued a refund to certain collectors, as there was otherwise no controversy in tort between the parties to be adjudicated.

Ultimately, the court found that there was only standing as to the artworks sold to two collectors, Levy and Shainwald, who were allegedly refunded by plaintiff after the Notification Letters were sent. Further, plaintiff's injury claims amounted, for each tort claim, to the amount that the four collectors had paid and had been, or may be in the future, refunded; accordingly, the court dismissed for lack of standing plaintiff's first, second, third, fourth, and fifth (inasmuch as it sounded in tort) claims as they related to Kolodny and Labouchère, the collectors who had, at that time, not been refunded.

The court further dismissed plaintiff's first through sixth claims in the FAC as raised against the individual defendants on the basis that plaintiff had alleged "only general, conclusory allegations that the individual defendants participated in the claimed tortious acts or omissions" and had not "demonstrate[d] that the individual defendants benefited from the alleged torts" (NYSCEF 66). The court further dismissed the contract prong of the sixth cause of action as against the individual defendants for lack of privity (*id.*). Finally, the court dismissed with prejudice plaintiff's General Business Law (GBL) § 349 claim as to all defendants as inadequately pleaded (*id.*).

#### Amendments to the SAC

Plaintiff amended the caption to remove as defendants the "Members of the Authentication [sic] Committee of the Agnes Martin Catalogue Raisonné," identified in the FAC as "John Doe or Jane Doe ##1-6." The defendants that remain are Agnes Martin Catalogue Raisonné LLC (AMCR), Arnold

Glimcher (A Glimcher), Tiffany Bell, and Marc Glimcher (M Glimcher). M Glimcher was identified in the FAC as a member of AMCR's Authentication Committee (Committee) but his identity was not disclosed publicly pursuant to the parties' Stipulation and Order for the Production and Exchange of Confidential Information, so-ordered by Justice Oing on December 20, 2016 (NYSCEF 22).<sup>1</sup>

Plaintiff further amended ¶ 8 of the FAC to reflect that A Glimcher "is the managing member" of AMCR, he "controls" AMCR and the Committee, and he is "primarily" responsible for AMCR's policies, practices, procedures, and actions.

Plaintiff states in the SAC that both A Glimcher and M Glimcher are art dealers. M Glimcher is the president of Pace Gallery and was appointed to the Committee by A Glimcher, his father.

Plaintiff states in the SAC that A Glimcher "founded and principally owns" Artifex Press (Artifex), the company that publishes the Agnes Martin Catalogue Raisonné (Catalogue), and A Glimcher appointed defendant Bell to the Committee and named her the Catalogue's editor.

Plaintiff adds in the SAC that Kolodny, one of the collectors who owned an artwork at issue, demanded and obtained a full refund pursuant to a warranty of authenticity on November 1, 2016. Another collector, Labouchère, demanded a refund pursuant to a warranty of authenticity but agreed with plaintiff not to seek to enforce any warranty rights until plaintiff "prevails" in this action.

As to the thirteen artworks, the SAC includes plaintiff's allegation that all works were "purportedly signed by Agnes Martin," and one work, *Day & Night*, also has a hand-written inscription "To Delphine, Agnes Martin."<sup>2</sup> Plaintiff alleges that "[d]efendants failed to compare the handwriting . . . on the thirteen artworks . . . [n]or did they engage a handwriting expert, at plaintiff's expense, to render an opinion on whether the signatures were authentic."

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<sup>1</sup> To the extent that any documents are filed to the NYSCEF docket in this action, the parties are directed to execute a new stipulation for the exchange of confidential material in the form accepted by Part 48 and to otherwise comport with the Part 48 Rules and Procedures, both available on the NYCourts.gov public website.

<sup>2</sup> The FAC included allegations regarding the inscription on *Day & Night* (NYSCEF 25 [FAC], ¶ 22).

Plaintiff further asserts in the SAC that evidence was "ignored" by defendants in evaluating *Day & Night* when it was submitted the second time: for instance, radiocarbon test results for the work's canvas; an email allegedly from Jack Youngerman, the husband of Delphine Seyrig and a friend of Agnes Martin, in which Youngerman stated "the dedication was an affectionate 'homage,' " but Seyrig never received the painting. Youngerman also expressed in that email his opinion that *Day & Night* could have been made by only Agnes Martin, not by a counterfeiter.<sup>3</sup>

Plaintiff states in the SAC that the collectors have not purchased any artwork from plaintiff since the Notification Letters were received and reasserts none of the thirteen artworks can be offered for resale by plaintiff because of AMCR's decision not to include the works in the Catalogue.

As to A Glimcher and M Glimcher, plaintiff asserts that there is a conflict of interest, or an appearance of such a conflict, because they both own and deal Agnes Martin artworks, and both have "substantial monetary interest in" her artworks, the value of which increases in step with the scarcity of her artworks on the market; thus, A Glimcher and M Glimcher have benefitted financially from AMCR's exclusion of the thirteen artworks from the Catalogue and "their decision to vote to reject" those artworks "was motivated by their economic interest . . . [to reduce] the number of Agnes Martin artworks in the marketplace." As to M Glimcher, plaintiff asserts that he lacks the professional experience "and objectivity" to serve on the Committee due to his financial interests.

Plaintiff seeks, apart from the general causes of action in the SAC, to enjoin all defendants to answer certain inquiries posed in the SAC, and to enjoin all defendants from engaging in the alleged improper practices outlined in the SAC. Plaintiff additionally seeks attorneys' fees from defendants other than Bell under GBL § 349 (h).

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<sup>3</sup> The FAC also included allegations regarding plaintiff's resubmission of *Day & Night* with radiocarbon testing results and the purported email by Youngerman (NYSCEF 25, ¶ 28; see also *id.* ex B [plaintiff's submission to AMCR for *Day & Night*, including both radiocarbon testing results and Youngerman's alleged email, annexed to the FAC]).

At oral argument for Motion 004, plaintiff's counsel clarified that the warranties of authenticity provided when the artworks were sold—no contract of sale is included in any papers before the court—were implied warranties, not written or otherwise recorded, which are “breach[ed]” when AMCR declines to include the artwork in the Catalogue, “compel[ing plaintiff] to issue a refund” (Tr at 9-10). Though not actually alleged, the court presumes that plaintiff refers to the implied warranty applicable to the sale of art goods under the UCC (*see* UCC § 2-312 [warranty of title implied in sale of art]).

#### The Claims in the SAC

Plaintiff alleges the following causes of action in the SAC:

1. Product disparagement against all defendants except Bell as to all thirteen artworks;
2. Tortious interference with contract against all defendants except Bell as to all artworks;
3. Tortious interference with prospective business relations against all defendants except Bell as to all artworks;
4. Negligent misrepresentation against all defendants except Bell as to all artworks;
5. Gross negligence/breach of contract against all defendants except Bell as to all artworks;
6. Breach of contract and breach of implied duty of good faith and fair dealing against all defendants except Bell (for pecuniary damages) and against all defendants (for injunctive relief) as to only one artwork, *Day & Night*, and
7. Violation of GBL § 349 against all defendants except Bell (for pecuniary damages) and against all defendants (for injunctive relief).

Defendants move, pursuant to CPLR 3211 (a) (1), (a) (3), and (a) (7), to dismiss the SAC entirely.

#### Discussion

##### As to Standing and the Individual Defendants

As to the threshold issue of standing, the court finds that plaintiff's new allegations that it has refunded Kolodny's purchase is adequate, at this pre-answer, pre-discovery phase, for the court to consider the claims as they relate to Kolodny's submissions to AMCR. As to Labouchère, plaintiff now alleges that he demanded a refund but then rescinded the demand and agreed “in substance” that he “would forebear from enforcing his rights under [the warranties of authenticity] and from demanding and receiving a refund of the purchase prices, but only if and until [plaintiff] brought and then prevailed

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