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Brand X Editions, Ltd. v Wool
2014 NY Slip Op 50005(U)
Decided on January 2, 2014
Supreme Court, New York County
Kornreich, J.
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Decided on January 2, 2014

Supreme Court, New York County

Brand X Editions, Ltd., Plaintiff,

against

Christopher Wool and Luhring Augustine Gallery, Inc., Defendants.

652133/2013

Pohl LLP, for plaintiff.

Willkie Farr & Gallagher LLP, for defendants.

Shirley Werner Kornreich, J.

Defendants, Christopher Wool and Luhring Augustine Gallery, Inc. (LAG), move to dismiss the first, second, third, and fifth causes of action in the Complaint pursuant to CPLR 3211.

Defendants' motion is granted in part and denied in part for the reasons that follow.

Factual Background & Procedural History

As this is a motion to dismiss, the facts recited are taken from the Complaint.

Plaintiff Brand X Editions, Ltd. (Brand X) is a printing business that utilizes "a unique proprietary mono-printing process" developed by its president, Robert Blanton. Complaint ¶ 3. Wool is an artist who collaborated with Brand X to produce unique artwork utilizing Brand X's printing process. ¶ 2. This case concerns the parties' dispute over the terms of their arrangement and the alleged interference by LAG in this arrangement and in another contract between Brand X and a different artist. As the instant motion to dismiss only concerns the transaction between Brand X and Wool, the court will not discuss the other artist's contract.

In July 2010, Blanton sought to work with Wool. ¶ 25. In October 2010, Blanton and Wool met to discuss the possibility of producing original works. ¶ 26. Wool, however, was not interested in hiring Brand X as a publisher (i.e., selling copies of a particular work through Brand X), because of prior bad experiences with other publishers. ¶ 27. No agreement was reached. *Id.*

Nine months later, on July 6, 2011, Brand X emailed Wool, offering to collaborate to create original works. ¶ 28. Blanton proposed that two-thirds of the works created would belong to Wool, one-third of the works would belong to Brand X, and Brand X would pay for 100% of the cost of production. ¶¶ 29-30. On July 28, 2011, Wool responded, expressing general interest and asked questions about Brand X's process. ¶¶ 33-34. Brand X replied on September 9, 2011, offering to further discuss the potential project. ¶ 35. On November 23, 2011, Blanton emailed Wool, offering to "revisit our discussion of late summer" and proposed another in-person meeting. ¶¶ 36-38. Wool responded on November 29, 2011, offering to meet [*2]in early January 2012. ¶ 39. That meeting occurred on January 9, 2012. ¶ 40. The next day, on January 10, 2012, Blanton emailed Wool to clarify the terms of the proposed agreement:

After you left I went back and re-read the proposal we made last summer. When [we] visited with you at your studio [in October 2010], we . . . understood your frustrating experiences with past publishers. We definitely heard you. That's why in our proposal, we suggested we pay all the up-front production costs to make approximately 60 mono-prints, and then divide the works so that you receive 2/3's of them (40 mono-prints) the day they're finished, and we keep 1/3 (20 prints).

This would be a clean way to do it, without you having to hope that we do a good job placing them with collectors.

* * *

I appreciate the opportunity to collaborate on a project as exciting as this mono-print project. It give[s] me and the studio a chance to show how creative printmaking can be.

¶ 41. Wool responded on January 14, 2012:

I will reread the email . . . maybe it was me who was doing the misunderstanding. . . . and I certainly agree that [Brand X] is both versed in my work and enthusiastic . . . . and I hear what you are saying . . . . anyway the publishing part is secondary to me so we can figure it out one way or another . . . . and the description you gave of the possibilities of crossing silkscreen and mono-print sound very promising . . .

¶ 43 (ellipses in original). Wool began working on the project with Brand X in June 2012. ¶ 49.

On July 10, 2012, Brand X and Wool reached an agreement on a different project, called the "Sonic Youth project". ¶ 55. Under this new deal, Wool kept 75% of the works, Brand X kept 25% of the works, and the parties split the cost of production. ¶ 56. Later in July 2012, shortly after the Sonic Youth project was finalized, Wool requested that the parties' original deal be restructured under the same terms as the Sonic Youth project (i.e., Wool requested 75% of the works instead of two-thirds). ¶ 57. Brand X rejected this offer, contending that Wool was bound by the original agreement ¶¶ 59-61. Despite Brand X's rejection of Wool's new offer, Wool continued to work on the original project with Brand X. ¶ 62.

At the end of July 2012, representatives of LAG, a gallery which sells the majority of Wool's works, came to Brand X to view the works for the first time. ¶ 63. LAG concluded that the works were more valuable than originally anticipated. ¶ 64.

By September 26, 2012, Wool had completed 34 of the 60 works under the parties' original deal. ¶¶ 67-68. Additionally, Wool had nearly completed another 22 works. ¶ 72. That day, Wool again sought to change the terms of the parties' original deal, contending that Brand X had not invested enough and offered to pay Brand X $50,000 (an amount he estimated to cover Brand X's costs) in exchange for all of the works. ¶¶ 73-76. Brand X rejected this offer. ¶ 77. Brand X also rejected an offer by LAG to purchase Brand X's one-third share of the works. ¶¶ 83-84. Brand X maintains that it has a valid contract with Wool, under which it is entitled to one-third of the works. ¶¶ 90-94. According to the complaint, Wool and LAG each repeatedly admitted the existence of this deal and its specific terms since the inception and throughout the parties' relationship. *Id.*

After Brand X refused to change the terms of their deal, Wool ceased working on the project, leaving the finished works unsigned and many of the works unfinished. ¶ 96. Brand X commenced this action on June 17, 2013, to enforce the terms of their alleged agreement and to [*3]compel Wool to complete the project. The Complaint lists six causes of action: (1) breach of contract against Wool; (2) promissory estoppel against Wool; (3) tortious interference with contract against LAG (the agreement with Wool); (4) tortious interference with contract against LAG (the agreement with another artist, not at issue on this motion); (5) unfair business practices against LAG; and (6) defamation against LAG (not at issue on this motion).

Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

Breach of Contract & Promissory Estoppel

Wool does not argue that Brand X failed to plead the existence of a contract between the parties. Rather, Wool avers that the alleged contract is unenforceable under the statute of frauds, NY UCC § 2-201, which requires contracts for the sale of goods worth more than $500 to be in writing.[FN1] Brand X argues that the UCC does not apply because the subject agreement was for services, not goods, and, in any event, the parties' partial performance precludes the invocation of § 2-201.

It is well established that in determining whether a contract is for goods or services, the "essence" of the agreement governs. *Perlmutter v Beth David Hosp.*, 308 NY 100, 104 (1954); *see also Marbelite Co. v Nat'l Sign & Signal Co.*, 2 FedAppx 118, 120 (2d Cir 2001). "It has long been recognized that, when service predominates, and transfer of personal property is but [*4]an incidental feature of the transaction, the transaction is not deemed a sale [under the UCC]." *Perlmutter*, 308 NY at 104. Importantly, in *Perlmutter*, the Court of Appeals held that " Sale' and transfer' are not synonymous, and not every transfer of personal property constitutes a sale." *Id.* In other words, though property may transfer between parties to a services contract, the contract is not deemed to be for the sale of goods unless the essence of the contract is the sale of such property. To wit, the *Perlmutter* Court cited favorably to a case holding that "a contract to paint a picture [is] a contract for work, labor and services rather than a sale, although the title to the canvas is actually transferred to the customer." *Id.*, quoting *Racklin-Fagin Const. Corp. v Villar*, 156 Misc 220 (1st Dept 1935).

Likewise, in this case, the parties' agreement was to collaborate on the creation of artwork. Wool, the artist, provided artistic vision, while Brand X, the artisan printer, leveraged its unique methods to bring Wool's vision to life. Their combined efforts led to the creation of artwork. The parties agreed that, of the completed works to which each contributed, Wool would keep two-thirds and Brand X would keep one-third. This arrangement is not a sale. Rather, it is an agreement to divide the fruits of the parties' joint venture. The agreement vested title in the works directly to the parties, in accord with their agreed-upon two-thirds/one-third split.

Consequently, this is not a case where goods are provided in consideration for services. The classic example of such a situation is where an employee provides services in exchange for stock. *See Gross v Vogel*, 81 AD2d 576 (2d Dept 1981). In that case, the contract is for goods and must be in writing. *Id.* at 576-77. However, as the Appellate Division explained, the reason this is so turns explicitly on the UCC's definition of "sale", which is "the passing of title from the seller to the buyer for a price." *Id.*, quoting NY UCC § 2-106(1). That is, when one works in exchange for stock, title to the stock is transferred from the company to the employee. Ergo, a sale takes place. *Cf. Sawyer v Camp Dudley*, 102 AD2d 914 (3d Dept 1984) (contract to deliver sand and gravel screened to specifics is contract for sale of goods, not services contract, since "predominant purpose" is transfer of title to personal property; related services are "merely incidental").

In contrast, in this case, title to the works did not exist at the time the parties entered into their agreement since the works did not yet exist. The very point of the parties' agreement was to decide who gets title to the works once they were jointly created. Hence, there is no sale, since title to the works never transferred between the parties. Instead, title inures to the parties upon the creation of the works in accordance with their agreement. Consequently, the UCC's statute of frauds does not apply because there is no sale.

In any event, even if the UCC applied, dismissal would not be warranted for two reasons: (1) under § 2-201(2), Wool's failure to object to Brand X's January 10, 2012 email, which set forth the terms of their agreement, precludes his invocation of the statute of frauds; and (2) under § 2-201(3), the partial performance exception, Brand X can enforce the parties' oral agreement for the completed works.

UCC § 2-201(2), the "merchant's exception",[FN2] provides that "[b]etween merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the [*5]requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received." Ergo, if one party memorializes the terms of an oral contract in a writing, gives that writing to the other party, the other party does not object, and then the parties perform under such contract, the breaching party cannot invoke the statute of frauds as a defense. "This section recognized the common practice among merchants, particularly small businesses, to enter into oral sales agreements later confirmed in writing by one of the parties." *Digital Centre, S.L. v Apple Indus., Inc.*, 2011 WL 7974766, at *4 (Sup Ct, Bronx County 2011), *aff'd in relevant part* 94 AD3d 571, 572 (1st Dept 2012), citing *Bazak Int'l Corp. v Mast Indus., Inc.*, 73 NY2d 113 (1989) (annotated purchase order form signed by buyer and sent and retained by seller but not signed by it, falls within merchant exception to signed writing). In *Bazak*, the Court of Appeals held that "in determining whether writings are confirmatory documents within [§ 2-201(2)], neither explicit words of confirmation nor express references to the prior agreement are required, and the writings are sufficient so long as they afford a basis for believing that they reflect a real transaction between the parties." *Bazak*, 73 NY2d at 123. Simply put, so long as a writing evidences the parameters of the parties' agreement (with the specificity required by § 2-201(1)) and defendant received it, defendant's failure to object to such confirmation precludes him from disavowing the entire deal by invoking the statute of frauds. Nonetheless, "the consequence of a failure to give timely written notice of objection to a confirmatory writing is only to remove the bar of the Statute of Frauds. The burden of proving that a contract was indeed made remains with the plaintiff, as does the burden of proving the terms of the contract. By the same token, the defendant remains free to urge that no contract was made, or that it differed from the one claimed by plaintiff." *Id.* at 122; *see also Whitewash Indus. v Sears Roebuck & Co.*,192 AD2d 331(1st Dept 1993) (confirmatory writing between merchants need only afford basis for believing it reflects transaction between parties); *Civale Corp. v Colonial Aluminum Sales, Inc*., 165 AD2d 805 (1st Dept 1990).

Here, Brand X's emails set forth the parameters of the parties' agreement. Wool never objected. Instead, Wool substantially performed by creating more than half of the agreed upon works. It was only after Wool realized that the value of the artwork would be more than anticipated that he sought to revise the terms of the deal. Tellingly, the terms of defendants' offers to change the deal evidence their original understanding of the contract (e.g., LAG offered to purchase Brand X's one-third interest). Thus, even if the UCC applied, Wool would be precluded from asserting a statue of frauds defense.

Additionally, where, as here, the subject oral contract is for multiple, divisible goods (i.e., separate works of art), the contract is enforceable, but only for the completed goods. *See Momentive Performance Materials USA, Inc. v AstroCosmos Metallurgical Inc.*, 659 FSupp2d 332, 343 (NDNY 2009), accord NY UCC § 2-201 cmt. 2 (" Partial performance' as a substitute for the required memorandum can validate the contract only for the goods which have been accepted or for which payment has been made and accepted"); *see also Regal Custom Clothiers, Ltd. v Mohan's Custom Tailors, Inc.*, 1997 WL 370595 (SDNY 1997). That is, under the partial performance doctrine, Brand X can only recover for completed works. To be sure, the question of whether any of the works have been completed is a question of fact that cannot be resolved on a motion to dismiss.

In sum, regardless of whether the UCC applies, Brand X can maintain its breach of contract claim. As a result, the court does not reach the issue of whether a claim for promissory [*6]estoppel, a quasi-contract claim, is also viable. Ordinarily, quasi-contract claims are not permitted when the breach of contract claim is barred by the statute of frauds. *See Mark Bruce Intel, Inc. v Blank Rome LLP*, 19 Misc 3d 1140(A), at *7 (Sup Ct, NY County 2008), *aff'd* 60 AD3d 550 (1st Dept 2009); *see also Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 (1987). However, there are exceptions, such as where, as here, labor is performed. *See Komolov v Segal*, 40 Misc 3d 1228(A), at *4 (Sup Ct, NY County 2013), citing *Farash v Sykes Datatronics, Inc.*, 59 NY2d 500, 503-04 (1983) and *RTC Properties, Inc. v Bio Resources, Ltd.*, 295 AD2d 285, 286 (1st Dept 2002). There is no need to address these issues as the breach of contract claim is viable.

Tortious Interference With Contract

"Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 (1996). However, when a defendant has an economic interest in the contract with which he allegedly interfered, it is not liable "absent allegations of malice or fraudulent or illegal means." *Hirsch v Food Resources, Inc.*, 24 AD3d 293, 297 (1st Dept 2005). In other words, "[a] defendant may assert that it acted to protect its own legal or financial stake in the breaching party's business.'" *Savage v Galaxy Media & Marketing Corp.*, 2012 WL 2681423, at *8 (SDNY 2012), quoting *White Plains Coat & Apron Co., v Cintas Corp.*, 8 NY3d 422, 426 (2007).

LAG's economic interest argument does not merit dismissal. The exact nature of the relationship between Wool and LAG is a question of fact that cannot be resolved on this motion to dismiss. It is not clear if LAG was serving as Wool's agent, his economic competitor (i.e., a non-exclusive gallery, making LAG a competitor to both Wool and Brand X), or something in between. Without clarity about LAG's actual allegiances at the time of the underlying events (notwithstanding that Wool and LAG are represented by the same counsel, since their allegiances may have changed after this lawsuit was commenced), the economic interest argument does not warrant dismissal. To be sure, this cause of action is otherwise sufficiently pled because LAG's role in causing Wool to breach is clearly set forth in the Complaint. The real question is whether Wool would have breached regardless of LAG's involvement, but that is a question for another day.

Unfair Business Practices

It is well settled that "[a]n injury to a person's business by procuring others not to deal with him, or by taking away his customers, if unlawful means are employed, such as fraud or intimidation, or if done without justifiable cause, is an actionable wrong." *Duane Jones Co. v Burke*, 306 NY 172, 190 (1953). The parties dispute whether this cause of action applies to this case, where there is no alleged misappropriation of confidential information or trade secrets. The court need not opine on this seemingly unclear area of law because this cause of action is based on the tortious interference and defamation claims that defendants do not seek to dismiss (the fourth and sixth causes of action, relating to another artist). This claim, therefore, is duplicative. If defendants improperly competed by committing these alleged torts, Brand X can recover damages accordingly. If Brand X cannot establish that the predicate "unfair" conduct [*7]was illegal, this claim would fail. Accordingly, it is

ORDERED that the motion to dismiss the Complaint by defendants Christopher Wool and Luhring Augustine Gallery, Inc. is granted on the fifth cause of action (unfair business practices) and denied on the first (breach of contract), second (promissory estoppel), and third (tortious interference with contract) causes of action; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a preliminary conference on January 28, 2014 at 10:30 in the forenoon.

Dated: January 2, 2014ENTER:

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J.S.C.

Footnotes

Footnote 1: NY UCC § 2-201 states: "Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing."

Footnote 2: The parties do not dispute that they are merchants (defined in UCC § 2-104(1)), as they each wax poetic about the other's skills.

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