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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

LUPER AUCTION GALLERIES, INC.,

Plaintiff,

v.

MICHAEL JUDGE, et al.

Defendants.

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) C.A. NO. 3:92CV556
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MEMORANDUM OPINION

This matter came before the Court on the motion for partial summary judgment of Plaintiff against three of the four defendants in this action-- Michael Judge ("Judge"), Vincent De Mase ("De Mase") and Joseph Tesoriero ("Tesoriero"); and on Defendants De Mase's and Tesoriero's motions for partial summary judgment against Plaintiff, all three motions being with respect to Counts I and II of the complaint, the breach of contract claims. Each movant also requests attorneys' fees and costs. (Defendant Harvey Rothstein is not a party to either motion in the present proceeding).

For the reasons stated below, Plaintiff's motion for partial summary judgment is GRANTED, as to Defendant Judge; but DENIED, as to Defendants De Mase and Tesoriero. Defendants De Mase's and Tesoriero's motions for summary judgment on Counts I and II are similarly DENIED.

BACKGROUND:

The instant breach of contract and fraud action arose from the consignment of allegedly fake paintings to an auctioneer. There is complete diversity between Plaintiff and each of the defendants, and the amount in controversy exceeds \$50,000.

On July 31, 1992, Luper Auction filed an action in the Circuit Court for the City of Richmond against the defendants over contracts executed on or about March 20, 1992, pursuant to which the latter consigned to Luper Auction art works purportedly represented to be originals by Picasso, Matisse, Rembrandt, Sloan, etc. Luper Auction claims that it subsequently discovered that the works were not only fake, but that Defendant Judge had been told as much when he had previously attempted to consign them to another gallery.

De Mase and Tesoriero claim that they purchased from Judge in 1989, a one-half interest in the painting that all three consigned to Luper Auction. The painting was entitled "Femme Accoudee," and Judge is alleged to have provided documentation of its authenticity to De Mase and Tesoriero. Luper Auction has now withdrawn the paintings from the market and seeks recovery of its advertising expenses, in addition to "withdrawal fees" provided for by the contract (Counts I and II). Counts III and IV charge the defendants with fraud and constructive fraud, alleging as damages, injury to Luper Auction's professional reputation and business image.

DISCUSSION:

Summary judgment is appropriate when "there is no genuine issue as to any material facts and... the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Plaintiff argues that it has met this burden in the instant case because it is undisputed that the defendants signed the contracts; that the plaintiff accepted the paintings and offered them for sale at auction, issuing consignment receipts to the former for the property consigned.

On Count I, Plaintiff is claiming \$13,577.73 in advertising expenses that it assertedly incurred in connection with the consignment contract. As to Count II, paragraph IX of the contract, the "Withdrawal of Property" clause provides that

[Luper Auction] may withdraw property at any time if we believe (a) in our opinion there is a reasonable doubt as to its authenticity or attribution, (b) any of your representations or warranties concerning it are inaccurate, or (c) if you have breached any provision of this Agreement. If we withdraw any property under (a), (b) or (c) of the preceding sentence, you will pay us 20% of the mean of our latest presale estimates.

(emphasis added). Luper Auction is thus requesting the 20% withdrawal fee, in addition to its advertising costs, on the basis that it does have reasonable grounds for doubting the authenticity of the art pieces.

Although Plaintiff is correct in this contention, the claims at issue are not ripe for disposal at this stage. Defendants Tesoriero and De Mase have raised affirmative defenses of mutual mistake and fraud which, if sustained, would render the contract invalid and unenforceable. See Jennings v. Jennings, 12 Va. App.

1187, 1189, 409 S.E.2d 8 (1991) ("Nothing is more clear in equity than the doctrine that a contract founded in mutual mistake of facts constituting the very basis or essence of it will avoid it." (citations omitted)).

De Mase and Tesoriero claim that they attempted to consign the paintings in the mistaken belief that they were co-owners thereof. They provide an affidavit from a Mr. Niles Bond ("Bond"), who attests to being the true owner of the painting. The claim here is that Bond merely consigned the artwork to Judge, who "sold" it to the other two defendants, without Bond's permission. Tesoriero and De Mase assert that since they never had a valid ownership interest in the painting and were, in effect, fraud victims themselves, the consignment agreement they signed is unenforceable. In addition, Judge's alleged fraud in the procurement of the contract, if proven, would vitiate the contract ab initio. See Pate v. Southern Bank and Trust, 214 Va. 596, 203 S.E.2d 126 (1974).

Without considering the validity of these claims, or the estoppel theories raised by Plaintiff, at this point, it is clear that sufficient questions remain over the affirmative defenses raised by De Mase and Tesoriero to render the issue inappropriate for summary judgment. This conclusion, however, does not apply in the instance of Defendant Judge. As a pro se defendant, he has been given latitude in presenting a defense, and has failed to provide an adequate response to the instant motion.

Accordingly, Plaintiff's motion for partial summary judgment is GRANTED with respect to Defendant Judge, but DENIED with respect

to Defendants De Mase and Tesoriero. Defendants De Mase's and Tesoriero's motions for partial summary judgment are likewise DENIED.

Let the Clerk send a copy of this Memorandum Opinion and the accompanying Order to the pro se defendant and all counsel of record.

DATE

SENIOR UNITED STATES DISTRICT JUDGE