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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON PART 55

Index Number : 603534/2009

FINE ART FINANCE

vs

TAWIL, EVAN

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE 7/19/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	6-7

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided by the Annexed Memorandum decision and order.

FILED

NOV 24 2010

NEW YORK
COUNTY CLERK'S OFFICE

NB Comp Conf set at end Jan. 24, 2011 @ 11 AM in Part 55.

Dated: 11-22-10

JANE S. SOLOMON J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

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FINE ART FINANCE, LLC,
Plaintiff,

-against-

Index No. 603534/09

EVAN TAWIL,
Defendant.

----------X

EVAN TAWIL,
Counterclaim-Plaintiff,

-against-

FINE ART FINANCE, LLC, BAIRD RYAN, IAN PECK, ACG CREDIT COMPANY, LLC and ART CAPITAL GROUP, INC.,
Counterclaim-Defendants.

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JANE S. SOLOMON, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

Counterclaim defendants Fine Art Finance, LLC (Fine Art), Baird Ryan, Ian Peck, ACG Credit Company, LLC and Art Capital Group, Inc. (collectively, counterclaim defendants) move, pursuant to CPLR 3013 and 3211 (a) (7), for an order dismissing the counterclaims (motion sequence number 001). The defendant Evan Tawil (Tawil) moves, pursuant to CPLR 3211 (a) (1), (2), (3), and (7), for an order dismissing the complaint (motion sequence number 002).

Tawil, as borrower, entered into a "loan and security agreement" and an "arranger agreement" with Fine Art, secured by

several pieces of art, including a work by Keith Haring (the Haring), and two pieces by Andy Warhol (the Warhols). Under the loan agreement, if Tawil desired to market or sell any of the collateral, Fine Art had a right of first refusal (Loan Agreement, attached to Epstein Affirmation, Ex. 1[A], § 2.8[b]). Under the arranger agreement, if Tawil defaulted on the loan, Fine Art would receive "a default sale fee equal to 25% of the gross sale proceeds . . . of any sale of any item of Collateral" (Arranger Agreement, attached to Epstein Affirmation, Ex. 1[B], ¶ 4). In October and November 2007, Tawil made three separate draws on the loan agreement, totaling the sum of $220,000.

Fine Art alleges that, around October 2008, Tawil violated the loan agreement by marketing, selling or attempting to sell the Haring without informing or receiving authorization from Fine Art, thus breaching the loan agreement. By letter dated October 7, 2008, Fine Art informed Tawil that he was in default and declared all of Tawil's obligations due and payable. Tawil did not make payment. Subsequently, on November 26, 2008, Fine Art assigned the Tawil loan to non-party SageCrest II, LLC (SageCrest), thereby giving SageCrest a first priority secured interest in the collateral. Fine Art, however, retained rights and interest to the arranger agreement, subject to its own timely payment on a $6.7 million loan from SageCrest (Collateral Assignment, attached to Epstein Reply Affirmation, Ex. 1, p. 2).

Fine Art now seeks the default 25% of the sale price of all the collateral under the arranger agreement. The complaint sets forth two causes of action for breach of contract.

In his answer, Tawil denies that he sold the collateral. He points to an article in the New York Times from February 2009, reporting that the Warhols hung on the wall of the counterclaim defendants' "loan store" (notably, no mention is made of the Harring). He then alleges that the counterclaim defendants refused to permit the collateral to be released to a new lender, despite the fact that they no longer retained an interest in it. He sets forth seven counterclaims: breach of contract; deceptive acts and practices in violation of General Business Law § 349; conversion of the collateral; tortious interference with prospective contractual relations by interfering with both the sale of the collateral and/or the refinancing through a new lender; intentional infliction of emotional distress by making graphic threats and using profane language; unjust enrichment through excessive interest; and in the alternative, breach of fiduciary duty.

In support of their motion, the counterclaim defendants argue that: the breach of contract allegations against them are too vague and are subject to dismissal under CPLR 3013, for failure to give notice of the claim, and under CPLR 3211(a)(7), for failure to state a cause of action. General Business Law §

349 does not apply to a private arm's-length business transaction between sophisticated entities. A cause of action for conversion cannot be predicated on a breach of contract. The claim for tortious interference fails to plead either a crime or an independent tort. The intentional infliction of emotional distress counterclaim fails to allege outrageous conduct. The existence of the enforceable written contract precludes the unjust enrichment counterclaim. There is no fiduciary duty between a debtor and a creditor. Finally, the affiliates and the individual defendants are not alter egos, and there is no basis to pierce the corporate veil.

In support of his motion to dismiss the complaint, Tawil makes the following arguments: The current holder of the loan, SageCrest, does not consider Tawil to be in default. Fine Art, itself, defaulted on the SageCrest loan, and so, lost its rights under the arranger agreement, and, therefore, lacks standing to bring this action. Finally, he contends that the arranger's agreement does not clearly provide for the payment of attorney's fees.

Notably, the parties do not agree on many facts, such as whether the collateral has been sold, and if so, when, by whom, or to whom.

DISCUSSION

On a motion to dismiss a pleading for legal

insufficiency (CPLR 3211[a][7]), the court "accept[s] the facts alleged as true and determine[s] simply whether the facts alleged fit within any cognizable legal theory" (*Morone v Morone*, 50 NY2d 481, 484 [1980] [citation omitted]). The pleading is to be liberally construed, accepting all the facts alleged as true, and according the allegations the benefit of every possible favorable inference (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 [2002]). "[A]ny deficiencies in the complaint may be amplified by supplemental pleadings and other evidence" (*AG Capital Funding Partners, L.P. v State St. Bank and Trust Co.*, 5 NY3d 582, 591 [2005]; *Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]). Ambiguities are resolved in plaintiff's favor (*Snyder v Bronfman*, 13 NY3d 504 [2009]). However, claims consisting of bare legal conclusions with no factual specificity, are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358 [2009]). On a motion to dismiss pursuant to CPLR 3211(a)(1), "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

A. The Counterclaims

The first counterclaim, captioned "breach of contract," contains only the contention that the counterclaim-defendants "breached" their duty of good faith and fair dealing towards Tawil.

"Implied in every contract is a covenant of good faith and fair dealing . . . which is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement" (*Jaffe v. Paramount Communications*, 222 AD2d 17, 22-23 [1st dept., 1996] [citations omitted]). This claim appears to arise from the contractual agreement between the parties but contains no references to that agreement. As such, the claim is facially deficient.

Turning to the second counterclaim, General Business Law (GBL) § 349(a) provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." The statutes confer a private right of action to "any person who has been injured by reason of any violation of this section" (GBL § 349[h]).

To state a claim under the statute, a plaintiff must allege that a defendant has engaged in "(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 New York v Smokes-Spirits.Com, Inc.*, 12 NY3d 616, 621 [2009] *revd & remanded on other grounds sub nom Hemi Group LLC v City of New York*, __ US __, 130 S Ct 983 [2010].

The scope of the statute "is intentionally broad, applying to virtually all economic activity" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 324 [2002] [Internal quotation marks omitted]). However, private transactions without ramifications for the public at large are not the proper subject of a claim under section 349 (*Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330 [1999].

In response to the motion, Tawil argues that he is a consumer of a loan, that Fine Art "broadly advertised" its services (both in print ads and on the internet) to the public, and that Fine Art made loans to many individuals. However, there is no authority to support the notion that the private loan agreement between the parties, negotiated at arms length and modified several times, affects consumers at large. Tawil's attempt to compare the Fine Art loan with a real estate mortgage is unpersuasive, and his argument that Fine Art is a consumer lender, and he a general consumer, is not convincing. Because Tawil fails to satisfy the requirement that the complained-of acts or practices have a broad impact on consumers at large (*see, e.g. Northeast Wine Dev. LLC v Service-Universal Distribs. Inc.*, 7 NY3d 871 [2006]), the second counterclaim must be dismissed.

The third counterclaim is for conversion, a claim which requires that "(1) plaintiff had legal ownership or an immediate superior right of possession to specific identifiable personal

property, and (2) defendant exercised unauthorized dominion over the property to the exclusion of the plaintiff's rights" (*Aetna Cas. & Sur. Co. v Glass*, 75 AD2d 786, 786 [1st Dept 1980]). The third counterclaim sets forth how and when the defendants purportedly exercised a right of ownership over the artwork belonging to Tawil, to the exclusion of Tawil's rights (*Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 44 [1995]). Fine Art's argument that this claim is predicated on a breach of contract alone is unpersuasive.

The fourth counterclaim is captioned "Tortious Interference with Prospective Contractual Relations." It is unclear whether this is a claim for tortious interference with contract or tortious interference with a business relation. Though similar, both claims require separate analyses.

The elements of a tortious interference with contract claim are: (1) the existence of a contract between the plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to the plaintiff (*Israel v Wood Dolson Co.*, 1 NY2d 116 [1956]). A claim for tortious interference with business relations requires "1) that [Tawil] had a business relationship with a third party; 2) that the defendant knew of that relationship and intentionally interfered with it; 3)that the defendant acted solely out of

malice or used improper or illegal means that amounted to a crime or independent tort; and 4) that the defendant's interference caused injury to the relationship with the third party" (*Amaranth, LLC. v. J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept., 2009]). Furthermore, a party must show that the alleged tort-feasors wrongfully interfered for the sole purpose of harming the plaintiff, or that they committed independent torts or predatory acts toward the third party *(EDP Hosp. Computer Sys. v Bronx-Lebanon Hosp. Ctr.*, 212 AD2d 570 [2d Dept 1995]).

No particular contractual relationship with anyone is alleged. Rather, the allegations concern unpleasant encounters with defendant Ryan which interfered with refinancing or selling the collateral through an unspecified auction house. Tawil's allegations in this claim are too vague to support it, and the fourth counterclaim must be dismissed.

Regarding the fifth counterclaim, a cause of action for intentional infliction of emotional distress must be supported by allegations of conduct by the defendants so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community (*Howell v. New York Post Co., Inc.*, 81 NY2d 115, 121 [1993]). Tawil's allegations that Ryan made unspecified "explicit and graphic threats" and used "obscene and profane language" against Tawil, harming his

"sensitive nature" (Answer, ¶ 44-46) do not describe conduct which supports this claim, (*see, Capellan v Marsh*, 71 AD3d 505 [1st Dept 2010]; *Suarez v. Bakalchuk*, 66 AD3d 419 [1st Dept., 2009]); nor does it establish a violation of the Fair Debt Collection Practices Act (FDCPA), 15 USC § 1692(d) (see, *Kloth v. Citibank [South Dakota] NA*, 33 FSupp2d 115, 119 [1998]; ["[g]enerally, the FDCPA does not apply to creditors"]).

The sixth counterclaim is for unjust enrichment, for which a plaintiff must establish that: (1) the defendant was enriched; (2) at plaintiff's expense; and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (*Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415 [1972], *cert denied* 414 US 829 [1973]).

Tawil alleges that Fine Art has been enriched as a result of enforcing its rights under the provisions of the negotiated agreement upon which it sues. There is nothing unlawful about hard bargaining. Accordingly, the sixth counterclaim must be dismissed.

Similarly, the seventh counterclaim, asserting a breach of fiduciary duty, must be dismissed. The loan documents evidence an arms-length transaction, and the counterclaim pleads no facts and circumstances extraneous to and independent of the parties agreements from which a fiduciary duty may be inferred (*Roni LLC v Arfa*, 74 AD3d 442 [1st Dept] *affd* __ NY3d __, 2010 WL

3703047 [2010]).

B. Claims against Ryan, Peck, and Art Capital

The counterclaim-defendants, other than Fine Art, seek to dismiss all claims against them on the ground that Tawil does not make specific allegations regarding their conduct, and because only Fine Art had a relationship with Tawil. The claim arguably against defendant Ryan is disposed of above. As no parties are described in the surviving claims other than Fine Art, this branch of the motion is granted.

B. The Direct Claims

Turning to Tawil's motion to dismiss the complaint, the contract-based claims are adequately pleaded. Contrary to Tawil's assertion, the contractual provisions and materials relied upon do not demonstrate, as a matter of law, that Fine Art is barred from recovering a 25% default sales fee under the arranger's agreement. Moreover, the language in the collateral assignment agreement between SageCrest and Fine Art carves out Fine Art's right to fees and expenses despite Fine Art's assignment of the underlying loan and collateral to SageCrest (Assignment Agreement, supra). Tawil's contention that Fine Art defaulted on its loan agreement to SageCrest is not conclusively supported at this point,[1] and cannot be the basis for dismissal.

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[1] Tawil submits a hearing transcript from an unrelated lawsuit in which Fine Art's principal states that payment to SageCrest was not timely made (Hearing transcript, attached to

Finally, Tawil seeks to strike Fine Art's claim for attorneys' fees because the arranger agreement does not explicitly contemplate them. While the arranger agreement does not cover them, the loan agreement does, and at this point in the lawsuit, the claim should survive.

In light of the foregoing, it hereby is

ORDERED that the counterclaim defendants' motion to dismiss all counterclaims as to Fine Art and Baird Ryan is granted, except that within 20 days of service of a copy hereof with notice of entry, Tawil may replead his breach of contract claim and his ill described claim arising from his effort to sell the collateral, and the counterclaims are otherwise dismissed as against defendants Ian Peck, ACG Credit Company, LLC and Art Capital Group, Inc.; and it further is

ORDERED that Fine Art Finance, LLC., is directed to serve a reply to the repleaded counterclaim within 20 days after receipt of such; and it further is

ORDERED that Tawil's motion to dismiss the complaint is denied; and it further is

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Adelman affirmation, Ex. C, p. 26-7). This does not conclusively prove that Fine Art defaulted, or that SageCrest held it in default.

ORDERED that counsel shall appear for a compliance conference in Part 55, 60 Centre Street, Room 432, New York, NY, on January 24, 2011 at 11 AM.

Dated: November 22, 2010

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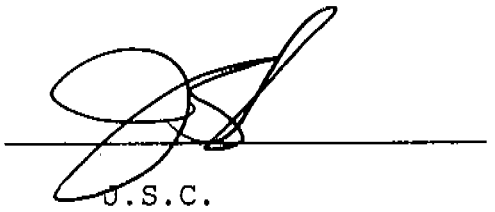

J.S.C.

JAMIE B. SOLOMON