Renaissance Art Invs., LLC v North Shore Risk Mgt. LLC
2017 NY Slip Op 30127(U)
January 23, 2017
Supreme Court, New York County
Docket Number: 162670/14
Judge: Debra A. James

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59

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RENAISSANCE ART INVESTORS, LLC,

Plaintiff,

Index No. 162670/14

Motion Sequence No. 001

-against-

NORTH SHORE RISK MANAGEMENT LLC, a New York limited liability company,

Defendant.

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HON. DEBRA A. JAMES, J.:

In this action, plaintiff Renaissance Art Investors, LLC (RAI) seeks damages against defendant North Shore Risk Management, LLC based upon defendant's North Shore Risk Management, LLC's (North Shore)'s alleged misrepresentations concerning the existence of a "comprehensive" corporate art insurance policy, and the ability to procure such a policy without certain exclusions. The complaint asserts one cause of action for fraud. Defendant now moves to dismiss the complaint as time-barred, for failure to state a claim based upon documentary evidence, and as barred by res judicata or collateral estoppel.

The complaint alleges that RAI acquired and consigned a portfolio of "Old Masters" art valued at $42,197,660. It asserts

Salander (Salander) and the Salander-O'Reilly Galleries, LLC (the Gallery)." AXA Art Ins. Corp. v Renaissance Art Invs., LLC, 32 Misc 3d 1223(A), 2011 NY Slip Op 51397(U), *1 (Sup Ct, NY County 2011), affd sub nom. Renaissance Art Invs., LLC v AXA Art Ins. Corp., 102 AD3d 604 (1st Dept 2013). AXA alleged that "RAI was formed by a group of investors, including the Gallery and L. Salander LLC (Salander LLC)." Id. AXA claimed that, thereafter, RAI "entered into a series of transactions with the Gallery, which was supposed to find art buyers on RAI's behalf, using Salander's many contacts in the art world. Instead, according to the complaint, Salander and the Gallery fraudulently swindled RAI out of millions of dollars." Id.

According to RAI's opposition papers, Salander is currently serving a prison sentence of 12 to 18 years for his crimes against RAI and others.

In 2011, RAI commenced an action against AXA in New York Supreme Court, New York County (Index Number 650271/11), seeking damages arising from AXA's refusal to pay RAI's claim under the Policy. (The actions under Index numbers 651844/10 and 650271/11 are referred to herein as the "AXA Actions.")

In the AXA Actions, RAI moved to dismiss AXA's claims, and AXA cross-moved for summary judgment on its declaratory judgment

claim. The trial court denied RAI's motion to dismiss and granted AXA's motion. The court held that AXA was not obligated to indemnify RAI, relying upon an exclusion in the Policy that excluded from coverage "[a]ny fraudulent, dishonest, or criminal act or acts" (AXA Art Ins. Corp., 32 Misc 3d 1223[A], 2011 NY Slip Op 51397[U], *4), and the First Department affirmed. Renaissance Art Invs., LLC, 102 AD3d 604.

RAI now claims that, prior to purchasing the Policy, it directed North Shore to "obtain quotes for a comprehensive, 'all risks' insurance policy that would cover all possible causes of loss," including "losses caused by RAI's consignee, the Salander-O'Reilly Galleries, and/or that may occur during any time in which the portfolio was in another's possession, custody or control, such as during the consignment period." RAI allegedly explained to North Shore that it "wished to buy the peace of mind of knowing that whatever happened to the art portfolio - whether it was in RAI's possession or in another's custody - the art and any loss thereof would be fully covered by insurance." North Shore allegedly represented to RAI that the Policy was "the most comprehensive policy available on the market and that it would cover against 'all risks' of any type of loss that occurred during the policy period, including without limitation losses caused by RAI's consignee." According to RAI, North Shore

"expressly represented . . . that neither AXA nor any other insurance company would underwrite or issue a policy that did not contain certain exclusions, such as those set forth in the [Policy]." North Shore allegedly recommended that RAI purchase the Policy, and RAI claims that it relied upon North Shore's representations concerning the comprehensive nature of the Policy and "the unavailability of a more comprehensive policy that did not contain the specified exclusions."

RAI claims that, in 2014, it discovered that North Shore's representations were false, and that "AXA actually had issued a more comprehensive 'all risks' art insurance policy that does not contain a 'dishonesty' exclusion to another insured." RAI avers that it would have purchased a policy that did not contain the dishonesty exclusion if it had known that such a policy was available. RAI maintains that North Shore's deception caused it to incur millions of dollars in damages due to its inability to collect insurance proceeds under the dishonesty exclusion. *Id.*, ¶ 17. RAI claims that it also sustained damages from the substantial time and money spent seeking to vindicate its rights.

Legal Analysis

North Shore argues that RAI's claim is time-barred under both the six-year statute of limitations and the two-year

discovery accrual rule. North Shore argues that the fraud claim is subject to dismissal for the additional reasons that it fails to state a claim, is refuted by documentary evidence, and is barred by collateral estoppel.

Under CPLR 213 (8), the statute of limitations for fraud is "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff . . . discovered the fraud, or could with reasonable diligence have discovered it." A claim that the plaintiff was fraudulently induced to purchase an insurance policy accrues on the date that the policy was purchased. Aetna Life & Cas. Co. v Nelson, 67 NY2d 169, 175 (1986) ("Statute of Limitations begins to run once a cause of action accrues (CPLR 203 [a]), that is, when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court"); Goldberg v Manufacturers Life Ins. Co., 242 AD2d 175, 180 (1st Dept 1998); Matter of Ply * Gem of Laurel (Lee), 91 AD2d 513, 513 (1st Dept 1982) (fraudulent inducement claim accrues upon "execution of the contract"). "The test as to when fraud should with reasonable diligence have been discovered is an objective one, and the duty of inquiry arises [w]here the circumstances are such as to suggest to a person of ordinary intelligence the probability that he [or she] has been defrauded." Apt v Morgan Stanley DW, Inc.,

115 AD3d 466, 467 (1st Dept 2014) (internal quotation marks and citations omitted), lv granted 23 NY3d 904 (2014); see also Kaufman v Cohen, 307 AD2d 113, 123 (1st Dept 2003) (same).

RAI commenced the instant action by filing the summons and complaint on December 23, 2014. RAI alleges that it renewed the Policy in 2007, more than six years before this action was commenced. Therefore, the action is untimely under the six-year statute of limitations.

With respect to the two-year discovery accrual rule, the complaint alleges that, "[i]n 2014, RAI learned that [North Shore's] representations were not true." However, contrary to that assertion, the documentary evidence establishes that RAI knew of or, with reasonable diligence, could have discovered the purported misrepresentation concerning the availability of a "comprehensive" policy, at the latest, on June 3, 2008, when AXA's denial of coverage expressly stated that its denial was based upon the Policy exclusion for fraudulent and/or dishonest conduct. At this point in time, facing an alleged $42 million loss resulting from a fraud, RAI had sufficient information to discover the existence and availability of a more "comprehensive" insurance policy than was allegedly recommended by North Shore. Apt, 115 AD3d at 467; Kaufman, 307 AD2d at 123. Applying the

discovery accrual rule, the statute of limitations expired on June 3, 2010, more than four years before RAI commenced the instant action.

The court notes RAI's reliance upon Frelinghuysen Morris Found. v AXA Art Ins. Corp. (2013 WL 5740207, 2013 NY Misc LEXIS 6509 [Sup Ct, NY County 2013]), which also involved Salander's theft of art insured by AXA. In Frelinghuysen Morris Found., the court:

> note[d] that the Policy that defendant issued to plaintiff had no fraud exclusion, which in at least one other action has been successfully invoked to preclude a plaintiff from recovering from this same insurer for the . . . fraud [committed by Salander and the Gallery]. See AXA Art Ins. Corp. v Renaissance Art Invs., LLC, 32 Misc 3d 1223(A), 2011 NY Slip Op 51397(U) (Sup Ct, NY County 2011), *affd* 102 AD3d 604 (1st Dept 2013). Absent a fraud exclusion in the Policy, this Court holds that the alleged loss is a 'Covered Cause of Loss.'

2013 WL 5740207, 2013 NY Misc LEXIS 6509, *14. The court issued its decision in Frelinghuysen Morris Found. on October 18, 2013. RAI argues that it had no knowledge of facts from which fraud could be inferred until August 2014, approximately 10 months after the court issued its decision in Frelinghuysen Morris Found.

RAI's argument is unpersuasive factually and legally. As documentary evidence, North Shore submits RAI's opposition brief in the AXA Actions, dated July 5, 2011. In that brief, RAI referred to a Maryland lawsuit, in which AXA was a defendant, to establish that AXA's conduct violated the General Business Law. RAI argued that the Maryland action involved "similarly situated insureds" who were "seeking damages against AXA for the same, or substantially the same, claims made by RAI". The complaint in the Maryland action attached the insurance policy at issue, which was also issued by AXA. That policy referred to fraud in its "General Conditions", but the policy "Exclusions" did not contain a fraud endorsement analogous to the exclusion in the instant action. This evidence shows that, as of the date of RAI's opposition brief, July 5, 2011, more than two years before RAI commenced the instant action, RAI "could, with reasonable diligence, have discovered" that AXA issued policies that did not contain the fraud endorsement at issue in the instant action. Apt, 115 AD3d at 467 (internal quotation marks and citations omitted); Kaufman, 307 AD2d at 123.

Moreover, in RAI's complaint against AXA in the action under Index Number 650271/11, filed January 31, 2011, RAI alleged that, "[i]f fidelity coverage was necessary to provide coverage for the acts committed by Salander or anyone else with the Gallery, AXA

and/or its insurance representatives failed to exercise reasonable care or competence by failing to inform RAI of such requirement prior to issuance of the Policies." "Fidelity coverage," as interpreted by New York courts, insures against losses resulting from dishonest or fraudulent acts. See Keybank N.A. v National Union Fire Ins. Co. of Pittsburgh, PA, 124 AD3d 512 (1st Dept 2015); Aetna Cas. & Sur. Co. v Kidder, Peabody & Co., 246 AD2d 202 (1st Dept 1998); Columbia Equities v Underwriters at Lloyd's, London, 186 AD2d 486 (1st Dept 1992); Capital Bank & Trust Co. v Gulf Ins. Co., 91 AD3d 1251 (3d Dept 2012). Thus, RAI's express assertion, that "AXA and/or its insurance representatives" failed to inform RAI that "fidelity coverage was necessary," implicitly concedes RAI's knowledge that such coverage existed when it filed its complaint against AXA in January 2011, more than two years before RAI commenced the instant action. As a matter of law, upon AXA's June 2008 denial of RAI's insurance claim based upon the fraud/dishonesty exclusion, and certainly upon RAI's subsequent submissions in the Maryland and AXA Actions, RAI had "a duty to inquire in order to discover the fraud within a reasonable time." Mienik v Mienik, 91 AD2d 604, 605 (2d Dept 1982) ("[u]nlike the proverbial ostrich, the plaintiff was not free to remain with [its] head in the sand").

For the foregoing reasons, North Shore's motion to dismiss this action as time-barred is granted.

The fraud claim must be dismissed for the additional, independent reasons that it fails to state a claim and is barred by collateral estoppel.

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 (2009); see also Friedman v Anderson, 23 AD3d 163, 167 (1st Dept 2005) ("[t]o establish a fraud claim, a plaintiff must demonstrate that a defendant's misrepresentations were the direct and proximate cause of the claimed losses").

Collateral estoppel bars relitigation of issues raised and decided in a prior action or proceeding. Matter of Doro's Rest. v City of New York, 179 AD2d 406, 407 (1st Dept 1992). It requires "two distinct elements: 'that an issue in the present proceeding be identical to that necessarily decided in a prior proceeding, and that in the prior proceeding the party against whom preclusion is sought was accorded a full and fair opportunity to contest the issue.'" Matter of Hofmann, 287 AD2d

119, 123 (1st Dept 2001), quoting Allied Chem. v Niagara Mohawk Power Corp., 72 NY2d 271, 276 (1988).

As a preliminary matter, the Policy's "General Conditions" provided that "coverage is void in any case of fraud" and where the insured "intentionally conceal[s] or misrepresent[s] a material fact". Thus, even if the separate fraud endorsement did not exist, the Policy would still exclude from coverage any loss arising from fraud on the part of the insured. Moreover as to the question of justifiable reliance, if procuring a "comprehensive" art insurance policy - one that did not contain a fraud exclusion - was critical to RAI, RAI could easily have sought such coverage in the marketplace from multiple insurance brokers before agreeing to the coverage procured by North Shore. DDJ Mgt., LLC v Rhone Group L.L.C., 15 NY3d 147, 154 (2010) (a plaintiff "will not be heard to complain that he was induced to enter into the transaction by misrepresentations" where it "has the means available to [it] of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation" [internal quotation marks and citation omitted]); UST Private Equity Invs. Fund v Salomon Smith Barney, 288 AD2d 87, 88 (1st Dept 2001) ("a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations

if that plaintiff failed to make use of the means of verification that were available to it"). For these reasons alone, RAI fails to state a cause of action for fraud.

In any event, in the AXA Actions, RAI argued that the fraud exclusion did not apply, because "RAI believed it was purchasing 'all risk' coverage and that the term 'all risk' implies comprehensive coverage—including fraud." Renaissance Art Invs., *LLC*, 102 AD3d at 605. The First Department held:

> "'[a]s a matter of law[,] insurance coverage, even under an all risk policy, extends only to fortuitous losses' and '[w]hether or not a loss is fortuitous . . . is a legal question to be resolved by the Court' (Redna Mar. Corp. v Poland, 46 FRD 81, 86, 87 [SD NY 1969]). Here, the motion court correctly determined that the fraud engaged in by Lawrence Salander, one of RAI's principals, and the Gallery, one of RAI's members, created by Salander for the purpose of holding objects of art purchased by RAI, was not fortuitous."

Id. Thus, the issue of whether the fraud was "fortuitous" was litigated and decided in the AXA Actions. Based on that holding, even if North Shore had procured "a more comprehensive 'all risks' art insurance policy that [did] not contain a 'dishonesty' exclusion," as is alleged by RAI, the fraud would not have been covered because it was not a fortuitous loss. Stated differently, regardless of North Shore's alleged

misrepresentations, it would not be liable because its liability as broker would be "limited to that which would have been borne by the insurer had the policy been in force." American Motorists Ins. Co. v Salvatore, 102 AD2d 342, 346 (1st Dept 1984) (stating that, "in order to support a recovery, it must be demonstrated that coverage could have been procured prior to the occurrence of the insured event"). Therefore, any damages suffered by RAI were not caused by North Shore's alleged conduct.

In opposition, RAI again relies upon Frelinghuysen Morris Found., where the trial court held that "the alleged loss was fortuitous." 2013 WL 5740207, 2013 NY Misc LEXIS 6509, *13. As discussed above, after so holding, the court noted that, unlike the Policy in the AXA Actions, the policy at issue in Frelinghuysen Morris Found. "had no fraud exclusion," and held that, "[a]bsent a fraud exclusion in the Policy, . . . the alleged loss [was] a 'Covered Cause of Loss.'" 2013 WL 5740207, 2013 NY Misc LEXIS 6509, *14.

As a preliminary matter, this language from Frelinghuysen Morris Found. is dicta. Moreover, while the court gives the decisions of courts of coordinate jurisdiction "respectful consideration," it "is not bound by [those decisions]." Matter of East Riv. Realty Co., LLC v New York State Dept. of Envtl.

Conservation, 22 Misc 3d 404, 413 (Sup Ct, NY County 2008), affd 68 AD3d 564 (1st Dept 2009). In any event on its facts, Frelinghuysen Morris Found. is distinguishable from those at bar as the plaintiff Frelinghuysen was a private foundation that delivered works of art on consignment for exhibition and/or sale to Salander and his Gallery. Frelinghuysen Morris Found., 2013 WL 5740207, 2013 NY Misc LEXIS 6509 at *2. The plaintiff foundation alleged that in 207, it discovered in that Salander and the Gallery "had secretly sold or otherwise disposed of forty-one artworks owned by plaintiff and consigned by it to [Salander and the Gallery]." *Id.* at *3. In reaching its holding, the court in Frelinghuysen Morris Found. expressly reasoned that "the fraud engaged in by Salander and the Gallery was not fortuitous as to them or any entity related to them (see Renaissance Art Invs., LLC, 102 AD3d at 604)," whereas for the trustees of the plaintiff foundation "it was fortuitous" because, "as to these trustees, at the time it happened, the alleged loss was an accident." Id. at *13.

As relevant to the instant action, the First Department has already held that Salander was "one of RAI's principals" and his Gallery was "one of RAI's members," and that, as such, Salander's "fraud . . . was not fortuitous." *Renaissance Art Invs., LLC,* 102 AD3d at 605. In other words, the trial court decision in

Frelinghuysen Morris Found. and the First Department's decision in *Renaissance Art Invs.* are consistent. *Frelinghuysen Morris Found.* held that the loss could be fortuitous or accidental with respect to an innocent investor where the loss, whereas Renaissance Art Invs., LLC makes clear that RAI's loss could not have been fortuitous because it was caused by the fraudulent conduct of its own principal. Renaissance Art Invs., LLC, 102 AD3d 604; Frelinghuysen Morris Found., 2013 WL 5740207, 2013 NY Misc LEXIS 6509; cf. RJC Realty Holding Corp. v Republic Franklin Ins. Co., 2 NY3d 158, 164 (2004) (holding that employer was entitled to insurance coverage in claim arising from employee's intentional tort because, from employer's point of view, the tort was an "'accident'" rather than "'expected or intended,'" as the employee's actions were not deemed to be the actions of the employer itself). Therefore, Frelinghuysen Morris Found. is analogous in its reasoning and distinguishable on its facts, and does not warrant a different result.

Accordingly, it is hereby

ORDERED that the defendant's motion to dismiss this action is granted and the Clerk is directed to enter judgment in favor of defendant dismissing this action, together with costs and

disbursements to defendant, as taxed by the Clerk upon presentation of a bill of costs.

Dated: January 23, 2017

ENTER:

J.S.C.

DEBRA A. JAMES