UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X Civil Action No. _____

JN CONTEMPORARY ART LLC,

Plaintiff,

-against-

PHILLIPS AUCTIONEERS LLC,

Defendant.

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PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

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PRELIMINARY STATEMENT

Defendant Phillips Auctioneers, LLC ("Defendant"), a prominent international auction house, is invoking the COVID-19 pandemic as a mask for committing flagrant breaches of contract in a transparent attempt to coax Plaintiff into retroactively agreeing to a stripped-down version of their agreement. Force majeure does not apply to this case for the reasons set forth below. Defendant induced Joseph Nahmad ("JN"), Manager of Plaintiff JN Contemporary Art, LLC ("Plaintiff"), to execute an agreement, dated June 27, 2019 (the "Basquiat Guarantee Agreement," Ex. 1), pursuant to which Plaintiff agreed to irrevocably bid GBP 3,000,000.00 (the "Guarantee Obligation") on Lot 19, *Untitled*, Executed in 1981 by Jean-Michel Basquiat (the "Basquiat"), which was to be auctioned at Defendant's 20th Century & Contemporary Art Evening Sale in London on June 27, 2019 (the "London Auction").

In consideration thereof, Defendant executed an agreement, dated June 27, 2019 (the "Stingel Consignment Agreement," Ex. 2), pursuant to which Plaintiff consigned *Untitled*, 2009 by Rudolf Stingel (the "Stingel") to Defendant to be offered for sale in New York as part of Defendant's Spring 2020 evening auction of 20th Century & Contemporary Art, scheduled for May 2020 (the "New York Spring Auction") and Defendant agreed to guarantee the Stingel in the amount of $5,000,000.00 (the "Guaranteed Minimum"). The Basquiat Guarantee Agreement (Ex. 1) expressly stated that it was conditioned on execution of and performance of the commitments set forth in the Stingel Consignment Agreement (Ex. 2). An agreement, dated as of December 27, 2019 (the "Amendment to the Stingel Consignment Agreement," Ex. 3), between Plaintiff, Defendant and Muses Funding I LLC ("MF"), amended the Stingel Consignment Agreement (Ex. 2) to recognize MF's first-priority lien on the Stingel.

After Plaintiff performed fully under the Basquiat Guarantee Agreement (Ex. 1) and bid GBP 3,000,000.00 on the Basquiat at the London Auction, Defendant pulled the rug out from under

Plaintiff and unilaterally terminated the Stingel Consignment Agreement (Ex. 2), disclaiming any legal obligations to Plaintiff thereunder, including payment of the Guaranteed Minimum. In an unlawful termination letter (the "Unlawful Termination Letter," Ex. 6), dated May 31, 2020 and signed by Harley Waltman ("Waltman,") Defendant's General Counsel, Americas, Defendant claimed that it was prevented from holding the New York Spring Auction and had no choice but to postpone as a result of the COVID-19 pandemic despite Defendant's continued holding of online auctions in April and May 2020 when the COVID-19 pandemic was at its peak.

Defendant further attempted to invoke in bad faith ¶ 12(a) ("Termination") of the Stingel Consignment Agreement (Ex. 2) despite the COVID-19 pandemic not falling under any of the enumerated events triggering postponement of the New York Spring Auction and Defendant refraining from canceling other consignment agreements for artworks to be offered in the New York Spring Auction. Defendant is picking and choosing which agreements to honor and is turning a blind eye to the potentially financially burdensome Guaranteed Minimum obligation legally owed by Defendant to Plaintiff.

Plaintiff respectfully is entitled to the requested injunctive relief and specific performance as Defendant has caused irreparable harm to Plaintiff and there is a likelihood of success on the merits on Plaintiff's breach of contract claims, as follows:

- ***Plaintiff has suffered irreparable harm and is entitled to specific performance because monetary damages are impossible to calculate and too speculative;***

- ***The balance of the hardships tips decidedly to Plaintiff because absent injunctive relief, Plaintiff will suffer irreparable harm and Defendant will not suffer any calculable and specific harm by being held to its contractual obligations;***

- ***Plaintiff has a high likelihood of success on the merits because Defendant clearly breached several provisions of the Stingel Consignment Agreement (Ex. 2), the Amendment to the Stingel Consignment Agreement (Ex. 3) and the Basquiat Guarantee Agreement (Ex. 1);*** and

- ***Defendant's pretext for not performing is legally baseless and disproven by***

Defendant's pattern of conduct.

FACTUAL BACKGROUND

For the factual background, the Court is respectfully referred to the Declaration of Joseph Nahmad, sworn to June 8, 2020 ("Nahmad Decl."), and the Complaint, dated June 8, 2020 (the "Complaint"). For the purpose of defining certain references, some of the facts are repeated herein.

POINT I
PLAINTIFF SATISFIES THE STANDARD FOR OBTAINING A PRELIMINARY INJUNCTION AND A TEMPORARY RESTRAINING ORDER

In order to obtain a temporary restraining order and/or a preliminary injunction, Plaintiff must demonstrate the following:

i. Irreparable harm; and

ii. Either: (a) Likelihood of success on the merits; or (b) Sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of the hardships tipping decidedly in Plaintiff's favor.

See New York Bay Capital, LLC v. Cobalt Holdings, Inc., 2020 WL 1989485, *4 (S.D.N.Y. Apr. 27, 2020); see also Polymer Technology Corp. v. Mimran, 37 F.3d 74 (2nd Cir. 1994); Roberts v. Atlantic Recording Corp., 892 F.Supp. 83 (S.D.N.Y. 1985).

A. Plaintiff has suffered irreparable harm and, in the absence of injunctive relief, will continue to suffer irreparable harm as a result of Defendant's breaches of contract and unlawful conduct. Accordingly, the balancing of the equities tips decidedly to Plaintiff and Plaintiff is entitled to specific performance.

"Irreparable harm is an injury that is not remote or speculative but actual and imminent, and for which a monetary award cannot be adequate compensation." Aguilar v. Immigration and Customs Enforcement Div. of the U.S. Dep't of Homeland Sec., 811 F.Supp.2d 803, 828 (S.D.N.Y. 2011); see also Robins v. Zwirner, 713 F.Supp.2d 367, 374 (S.D.N.Y. 2010). Plaintiff is irreparably harmed "where, but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied." Home It, Inc. v. Wen, 2020 WL 353098, *3 (S.D.N.Y. Jan. 21, 2020) (internal citation omitted).

Irreparable harm is the "single most important prerequisite for the issuance of a preliminary injunction." Robins, supra, 713 F.Supp.2d at 374.

By breaching the Stingel Consignment Agreement (Ex. 2), the Amendment to the Stingel Consignment Agreement (Ex. 3) and the Basquiat Guarantee Agreement (Ex. 1) and reneging on its legal obligation to offer the Stingel for sale at public auction while guaranteeing the Stingel in the amount of $5,000,000.00, Defendant has irreparably harmed Plaintiff in an amount that cannot be calculated with any reasonable certainty (Nahmad Decl. at ¶¶ 9-14). Pursuant to ¶ 2 of the Stingel Consignment Agreement (Ex. 2), if the final bid exceeded $5,000,000.00, Defendant would owe Plaintiff 80% of the amount by which the final bid exceeded the $5,000,000.00 Guaranteed Minimum (Nahmad Decl. at ¶¶ 11, 18). It is simply not possible to know prior to the completion of an auction who will bid on a particular artwork and for how much that artwork will sell (Id. at ¶¶ 12, 19). Defendant concedes the speculative nature of auction pricing in ¶ 7 of the Stingel Consignment Agreement (Ex. 2) in which Defendant states that it made no representations or warranties to Plaintiff about the actual price at which the Stingel will sell and that Plaintiff cannot rely on pre-sale estimates as a prediction or guarantee of the value of the Stingel or the price at which it will sell at the New York Spring Auction (Nahmad Decl. at ¶¶ 12, 19).

The only certainty with respect to Plaintiff's damages is their floor: $5,000,000.00, or the Guaranteed Minimum that Defendant is legally obligated to pay Plaintiff in the event no other bidder places a higher bid on the Stingel, pursuant to ¶ 11 of the Stingel Consignment Agreement (Ex. 2). However, Plaintiff's damages may be much higher insofar as a bidder may pay $6,000,000.00, $10,000,000.00 or an even greater amount for the Stingel with Plaintiff entitled to 80% of the amount by which the final bid exceeded the $5,000,000.00 Guaranteed Minimum. The vagaries of human behavior are unpredictable. A monetary award cannot possibly be adequate compensation when there is no certainty as to the amount of Plaintiff's damages.

"Courts have recognized that artworks are unique chattels that warrant the protection of injunctive relief." Naber v. Steinitz, 1991 WL 11764578 (Sup. Co. N.Y. Co. December 23, 1991); see also Robins, supra, 713 F.Supp.2d at 374-75; Onecard Corp. v. Unisys Corp., 1991 WL 196399 (S.D.N.Y. Sept. 23, 1991); Kinderhill Select Bloodstock, Inc. v. United States of America, 835 F.Supp. 699 (N.D.N.Y. 1993) ("…[T]his court agrees in light of precedent from New York State courts which have previously found such items as works of art … to be unique"); Staff v. Hemingway, 47 A.D.2d 709, 365 N.Y.S.2d 84 (1975); Danae Art Intern. Inc. v. Stallone, 163 A.D.2d 81, 557 N.Y.S.2d 338 (1st Dep't 1990) (finding art unique for purposes of injunctive relief); Morse v. Penzimer, 58 Misc.2d 156, 295 N.Y.S.2d 125 (Sup. Ct. Oneida Co. 1968). As irreparable harm often arises in connection with breached contracts concerning unique products or services, such as artworks, "a showing of irreparable harm is similar to the showing required for specific performance of a contract." Robins, supra, 713 F.Supp.2d at 374.

Specific Performance

Plaintiff must be granted specific performance. The "guiding consideration" in determining whether specific performance will be ordered is "the difficulty of proving damages with reasonable certainty." Edge Grp. WAICCS LLC v. Sapir Grp. LLC, 705 F.Supp.2d 304, 313 (S.D.N.Y. 2010). "[I]in all cases the court must address the practical question of whether the damages of the aggrieved party can be reliably determined." Id. The Court does so by "look[ing] to the specific circumstances of the case to determine whether there is a sufficiently reliable means of measuring value for purposes of awarding contract damages." Id. at 313-14; see also JMG Custom Homes, Inc. v. Ryan, 45 A.D.3d 1278, 1281 (4th Dep't 2007); Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409, 415 (2001).

"[S]pecific performance usually is limited to contracts for whose breach the traditional remedy of damages is inappropriate because the unusual goods or services involved are difficult to

value." La Mirada Prods. Co., Inc. v. Wassall PLC, 823 F.Supp. 138, 141 (S.D.N.Y. 1993); see also David Tunick, Inc. v. Kornfeld, 838 F.Supp. 848, 852 (S.D.N.Y. 1993) (holding that specific performance is available in cases involving intrinsically unique objects, such as prints). Specific performance may be ordered "if the assessment of monetary damages is impractical or too speculative." La Mirada, supra, 823 F.Supp. at 141; see also Union Capital LLC v. 5BARZ Int'l Inc., 2016 WL 8794475, *1-2 (S.D.N.Y. Oct. 5, 2016) (granting specific performance where, inter alia, the amount of damages is "difficult to calculate because the price of defendant's stock fluctuates widely"). "That plaintiff has an available remedy at law does not bar specific performance…Rather, a court will order specific performance when the remedy at law is not as certain, prompt, complete and efficient to attain the ends of justice and its prompt administration as the remedy in equity." La Mirada, supra, 823 F.Supp. at 141 (internal citation omitted).

As discussed, infra, the damages flowing from Defendant's breach of the Stingel Consignment Agreement (Ex. 2), the Amendment to the Stingel Consignment Agreement (Ex. 3) and the Basquiat Guarantee Agreement (Ex. 1) cannot be reliably determined. If Defendant offered the Stingel at the New York Spring Auction and there were no bids, Defendant would owe Plaintiff the $5,000,000.00 Guaranteed Minimum, pursuant to ¶ 11 of the Stingel Consignment Agreement (Ex. 2) (Nahmad Decl. at ¶¶ 10, 17). If the final bid exceeded $5,000,000.00, Defendant would owe Plaintiff 80% of the amount by which the final bid exceeded the $5,000,000.00 Guaranteed Minimum, pursuant to ¶ 2 of the Stingel Consignment Agreement (Ex. 2) (Nahmad Decl. at ¶¶ 11, 18).

Without conducting the New York Spring Auction, it is impossible to determine how many bids would be made on the Stingel and what the final bid would be (Id. at ¶¶ 12, 19). ¶ 7 of the Stingel Consignment Agreement (Ex. 2), drafted exclusively by Defendant, recognizes this inherent uncertainty as it states that Defendant made no representations or warranties to Plaintiff about the

actual price at which the Stingel will sell and that Plaintiff cannot rely on pre-sale estimates as a prediction or guarantee of the value of the Stingel or the price at which it will sell at the New York Spring Auction (Nahmad Decl. at ¶¶ 12, 19). As the Stingel is an intrinsically unique object and the assessment of monetary damages at bar is impractical and speculative, a monetary award cannot adequately compensate Plaintiff.

Balancing of the Hardships

The irreparable harm suffered by Plaintiff, which is not presently calculable with any certainty, and Plaintiff's entitlement to specific performance are set forth supra. The balancing of the equities could not be starker and "simply requires the court to look to the relative prejudice to each party accruing from a grant or a denial of the requested relief." Ma v. Lien, 198 A.D.2d 186,187, 604 N.Y.S.2d 84, 85 (1st Dep't 1993) (reversing denial of preliminary injunctive relief where "plaintiff would suffer irreparable injury absent the relief sought[;] [o]n the other hand, we can perceive no great harm to defendants"); see also Home It, supra, 2020 WL 353098 at *6.

A "balancing of the equities favors the movant [for preliminary injunctive relief] where the irreparable injury to be sustained by the plaintiff is more burdensome to it than the harm caused to defendant[s] through imposition of the injunction." Kimm v. Blue Cross & Blue Shield of Greater N.Y., 160 Misc. 2d, 97,101, 608 N.Y.S.2d 385 (Sup. Co. N.Y. Co. 1993) (internal citation omitted). The balancing of the hardships cannot tip in favor of Defendant where it cannot "establish that [they] will suffer any calculable and specific harm merely from being bound by their contractual obligations." 251 West 30th St. LLC v. 251 West 30th St. Owner, LLC, 2017 WL 1349978, *6 (Sup. Co., N.Y. Co. Mar. 31, 2017).

Absent injunctive relief, Plaintiff will have been damaged in an amount no less than $5,000,000.00—and very possibly much more—as a direct result of Defendant's breaches of contract and will have been made to bid GBP 3,000,000.00 on the Basquiat at the London Auction

while Defendant evades its legal obligation to guarantee the Stingel for $5,000,000.00 at the New York Spring Auction (Nahmad Decl. at ¶¶ 9-14). Granting Plaintiff's requested relief will not harm Defendant in any manner whatsoever and simply will force Defendant to be bound by its contractual obligations.

B. Plaintiff has sufficiently alleged the likelihood of success on the merits at trial.

The elements of a breach of contract cause of action are: (1) The existence of an agreement; (2) Adequate performance of the agreement by Plaintiff; (3) Breach of the agreement by Defendant; and (4) Damages. See Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc., 837 F.Supp.2d 162, 188-89 (S.D.N.Y. 2011). "The construction of an unambiguous contract…is a matter of law for the court and 'the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms.' Reed Foundation, Inc. v. Franklin D. Roosevelt Four Freedoms Park, LLC, 2012 WL 5966641, *5 (Sup. Ct. N.Y. Co. Oct. 19, 2012) (internal citation omitted). "[W]hen parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms." Id. (internal citation omitted).

Courts routinely hold that a defendant has breached a written agreement where the defendant has taken certain actions without the prior written consent of plaintiff in direct contravention of the express terms of a written agreement mandating that defendant obtain the prior written consent of plaintiff prior to taking such actions. See Metro Funding Corp. v. WestLB AG, 2010 WL 1050315, *18 (S.D.N.Y. Mar. 19, 2010) (finding a breach of the servicing agreement where a party modified loans without its counterparty's prior written consent, contrary to the express terms of the agreement); see also Icahn School of Medicine at Mount Sinai v. Neurocrine Biosciences, Inc., 191 F.Supp.3d 322, 330 (S.D.N.Y. 2016) (defendant's licensing of a drug-discovery tool to a third-party company without plaintiff's prior written consent breached the parties' agreement); US Bank Nat.

Ass'n Orix Capital Markets, LLC v. NNN Realty Advisors, Inc., 614 Fed.Appx. 548, 550-51 (2d Cir. 2015); Clinical Insight, Inc. v. Louisville Cardiology Med. Grp., PSC, 2013 WL 3713414, *10 (W.D.N.Y. Jul. 12, 2013); First Mercury Ins. Co. v. Schwartz, 2019 WL 2053850, *16-17 (E.D.N.Y. Mar. 1, 2019); VRA Family Ltd. Partnership v. Salon Mgmt. USA, LLC, 2020 WL 2164913, *1 (2d Dep't May 6, 2020); Empire Room, LLC v. Empire State Bldg. Co. LLC, 159 A.D.3d 648, 649 (1st Dep't 2018).

Pursuant to General Obligations Law 15-301, where a written contract has a clause expressly prohibiting oral modification and requiring a subsequent writing for modification, oral modifications are unenforceable as a matter of law. See Nostrum Pharm., LLC v. Dixit, 2016 WL 5806781, *21 (S.D.N.Y. Sept. 23, 2016); see also Credit Suisse First Boston Mortg. Capital LLC v. Cohn, 2004 WL 1871525, *6 (S.D.N.Y. Aug. 19, 2004). In any event, there has been no oral modification of any of the subject agreements and Plaintiff has not entered into any other oral or written agreement with Defendant concerning the New York Spring Auction (Nahmad Decl. at ¶ 16).

It is indisputable that Defendant executed three written agreements with Plaintiff, exclusively drafted by Plaintiff, concerning the Stingel: (i) Stingel Consignment Agreement (Ex. 2); (ii) Amendment to the Stingel Consignment Agreement (Ex. 3); and (iii) Basquiat Guarantee Agreement (Ex. 1) (Nahmad Decl. at ¶ 3). It is also beyond cavil that Plaintiff has fully performed under each of the agreements (Id. at ¶¶ 4, 24; Complaint at ¶¶ 11, 30-31, 37, 52, 65, 68). With respect to the Basquiat Guarantee Agreement (Ex. 1), Plaintiff submitted an irrevocable bid in the sum of GBP £3,000,000.00 at Defendant's London Auction on June 27, 2019 (Nahmad Decl. at ¶¶ 4, 24; Complaint at ¶¶ 11). With respect to the Stingel Consignment Agreement (Ex. 2) and Amendment to the Stingel Consignment Agreement (Ex. 3), Plaintiff has consigned the Stingel to Defendant and has permitted Defendant to advertise the New York Spring Auction using images of

the Stingel (Nahmad Decl. at ¶ 41). Leading up to Defendant's contractual breaches, Defendant exclusively used images of the Stingel on its website as the sole and pivotal artwork to attract bidders for the New York Spring Auction (Id.).

For Plaintiff's manifold breaches of contract with respect to, inter alia, ¶¶ 6(a), 17(b) and 17(d) of the Stingel Consignment Agreement (Ex. 2), ¶ 8(c) of the Amendment to the Stingel Consignment Agreement (Ex. 3) and the Basquiat Guarantee Agreement (Ex. 1), the Court is respectfully directed to the Complaint at ¶¶ 19-28, 30-62 and 64-78.

Defendant Cannot Rely on Force Majeure

Defendant's reliance on force majeure is nothing but a bad faith canard. See Kel Kim Corp. v. Central Markets, 70 N.Y.2d 900, 902-03 (1987) ("Ordinarily, only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused"). ¶ 12(a) of the Stingel Consignment Agreement ("Termination") (Ex. 2) states that Defendant's obligation to pay Plaintiff the Guaranteed Minimum would be deemed null and void only in the event of certain contractually limited circumstances causing Defendant to postpone the New York Spring Auction beyond Defendant's or Plaintiff's reasonable control, namely natural disaster, fire, flood, general strike, war, armed conflict, terrorist attack and natural or chemical contamination (Ex. 2 at ¶ 12(a) ("Termination")). Pursuant to the law of New York, force majeure is not applicable here and cannot excuse Defendant's breaches of contract because ¶ 12(a) of the Stingel Consignment Agreement (Ex. 2) contains no reference to anything akin to the COVID-19 pandemic.

According to the principle of ejusdem generis, even when there is an expansive catchall clause, "the general words are not to be given expansive meaning; they are confined to things of the same kind or nature as the particular matters mentioned." Id.; see also Team Marketing USA Corp. v. Power Pact, LLC, 41 A.D.3d 939, 942-43. It is beyond a shadow of a doubt that Defendant

unlawfully unilaterally terminated the Stingel Consignment Agreement (Ex. 2) because Defendant did not want to live up to the risk that it signed on to take. Defendant is attempting to hide under the imaginary blanket of the COVID-19 pandemic excusing the performance of any and all legal contracts while simultaneously holding online auctions throughout April, May and June 2020 of the contemporary art market of which the Stingel is a part.

In the Unlawful Termination Letter (Ex. 6), Defendant references "the COVID-19 pandemic" and states, "Due to these circumstances and the continuing government orders, we have been prevented from holding the Auction and have had no choice but to postpone the Auction beyond its planned May 2020 date" (Nahmad Decl. at ¶ 24). Defendant's assertion is false and unsupported and is belied by Defendant's own pattern of conduct (Nahmad Decl. at ¶¶ 37-39; Complaint at ¶¶ 44-50). Defendant's claim that the New York Spring Auction had to be canceled is a flat-out lie.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that Plaintiff's Order to Show Cause be granted in its entirety, together with such other and further relief as to this Court seems just and proper.

Dated: New York, New York
June 8, 2020

Respectfully submitted,
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