UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JN CONTEMPORARY ART LLC, PLAINTIFF, -AGAINST- PHILLIPS AUCTIONEERS LLC, DEFENDANT.	CASE NO.: 1:20-cv-04370-DLC

PHILLIPS AUCTIONEERS LLC'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

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PRELIMINARY STATEMENT

Plaintiff tries to save its meritless lawsuit by clinging desperately to the Rule 12(b)(6) pleading standard. But that pleading standard does not allow Plaintiff to distort, ignore, or contradict the plain meaning of its contracts with Phillips. It does not permit Plaintiff to speculate what *might* be uncovered if the Court indulges Plaintiff's fantasy of what it *might* find in discovery. Nor does it provide justification for pretending that COVID-19 was a foreseeable event or anything other than a natural disaster. Not even the most favorable inferences could save a lawsuit based on these absurd arguments, because a complaint must be dismissed when its allegations contradict a contract's plain meaning. *E.g.*, *MBIA Inc. v. Certain Underwriters at Lloyd's, London*, 33 F. Supp. 3d 344, 353 (S.D.N.Y. 2014). That principle controls here and requires dismissal of the Complaint with prejudice.

Plaintiff's case hinges on its argument that Phillips was required to auction the Stingel at *any* online auction conducted at *any* time and in *any* place, despite the contract's express requirement that the work "shall be offered for sale in New York in our major spring 2020 evening auction of 20th Century & Contemporary Art" in "May 2020." Plaintiff's insistence that the contract could have been satisfied by auctioning the work at what Plaintiff calls the "July 2 'New York' Evening Auction (conducted in London and livestreamed globally)" (Opp. 10) exemplifies its view that words in a contract don't matter and that dates and locations have no meaning. Plaintiff's own admissions further demonstrate the frivolity of its position: Plaintiff's proposed order to show cause recognized that the auction referenced in the contract is the in-person, May auction in New York; Plaintiff's principal admitted in a declaration that this auction takes place in New York in May; and Plaintiff's lawyer admitted in oral argument that Phillips was prevented from holding that auction because of COVID-19. The Complaint should be dismissed.

ARGUMENT

I. PLAINTIFF'S BREACH OF CONTRACT CLAIMS MUST BE DISMISSED

A. The Complaint Does Not State A Claim For Breach Of The Basquiat Agreement

Plaintiff's argument about the Basquiat Agreement ignores the contract's plain terms. Plaintiff argues instead that the Basquiat and Stingel Agreements are "interrelated," and "common sense" therefore dictates that the Basquiat Agreement be read to be conditional on Phillips' supposed "corresponding requirement to comply with its guarantee obligations pursuant to the [Stingel Agreement]." Opp. 16-18.[1] Plaintiff's argument is both wrong and irrelevant.

First, that argument is wrong because it is not supported by the contract. The Basquiat Agreement does not say that it is conditional on Phillips paying a guarantee on the Stingel Work no matter what—which is what it would need to say for Plaintiff to prevail. It says that it is "[c]onditional upon signature by" Plaintiff of the Stingel Agreement. Dkt. 62: Declaration of Luke Nikas ("Nikas Decl.") Ex. A, Basquiat Agreement at 1. This means what it says, and the Complaint concedes that this condition was indeed satisfied. SAC ¶¶ 15-18, 24.

Further, whether this condition creates a degree of so-called "interdependence" between the Basquiat and Stingel Agreements—each of which contains an integration clause, which alone undermines Plaintiff's position—does not change the nature of the parties' separate bargains under each agreement, which must be enforced according to their plain terms. Basquiat Agreement ¶ 23; Stingel Agreement ¶ 17(a); *see Nat'l Union Fire Ins. Co. of Pittsburgh v. Clairmont*, 231 A.D.2d 239, 241-42 (1st Dep't 1997); *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 725 F. Supp. 712, 731-32 (S.D.N.Y. 1989).

[1] All citations to "Opp.," "Br.," and "SAC" refer to Plaintiff's opposition brief, Phillips' brief in support of its motion to dismiss, and Plaintiff's Second Amended Complaint, respectively. All emphasis is added and all citations are omitted unless otherwise indicated.

Second, the argument is irrelevant because even if Plaintiff were correct that the Basquiat Agreement required Phillips to "comply with its guarantee obligations" pursuant to the Stingel Agreement (Opp. 17) (which it is not), Phillips *did* comply with those obligations by terminating the agreement and the corresponding guarantee obligation under Paragraph 12(a). Nikas Decl. Ex. B, Stingel Agreement ¶ 12(a). Because the Basquiat Agreement was fully performed according to its terms (Br. 8-10), any claim for breach of that contract fails. *See, e.g.*, *Whitehurst v. 230 Fifth, Inc.*, 998 F. Supp. 2d 233, 255 (S.D.N.Y. 2014) ("Defendants completely satisfied their obligations under any contract and so cannot be liable for breach.").[2] Moreover, Plaintiff's allegations of purported extra-contractual "trade" negotiations between the parties (Opp. 17) cannot overcome the plain terms of the contracts. *See Schron v. Troutman Saunders LLP*, 97 A.D.3d 87, 93 (1st Dep't 2012) ("the parol evidence rule precluded the use of extrinsic evidence to show the claimed interdependence"); *see also Transammonia, Inc. v. Enron Capital & Trade Res. Corp.*, 278 A.D.2d 152, 153 (1st Dep't 2000); *Shipping & Fin., Ltd. v. Aneri Jewels LLC*, 2019 WL 5306979, at *3 (S.D.N.Y. Oct. 21, 2019); *W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157, 163 (1990).[3]

B. The Complaint Does Not State A Claim For Breach Of The Stingel Agreement

1. Phillips did not breach the contract's notice provision

Phillips did not breach the Stingel Agreement by failing to obtain Plaintiff's consent before postponing the Spring New York Evening Auction (Opp. 2-3), because no such consent was required. Br. 19-20.

[2] Plaintiff's claim that "the majority" of Phillips' arguments "concern an allegation in the FAC (Docket 30 ¶¶ 9 and 69) that does not appear in the SAC" (Opp. 18) is a red herring; the deleted paragraphs quoted the Basquiat Agreement's operative language, which remains the key issue.

[3] Neither *Novick v. AXA Network, LLC*, 642 F.3d 304 (2d Cir. 2011), nor *Kamin v. Koren*, 621 F. Supp. 444 (S.D.N.Y. 1985) (Opp. 16-17), held that contractual interdependence cannot be resolved on a motion to dismiss where, as here, the parties' intent can be "gleaned from within the four corners of the instrument" without extrinsic evidence. *Shipping & Fin.*, 2019 WL 5306979, at *3.

Plaintiff is wrong that Paragraph 6(a)(i) "contains no reference whatsoever to 'voluntary rescheduling' and does not contrast itself to" the Stingel Agreement's termination provision. Opp. 3. Paragraphs 6(a)(i) and 12(a), by their terms, address two fundamentally different scenarios: the rescheduling of the Spring New York Evening Auction in Phillips' "reasonable discretion" on the one hand (*i.e.,* Paragraph 6(a)(i)), and the postponement of the Spring New York Evening Auction "for circumstances beyond [Phillips'] or [Plaintiff's] reasonable control," on the other (*i.e.,* Paragraph 12(a)). Stingel Agreement ¶¶ 6(a)(i), 12(a). Phillips properly terminated the contract under Paragraph 12(a) as a result of the latter. Br. 6-7. Paragraph 17(b) in turn provides that "[n]o term of this Agreement shall be amended, supplemented or waived unless each of us has agreed to do so in writing," further supporting Phillips' argument that Plaintiff cannot unilaterally demand that the Stingel Work be sold at a different auction than the one bargained for. *Id.* ¶ 17(b); Br. 19-20. Finally, the form and timing of Phillips' termination notice (Opp. 3) has no bearing on the contract claim because such notice was not a condition precedent to termination. *See* Stingel Agreement ¶ 12(b) (Phillips "may terminate this Agreement with immediate effect"); *Toyomenka Pac. Petroleum, Inc. v. Hess Oil Virgin Islands Corp.*, 771 F. Supp. 63, 67-68 (S.D.N.Y. 1991).

2. The Stingel Agreement clearly designates the Spring New York Evening Auction as the exclusive venue of sale

Plaintiff's claim for breach of the Stingel Agreement rests on its argument that the contract did not require the Stingel Work to be sold at the Spring New York Evening Auction that took place physically in New York in May 2020. Opp. 4-8. This argument fails.

Plaintiff argues that "no contract term required the Stingel Work to be auctioned in New York at an in person auction" and "no contract term required the Stingel Work to be auctioned in May 2020." Opp. 5-6. This is wrong on both counts. Paragraph 6(a) is clear: "The Property shall be offered for sale in New York at our major spring 2020 auction of 20th Century & Contemporary

Art currently scheduled for May 2020." Stingel Agreement ¶ 6(a). This clear term, along with others, restricted the sale of the Stingel Work to the Spring New York Evening Auction in New York in May 2020. Br. 12-13; *see also* Stingel Agreement at 1; Nikas Decl. Ex. C ¶ 1(c).

Plaintiff's argument that this "reference to New York is alchemy, not contractual, and is consistent with conducting an 'online auction' in which the Stingel Work is sold in New York and globally via a live, real-time digital transmission" (Opp. 5) not only contradicts the agreement's unambiguous language, it is nonsensical. *See Kephart v. Certain Underwriters at Lloyd's of London*, 427 F. Supp. 3d 508, 515 (S.D.N.Y. 2019) ("In interpreting contracts, 'words should be given the meanings ordinarily ascribed to them and absurd results should be avoided.'"). Accepting Plaintiff's interpretation, the contract merely required the Stingel Work to be made available for purchase by individuals living in New York "and globally" online at any time—thereby eliminating any reason to specify an auction date or location at all. No reasonable reading of the Agreement's plain language supports that self-serving interpretation, already contradicted under oath by Plaintiff's principal. Dkt. 22: Declaration of Joseph Nahmad ¶ 3 n.1 ("The New York Spring Auction traditionally takes place each year in May and is one of Defendant's two major evening auctions *in New York*."); *see also* Dkt. 21, at 2 & n.1. This interpretation would also render meaningless other provisions that clearly contemplate that any change to the Auction's agreed date or location would be a material change to the contract's terms. Br. 13-14; Stingel Agreement ¶¶ 3(c), 6(a)(i); *see also Manley v. AmBase Corp.*, 337 F.3d 237, 250 (2d Cir. 2003) (interpretations that render contract provisions meaningless or superfluous are disfavored).[4]

[4] Equally absurd is the suggestion that the auction was required to take place via the internet in New York (Opp. 5), because the parties wouldn't need to specify the physical location for such an auction. *See Digital Equip. Corp. v. AltaVista Tech., Inc.*, 960 F. Supp. 456, 462 (D. Mass. 1997) ("The Internet has no territorial boundaries. . . . When business is transacted over a computer network via a Web-site accessed by a computer in Massachusetts, it takes place as much in Massachusetts, literally or figuratively, as it does anywhere.")

The fact, as Plaintiff points out, that the Spring New York Evening Auction was "postponed" due to COVID-19 to a later date in July, in an entirely different format that was live-streamed from a physical location in London to remote buyers (Opp. 5-6), squarely demonstrates that the circumstances fell within Paragraph 12(a); indeed, if not intended for this circumstance, Paragraph 12(a) would have no meaning at all. *See Manley*, 337 F.3d at 250. Plaintiff distorts the contract beyond all reasonable bounds and proposes an interpretation that defies its plain meaning.

3. COVID-19 prevented Phillips' performance

Plaintiff's argument that Phillips was not prevented by COVID-19 or the resulting government orders from holding the Spring New York Evening Auction turns, again, on its erroneous contention that Phillips could have held the auction online. Opp. 10-13. But Phillips was not required to reach outside the contract to undertake alternative performance after the contractually specified performance was rendered impossible. Br. 18-19; *see, e.g.*, *Harriscom Svenska, AB v. Harris Corp.*, 3 F.3d 576, 580 (2d Cir. 1993); *Va. Power Energy Mktg., Inc. v. Apache Corp.*, 297 S.W.3d 397, 403 (Tex. App. 2009). That is the end of the matter. *See Bank v. Verde Energy USA, Inc.*, 2020 WL 5596046, at *6 (E.D.N.Y. Sept. 18, 2020) ("By ignoring the plain language of the contract, [the] plaintiff effectively rewrites the bargain that was struck.").

Plaintiff also argues that the relevant issue is not what it bargained for in the Stingel Agreement, but how Phillips dealt with other consignors under different contracts and circumstances and whether online auctions were possible. Opp. 9-11. But whether Phillips auctioned other works subject to guarantees at the July 2 online auction is irrelevant, as is the allegation that Phillips and other auction houses had the ability (but not the obligation) to conduct online auctions at the same time as the Spring New York Evening Auction. Br. 16-19. This case is not about Phillips' "inability to perform in the exact manner that it anticipated and prefers" (Opp.

11), but Phillips' inability to auction the work *as contractually agreed* due to force majeure.[5]

4. COVID-19 is an unforeseeable force majeure event within the meaning of Paragraph 12(a)

Plaintiff contends, without authority or explanation, that pandemics are not similar to or within the meaning of "natural disaster" in Paragraph 12(a). Opp. 13. It simultaneously argues that Phillips "concedes" that it was only government orders, and not COVID-19, that prevented Phillips from holding the Spring New York Evening Auction. *Id.* Neither is correct.[6] The COVID-19 pandemic falls squarely within every available definition of "natural disaster" that exists, as numerous courts have held and the ordinary dictionary definition confirms.[7] Br. 14-16; *see also CT Inv. Mgmt. Co., LLC v. Chartis Specialty Ins. Co.*, 130 A.D.3d 1, 6 n.2 (1st Dep't 2015) ("[I]t is common practice for the courts of this State to refer to the dictionary to determine the plain and ordinary meaning of words to a contract."); *Pennsylvania Democratic Party v. Boockvar*, 2020 WL 5554644, at *17 (Pa. Sept. 17, 2020) ("We have no hesitation in concluding

[5] Plaintiff's citation to *United Equities Co. v. First Nat. City Bank*, 52 A.D.2d 154 (1st Dep't 1976) is inapposite. In that case, the court specifically found that the intervening government regulation did *not* limit the defendant's ability to perform, *id.* at 160, that defendant *did* in fact perform, *id.* at 162-63, and that the parties got what they bargained for, *id.* at 157. Moreover, the court *rejected* plaintiff's attempt to use the force majeure clause to compel defendant to perform in a manner that the contract did not require. *Id.* at 160, 162-63.

[6] Plaintiff's argument that a "temporary" impossibility only suspends performance for the duration (Opp. 13) also has no application here because Paragraph 12(a) makes clear that any "postponement" of the Spring New York Evening Auction past the scheduled May 2020 date justifies termination of the contract and, in practice, the impossibility of holding the auction in May 2020 destroyed "the subject matter of the contract or the means of performance mak[ing] performance objectively impossible." *LeRoy v.* Sayers, 635 N.Y.S.2d 217, 223 (1st Dep't 1995); *see also* Br. 20-21.

[7] Black's Law Dictionary defines "natural" as "[b]rought about by nature as opposed to artificial means," and "disaster" as "[a] calamity; a catastrophic emergency," NATURAL, DISASTER, Black's Law Dictionary (11th ed. 2019). There is no better definition for COVID-19, a pandemic "brought about by nature" causing a state of "calamity" and "catastrophic emergency" worldwide. *See, e.g.*, *COVID-19 coronavirus epidemic has a natural origin*, Science Daily (March 17, 2020) https://www.sciencedaily.com/releases/2020/03/200317175442.htm.

that the ongoing COVID-19 pandemic equates to a natural disaster."). And Phillips has clearly stated that it was prevented by the pandemic from holding the Spring New York Evening Auction in all of its public statements (Nikas Decl. Ex. N) and opening brief. Br. 10-11.[8]

Plaintiff is also incorrect that the COVID-19 pandemic was foreseeable and was not specifically risk assessed in the contract. Opp. 14-15. The fact that other, different pandemics have occurred in the past (Opp. 14) does not render COVID-19 a foreseeable event any more than one flood in American history would exclude a specific flood from force majeure protection if that general category is listed in the contract. So, too, here. The parties bargained to allocate the risk of a natural disaster—which includes COVID-19 (Br. 14-16)—preventing performance to Plaintiff, and that bargain must be enforced. Neither can Plaintiff avoid dismissal by arguing that the foreseeability of the pandemic presents "a fact-intensive inquiry." Opp. 15. Does Plaintiff think *Phillips* knew about COVID-19 before the rest of the world? The COVID-19 pandemic was a patently extraordinary and unforeseeable event unlike anything in modern history, and this question can be decided as a matter of law. *See, e.g.*, *United States v. Rodriguez*, 2020 WL 3051443, at *1 n.2 (S.D.N.Y. June 8, 2020) ("Courts may take judicial notice of basic facts about the pandemic that are not reasonably in dispute."); *Myers v. Superintendent, Ind. State Prison*, 2020 WL 2803904, at *4 (S.D. Ind. May 29, 2020) (describing COVID-19 pandemic as "both

[8] Plaintiff's attempt to distinguish *Friends of Danny DeVito v. Wolf*, 227 A.3d 872 (Pa. 2020), is erroneous. Opp. 14. There, the court interpreted the definition of "natural disaster" in Pennsylvania's Emergency Code and held that "the only commonality among the disparate types of specific disasters referenced is that they all involve 'substantial damage to property, hardship, suffering or possible loss of life,'" and thus the COVID-19 pandemic was of the "same general nature or class as those specifically enumerated." *Id*. at 888-89. In light of this expansive definition, principles of *ejusdem generis* could not operate "to confine the operation of a statute within narrower limits that those intended by the General Assembly when it was enacted." *Id*. at 889. That holding has no bearing on the appropriate definition of "natural disaster" here, particularly given that Plaintiff has failed to cite *any* contrary definition or other authority establishing that COVID-19 is not properly considered a natural disaster.

unforeseen and unforeseeable"). Paragraph 12(a)'s termination provision also dooms Plaintiff's claim for breach of the settlement and payment clauses of the contract. Opp. 16.

II. PLAINTIFF'S REMAINING CLAIMS MUST ALSO BE DISMISSED

Plaintiff attempts to salvage its implied covenant claim by asserting that the parties dispute the meaning of the contract's terms (Opp. 19), but that argument is irrelevant where, as here, the underlying claims are substantively identical. *Gravier* bolsters—not "destroy[s]" (*id*. at 18)—Phillips' argument because, like the plaintiff in that case, Plaintiff here "do[es] not identify any disagreement over the meaning of terms in those contracts that could render [its] implied covenant claims non-duplicative." *Gravier Prods., Inc. v. Amazon Content Servs., LLC*, 2019 WL 3456633, at *4 (S.D.N.Y. July 31, 2019) (Cote, D.J.). The Complaint alleges that Phillips claimed it "would honor all contractual commitments with consignors" and was "considering moving the Stingel Work to an auction in November 2020," which purportedly "lull[ed] Plaintiff into a false sense of security." Opp. 19 (citing SAC ¶¶ 102-04, 109). Those wholly conclusory allegations cannot support an independent implied covenant claim. *See, e.g.*, *Kortright Capital Partners LP v. Investcorp Inv. Advisers Ltd.*, 257 F. Supp. 3d 348, 360 (S.D.N.Y. 2017).

Plaintiff's equitable estoppel claim fails because the Complaint concedes that Plaintiff was on notice as of March 14 that Phillips had postponed the Spring New York Evening Auction due to the pandemic and therefore could terminate the contract at any time.[9] SAC ¶ 102. The Complaint further admits that Plaintiff was notified no later than May 26 that Phillips did not intend to offer the Stingel Work at the rescheduled auction. *Id*. ¶¶ 103, 121. Paragraph 12(a) does

[9] Phillips' alleged representation in April 2020 that it "would honor all contractual commitments with consignors" (Opp. 22) is of no consequence because Phillips' exercise of its termination right was completely consistent with its contractual obligations. *See Pearce v. Manhattan Ensemble Theater,* 528 F. Supp. 2d 175, 180 (S.D.N.Y. 2007) ("[R]ightful termination is one means of completing performance"); *N. Shore Bottling Co. v. C. Schmidt & Sons*, 22 N.Y.2d 171, 176 (1968) ("Performance . . . is simply carrying out the contract by doing what it requires or permits.").

not require any specific form or date of notice, and the SAC alleges no actions by Phillips that were inconsistent with its contractual rights. Br. 23. Nor can Plaintiff show that it was prejudiced by its reliance on Phillips' conduct, and it provides zero support for its bald assertion that Phillips "led Plaintiff to believe that it ***would not*** invoke force majeure." Opp. 22-23 (emphasis original); *see also Longview Equity Fund, LP v. McAndrew*, 2007 WL 186769, at *5 (S.D.N.Y. Jan. 23, 2007). Nothing in the SAC suggests that Phillips ever made any representations to the contrary, or anything close to it. Neither is there any support for the conclusory allegation that Plaintiff refrained from offering the Stingel Work to other auction houses (Opp. 23), as Plaintiff was well aware from March 14 that the Spring New York Evening Auction had been postponed to a later date and therefore that, even absent termination, Phillips had no right to exclusively auction the Stingel Work without Plaintiff's written consent. Stingel Agreement ¶ 6(a)(i). And the removal of the Stingel Work from the rescheduled auction, where the auction catalogue was materially different in many respects, is both irrelevant and is not what "burned" the work in the market (Opp. 23)—if anything, Plaintiff's public lawsuit did. The threadbare and self-serving allegation otherwise cannot salvage this claim. Br. 22-24.

Lastly, Plaintiff's fiduciary duty claim fails because parties may "modify by contract the common law agency principles that would govern their relationship in the absence of an agreement," *Greenwood v. Koven*, 880 F. Supp. 186, 194 (S.D.N.Y. 1995); *see also Mickle v. Christie's, Inc.*, 207 F. Supp. 2d 237, 244-45 (S.D.N.Y. 2002); *Reale v. Sotheby's, Inc.*, 718 N.Y.S.2d 37, 38 (1st Dep't 2000), and the duties inherent in a consignor-consignee relationship cannot be stretched to prevent either party from exercising its contractual rights. Br. 24.

CONCLUSION

The Court should grant Phillips' motion to dismiss the Complaint, with prejudice.

Dated: October 2, 2020

Respectfully submitted,

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