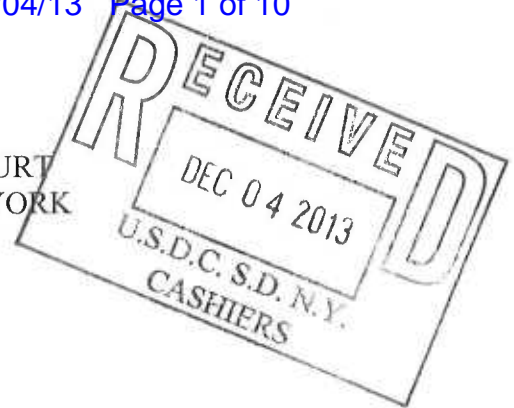


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



JOSEPH MARINO STATKUN,

Plaintiff,

v.

KLEMENS GASSER & TANJA
GRUNERT, INC. AND
TANJA GRUNERT,

Defendants.

Civil Action No.: 13-cv-05570 (LAK)

AMENDED COMPLAINT

1. Plaintiff Joseph Marino Statkun, by and through his undersigned counsel, as and for his complaint against Defendants Klemens Gasser & Tanja Grunert, Inc. and Tanja Grunert (collectively, "Defendants"), hereby alleges:

The Parties

2. Plaintiff Joseph Marino Statkun ("Plaintiff") is an individual residing at 91 Meserole Street, Brooklyn, NY 11206.

3. Upon information and belief, Defendant Klemens Gasser & Tanja Grunert, Inc. ("Gasser Grunert Gallery" or "Gallery") is/was a New York corporation presently with a principal place of business at 33 Orchard Street, New York, NY 10002, and with a last known mailing address of 524 West 19th Street, New York, NY 10011.

4. Upon information and belief, at all times relevant to this action, Defendant Tanja Grunert ("Ms. Grunert") resided at 524 West 19th Street, New York, NY 10011. Upon information and belief, Ms. Grunert is a resident of New York, NY.

5. Upon information and belief, at all times relevant to this action, Ms. Grunert has been an owner and director of Gasser Grunert Gallery.

Jurisdiction and Venue

6. This is an action for damages for violation of the Visual Artists Rights Act of 1990 (“VARA”), 17 U.S.C. § 106A, and related claims.

7. This Court has jurisdiction over this action pursuant to 17 U.S.C. § 101 *et seq.* and 28 U.S.C §§ 1331 and 1338. Moreover, pursuant to 28 U.S.C. § 1367, this Court has supplemental jurisdiction over Plaintiff’s state law claims in that such claims arise out of the same series of acts and transactions as to be part of the same case or controversy.

8. Venue is proper in this judicial district pursuant to 28 U.S.C §§ 1391(b), 1391(c) and 1400(a) in that Defendants reside and may be found in this district, and a substantial part of the events giving rise to the claims occurred in this judicial district.

Facts

A. The Fraudulent Cropping of Plaintiff’s Painting

9. Plaintiff is a professional artist who resides in New York. He obtained a Master of Fine Arts from Boston University, where he received the Jack Kramer Award and the Esther B. and Albert S. Kahn Award. Plaintiff has exhibited internationally in numerous solo and group exhibitions and has works in many private and public collections.

10. Plaintiff painted *Tubal Cain at Beggar’s Creek*, a “work of visual art” within the meaning of 17 U.S.C. §§ 101 and 106A(a). Attached hereto as Exhibit 1 is a photograph of the original painting.

11. The original dimensions of *Tubal Cain at Beggar’s Creek* were 60 inches by 72 inches.

12. *Tubal Cain at Beggar's Creek* was on consignment at the Gasser Grunert Gallery from the fall of 2009 through the summer of 2010.

13. *Tubal Cain at Beggar's Creek* was sold for \$16,000 on or around August 11, 2010. Upon information and belief, attached hereto as Exhibit 2 is a copy of the invoice from the sale.

14. Plaintiff was informed on or around September 2, 2012 by a former employee of Defendants that *Tubal Cain at Beggar's Creek* was cropped at or around the time of the sale in August 2010.

15. Upon information and belief, approximately 10 inches were cropped from *Tubal Cain at Beggar's Creek*, without Plaintiff's knowledge or consent.

16. Upon information and belief, Ms. Grunert fraudulently represented to the buyer that Plaintiff had consented to the cropping of *Tubal Cain at Beggar's Creek* and that the modified work was an authentic painting by Plaintiff. See Exhibit 3, attached hereto.

B. Ms. Grunert is Liable for the Conduct of the Gallery

17. Upon information and belief, at all times relevant to this action, and at least from May 16, 2008 through the time of filing of this amended complaint, the Gallery has held itself out to the public and transacted business under the name, "Klemens Gasser & Tanja Grunert, Inc." See <http://gassergrunert.net/test/> (last accessed December 3, 2013; Internet Archive Wayback Machine, http://web.archive.org/web/*/http://gassergrunert.net/test/ (last accessed December 3, 2013)).

18. According to the records of the New York Department of State, Klemens Gasser & Tanja Grunert, Inc. was dissolved by proclamation on December 26, 2001, and suspended with an "inactive" designation on February 24, 2012.

19. Accordingly, upon information and belief, all conduct described herein done in the name of “Klemens Gasser & Tanja Grunert, Inc.” that post-dates the dissolution of that entity in 2001 was done by Ms. Grunert personally.

20. Upon information and belief, to the extent that any conduct described herein occurred while Klemens Gasser & Tanja Grunert, Inc. was an ongoing entity, that entity was dominated and controlled by Ms. Grunert with respect to said conduct, such that the entity had no independent existence and was the alter ego of Ms. Grunert, used to accomplish the fraudulent purposes described in this amended complaint and avoid liability therefor.

21. In particular, upon information and belief, Ms. Grunert transacted and continues to transact business under the name of a dissolved and/or inactive corporation, while holding the same out as a viable corporate entity. Therefore, Ms. Grunert has abused the corporate status of the Gallery (assuming any corporate status exists) in an attempt to unjustly insulate herself from liability. Accordingly, the corporate form of the Gallery - if any - should be disregarded in order to prevent injustice and fraud. Thus, Ms. Grunert should be liable for the allegations set forth herein.

22. As a result, upon information and belief, Ms. Grunert and the Gallery are jointly and severally liable for all relief sought herein.

Count 1

Violation of the Visual Artists Rights Act, 17 U.S.C. §106A

23. Plaintiff repeats and realleges the allegations of paragraphs 1 through 22 as if fully set forth herein.

24. Plaintiff is the author of an original work of visual art of recognized stature entitled *Tubal Cain at Beggar's Creek*.

25. The Visual Artists Rights Act (“VARA”) was adopted to protect artists’ rights of attribution and of integrity.

26. VARA provides that the author of a work of visual art shall have the right, among others, “to prevent any intentional distortion, mutilation or modification of the work that would be prejudicial to his or her honor or reputation, and any intentional distortions, mutilation or modification of that work is a violation of that right” 17 U.S.C. §106(A).

27. Plaintiff has not waived any of his rights under VARA.

28. The acts of Defendants, including but not limited to the misrepresentations leading to the intentional distortion, mutilation or other modification of Plaintiff’s *Tubal Cain at Beggar’s Creek* painting by, among other things, altering the size, without Plaintiff’s consent and to his prejudice, constitute violations of Plaintiff’s rights under Section 106A of VARA.

29. By reason of the foregoing, Plaintiff has suffered damages to his integrity, honor and reputation in an amount to be determined at trial.

30. Because Defendants’ violations of Plaintiff’s rights were intentional within the meaning of VARA, Plaintiff is also entitled to statutory damages in the amount of \$150,000 for each intentional act.

Count 2

Violation of N.Y. Arts & Cult. Aff. Law § 12.01

31. Plaintiff repeats and realleges the allegations of paragraphs 1 through 22 as if fully set forth herein.

32. Defendants’ wrongful conduct, acts, and omissions alleged hereinabove constitute violations of New York’s Arts and Cultural Affairs Law, which provides, in pertinent part:

Whenever an artist or craftsperson, or a successor in interest of such artist or craftsperson, delivers or causes to be delivered a work of fine art, craft or a print of such artist's or craftsperson's own creation to an art merchant for the purpose of exhibition and/or sale on a commission, fee or other basis of compensation, the delivery to and acceptance thereof by the art merchant establishes a consignor/consignee relationship as between such artist or craftsperson, or the successor in interest of such artist or craftsperson, and such art merchant with respect to the said work, and:

- (i) such consignee shall thereafter be deemed to be the agent of such consignor with respect to the said work;
- (ii) such work is trust property in the hands of the consignee for the benefit of the consignor;

N.Y. Arts & Cult. Aff. Law § 12.01(1)(a)(i)-(ii).

33. The acts of Defendants, including but not limited to the misrepresentations leading to the intentional distortion, mutilation or other modification of Plaintiff's *Tubal Cain at Beggar's Creek* painting by, among other things, altering the size, without Plaintiff's consent and to his prejudice, constitute failures to care for and manage Plaintiff's consigned property prudently; to deal fairly and honestly with Plaintiff; and to disclose to Plaintiff all information relevant to the subject matter of the agency, thereby violating Plaintiff's rights under N.Y. Arts & Cult. Aff. Law § 12.01(1)(a).

34. As a result of Defendants' violation of N.Y. Arts & Cult. Aff. Law § 12.01, Plaintiff has been damaged, in an amount yet to be ascertained.

Count 3

Breach of Contract

35. Plaintiff repeats and realleges the allegations of paragraphs 1 through 22 as if fully set forth herein.

36. Plaintiff entered into an implied-in-fact contract with Defendants when he consigned his *Tubal Cain at Beggar's Creek* painting to Defendants' gallery in the fall of 2009.

37. The acts of Defendants, including but not limited to the misrepresentations leading to the intentional distortion, mutilation or other modification of Plaintiff's *Tubal Cain at Beggar's Creek* painting by, among other things, altering the size, without Plaintiff's consent and to his prejudice, constitute a breach of the contract between Plaintiff and Defendants.

38. As a result of Defendants' breach, Plaintiff has been damaged, in an amount yet to be ascertained.

Count 4

Fraud

39. Plaintiff repeats and realleges the allegations of paragraphs 1 through 22 as if fully set forth herein.

40. During the fall of 2009, Defendants falsely and fraudulently represented to Plaintiff that (1) Plaintiff's *Tubal Cain at Beggar's Creek* painting would be properly displayed for sale in its entirety while on consignment at the Gasser Grunert Gallery; (2) the painting would be cared for and managed prudently; and (3) Defendants would disclose to Plaintiff all information relevant to the consignment of his painting.

41. Defendants knew that these representations were false and were made with the intent to deceive and defraud Plaintiff and to induce him to produce and deliver *Tubal Cain at Beggar's Creek* to Defendants for display at the Gasser Grunert Gallery.

42. At the time the representations were made, Plaintiff believed the representations to be true and relied on them, and as a result Plaintiff was induced to entrust his *Tubal Cain at Beggar's Creek* painting to Defendants.

43. The representations were false, at least because Defendants subsequently represented to a buyer that Plaintiff had consented to the cropping of *Tubal Cain at Beggar's Creek* and that the modified work was an authentic painting by Plaintiff, when in fact no such consent was given. *See* Exhibit 3, attached hereto.

44. As a result of Defendants' fraudulent representations, Plaintiff has been damaged, in an amount yet to be ascertained.

Count 5

Defamation

45. Plaintiff repeats and realleges the allegations of paragraphs 1 through 22 as if fully set forth herein.

46. On or about August 9, 2010, Defendants published statements concerning Plaintiff by writing them and communicating them to a third party, as set forth in Exhibit 3.

47. The statements in Exhibit 3 concerning Plaintiff's consent to crop *Tubal Cain at Beggar's Creek* and willingness to "play with external influence" are false.

48. The statements in Exhibit 3 refer to Plaintiff by name.

49. Defendants published the statements referenced in Exhibit 3 with malice - knowing they were false, or with reckless disregard for the truth or falsity of the statements; or in a grossly irresponsible manner without consideration for the standards of information gathering and dissemination followed by responsible parties.

50. The statements in Exhibit 3 are defamatory on their face and constitute libel *per se*, as they tend to injure Plaintiff in the conduct of his trade, business, or profession as an artist.

51. The statements in Exhibit 3 proximately caused actual harm to Plaintiff, who has suffered damage to his reputation as a professional artist and financial loss, in an amount yet to be ascertained.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

- a) For maximum statutory damages in the amount of \$150,000 with respect to each willful violation of VARA; or for such amount as may be proper pursuant to 17 U.S.C. 504(c).
- b) For compensatory damages to be determined at trial, but not less than \$20,000, together with punitive damages.
- c) That Defendants be ordered to pay Plaintiffs' attorneys fees and costs of the action.
- d) That Defendants be ordered to pay enhanced damages for their willful violations.
- e) That Defendants be ordered to pay pre-judgment interest.
- f) That Plaintiff be awarded such other and further relief as this Court may deem just and proper.

Jury Demand

Plaintiff demands trial by jury.

Dated: December 3, 2013

By: 

Raymond R. Mandra (RM5011)
Josh Calabro (JC6363)
FITZPATRICK, CELLA, HARPER & SCINTO
1290 Avenue of the Americas
New York, New York 10104-3800
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Facsimile: (212) 218-2200

Attorneys for Plaintiff

Exhibit 1



Exhibit 2

Gasser / Grunert

Alex Mikhailov
7634 Fisher Island Drive,
Fisher Island, FL33109

August 11, 2010

INVOICE

Tubal Cain at Beggar's Creek 2009 oil on canvas 50" x 72"	\$20,000.00
Special discount 20%	- \$ 4,000.00
Subtotal	\$16,000.00
Plus NY sales tax 8.875%	<u>\$1,420.00</u>
TOTAL	\$17,420

<Footnote>

The image is approved by purchaser at 50" x 72" as presented in color prints. The purchaser expects the re-stretching of the canvas to the new dimensions to be done in a professional like manner and to have the appearance of not being reworked. Meaning the canvas will be pulled taut and all excess material be removed as to not bunch up on the back side of the stretcher rails and to be attached in a smooth manner to said stretch frame.

Exhibit 3

From: "Tanja Grunert" <tanja@gassergrunert.net>
Date: August 9, 2010 8:32:14 AM EDT
To: "David Mann" <Mann@mrarch.com>
Cc: <Chrisbenfield@gmail.com>
Reply-To: <tanja@gassergrunert.net>

Dear David

It sounds like War and Peace. Your Russian client wants to have a conversation with you about the resized version of the Jomar piece. I placed both versions in this email so you can compare them. I gave Jomar Statkun (artist) different options and he said that the trimmed is really great and meet his approval for resizing. In most instances the artist is the most finicky about any sort of modifications to work, however Jomar finds this process intriguing and likes the play with external influence. He finds the concept interesting, so okay, David lets circle the wagons.

If you want to have an alcohol-free dinner with me we could do that, as I am in town till Wednesday to return to the Hamptons to take care of my children. I am off to Connecticut. I am able to be reached on my mobile if you want to hear my lovely voice.

Love you long time,
Tanja

Gasser Grunert
524 West 19th Street
New York, NY 10011
(646) 944-6197

