

Sotheby's Inc. v Mao
2016 NY Slip Op 30708(U)
April 11, 2016
Supreme Court, New York County
Docket Number: 652283/2015
Judge: Shirley Werner Kornreich
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
SOTHEBY’S, INC.,

Index No.: 652283/2015

Plaintiff,

DECISION & ORDER

-against-

CHRISTOPHE MAO, CHAMBERS FINE ART, LLC,
and CHAMBERS 2010, INC.,

Defendants.

-----X
SHIRLEY WERNER KORNREICH, J.:

Defendants Christophe Mao, Chambers Fine Art, LLC (Chambers LLC), and Chambers 2010, Inc. (Chambers Inc.) move, pursuant to CPLR 3211(a)(5) & (7), to dismiss the Amended Complaint (the AC). Plaintiff Sotheby’s, Inc. (Sotheby’s) opposes and cross-moves for partial summary judgment on its first, second, and seventh causes of action.¹ For the reasons that follow, defendants’ motion is granted in part and denied in part, and plaintiff’s cross-motion is denied.

I. Factual Background & Procedural History

Sotheby’s and Chambers LLC are parties to a Secured Revolving Loan and Sale Agreement dated June 29, 2006 (the Agreement).² See Dkt. 72.³ The Agreement is a robust

¹ In deciding the motion to dismiss, the court relies on the facts pleaded in the AC (Dkt. 49) and the documentary evidence submitted by the parties. In deciding the cross-motion for partial summary judgment, the court relies on facts that are clearly undisputed.

² The version of the Agreement that defendants’ counsel filed is missing page 2, which contains the full definition of the Loan, some of the most important contractual provisions. See Dkt. 65 at 2-3. More disturbingly, the version of the Guaranty that he filed is not signed by Mao, suggesting it was never executed. See *id.* at 13. Plaintiff’s counsel, however, filed a complete copy of the Agreement and a signed copy of the Guaranty [see Dkt. 72 at 2 (the Agreement), 13 (the Guaranty)]. The fully executed version of the Guaranty was previously filed in support of Sotheby’s’ prior motion for summary judgment in lieu of complaint. See Dkt. 7 at 15.

contract clearly drafted by counsel experienced in secured transactions and the art industry. It is governed by New York law, provides for jurisdiction in this court, and contains merger and integration clauses. The Agreement begins by stating that it:

confirms the terms and conditions under which [Sotheby's] will make loans to you [i.e., Chambers LLC]⁴ from time to time in connection with your purchase and resale of Property. As used herein, the "Property" shall mean those items of contemporary Chinese fine art ("Contemporary Chinese Art") purchased by you with the proceeds of the Loans (as defined below) subject to the terms and conditions herein.

See Dkt. 72 at 2.

Paragraph 1 of the Agreement describes how the Loan – essentially a revolving credit facility secured by the purchased art⁵ – would operate. Sotheby's obligated itself to loan

³ References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

⁴ The word "you" always refers to Chambers LLC, Mao is separately referred to as the Guarantor, and Chambers Inc. is not mentioned because it did not yet exist.

⁵ The Agreement, including those provisions not quoted herein, expressly addresses every aspect of the parties' relationship, including how the Loan proceeds were to be used to purchase art and treatment of the art and proceeds. While defendants characterize the parties' relationship as a joint venture agreement, that characterization is of no legal import. The parties' duties to each other are defined exclusively by the Agreement, which contains merger and integration clauses. *See* Dkt. 72 at 11. Additionally, regardless of how the parties might have informally characterized their relationship, they did not engage in a joint venture because they did not agree to share losses. *See Lerch v Ark Restoration & Design Ltd.*, 2016 WL 1137097, at *1 (1st Dept Mar. 24, 2016) ("the agreement ... had no provision for the sharing of losses, and therefore was not one for a joint venture"), citing *Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 298 (1st Dept 2003); *see also Mawere v Landau*, 130 AD3d 986, 988 (2d Dept 2015) ("The plaintiff failed to state a cause of action based on a joint venture agreement because he failed to allege a mutual promise or undertaking **to share the burden of the losses of the alleged enterprise**") (emphasis added; quotation marks omitted). Here, while the Agreement provides for profit and cost sharing, only defendants bear the risk of loss because their obligation to repay the loans with interest, pursuant to paragraph 1(c), is "absolute and unconditional and is not subject to the results of the sale of the [art]." *See* Dkt. 72 at 3. Hence, defendants have no viable stand-alone defense that Sotheby's allegedly breached their joint venture agreement if such alleged breach is predicated on obligations not set forth in the Agreement. The parties' liability turns exclusively on whether the Agreement was breached.

Chambers LLC up to \$5 million (the Loan) on condition that Chambers LLC fulfill conditions precedent contained in paragraph 2 of the Agreement. *See* Dkt. 72 at 2. Chambers LLC, upon two days' notice to Sotheby's, could drawdown up to \$500,000 (the Drawdown) up to three days before the Maturity date. *See id.* The Drawdown could be repaid or reborrowed but had to be used to purchase contemporary Chinese fine art. *See id.* Paragraph 1 then provides:

(a) ... You will use the proceeds of the Loan solely to purchase Property, subject to prior written approvals as set forth in paragraph 1(e) below, and such proceeds must be used within 10 business days of the Drawdown. If the proceeds of the Drawdown is not used to purchase the Property for which it was borrowed within such 10 business days, then it shall be repaid to Sotheby's immediately. **The Loans will be repayable by you to Sotheby's ... on the earlier of the following (the "Maturity Date"): (i) the occurrence of an Event of Default (as defined below) or (ii) June 29, 2009.** Interest will be payable on the same date on which principal is due and payable (i) from the date the proceeds of the Loan are made available to you on the unpaid principal amount thereof from time to time outstanding at a fluctuating rate per annum equal to the prime rate (as defined below) plus one (1%) percentage point until the entire unpaid principal amount thereof shall have become due and payable, and (ii) on any principal which shall not be paid in full when due (whether at stated maturity, by acceleration or otherwise) for the period commencing on the due date thereof until the same is paid in full at a fluctuating rate per annum equal to the prime rate plus four (4%) percentage points, but in no event greater than the maximum rate permitted by law.

(b) The term "prime rate" as used herein shall mean the rate of interest publicly announced by the principal office of HSBC Bank USA, N.A. ... Interest shall be computed on the basis of a year of 360 days and actual days elapsed.

(c) **The payment of any amounts due to Sotheby's hereunder shall not be subject to any defenses, setoffs or counterclaims of any kind whatsoever. Your obligation to repay the Loan and accrued interest thereon is absolute and unconditional and is not subject to the results of the sale of the Property.**

...

See Dkt. 72 at 2-3 (emphasis added).

Paragraph 3 defines Events of Default:

- (a) **you shall default in the payment of any principal of or interest on the Loan or any other amount payable by you to Sotheby's hereunder as and when the same shall become due and payable; or**
- (b) any representation or warranty made by you herein shall be incorrect or misleading in any respect; or
- (c) **you shall breach, or fail to perform when due, any agreement, covenant or obligation to be performed by you pursuant hereto or pursuant to any other agreement between you and Sotheby's; or**
- (d) you or Christophe Mao (the "Guarantor") shall file [for bankruptcy] ...; or
- (e) the Property or any other item of Collateral (as defined below) shall cease to be subject to Sotheby's continuing security interest of first priority in and first lien upon all of your right, title and interest in and to the Property and the proceeds thereof, insurance proceeds and products thereof, additions and accessions thereto and any accounts receivable arising therefrom; or
- (f) there shall be any levy, seizure, attachment or execution upon any of the Property or any of the Collateral;

then, the outstanding principal amount of the Loan together with accrued interest thereon and all other outstanding indebtedness and obligations of you to Sotheby's shall become immediately due and payable, without presentment, demand, protest, notice of intent to accelerate, notice of acceleration or notice of any other kind, all of which are hereby waived by you and you will immediately deliver to Sotheby's all Property not in Sotheby's possession and will immediately admit Sotheby's to enter any location where Property is located. You acknowledge and agree that irreparable damage is likely to result to Sotheby's if you fail or refuse to perform your foregoing obligation to deliver Property and grant Sotheby's access to Property, and that no adequate remedy at law is likely to exist with respect to such failure or refusal. In addition to any other rights or remedies and damages available to Sotheby's at law or in equity, Sotheby's shall be entitled to temporary and permanent injunctive relief, without the necessity of proving actual damage, and Sotheby's shall be entitled to seek the remedy of specific performance of such obligation and you shall not object to or oppose such relief. In addition, Sotheby's shall have all or the rights, powers and privileges of a secured party under the New York Uniform Commercial Code⁶ as in effect from time to time, as well as any other rights or remedies otherwise available to Sotheby's at law, in equity, or

⁶ It is unclear why Sotheby's' counsel has not sought to plead a claim under the UCC in light of the statute of limitations arguments proffered by defendants.

hereunder, all of which shall be cumulative to the extent permitted by law. Sotheby's may, at any time or times, sell, resell, lease, assign and deliver, grant options for or otherwise dispose of any or all of the Property or Collateral in its then condition or following any restoration or preparation, at public or private sale or proceedings, by one or more contracts, in one or more parcels, at the same or different times, at any place, with or without having the Property or the Collateral at the place of sale or other disposition, upon any terms, and to such persons, firms or corporations as Sotheby's deems best, all without demand for performance or any notice or advertisement whatsoever ... [remainder of Collateral sale process omitted].

See Dkt. 72 at 4-6 (emphasis added).

Mao signed the Agreement on behalf of Chambers LLC, a New York LLC that he controlled. That same day, June 29, 2006, Mao also signed a personal guaranty (the Guaranty), in which he irrevocably and unconditionally guaranteed Chambers LLC's payment and performance obligation under the Agreement. *See* Dkt. 72 at 13. The Guaranty provides:

This Guarantee is an irrevocable, unconditional, and absolute present and continuing guarantee of payment and performance and not of collection and the undersigned agree that the execution and delivery of this Guarantee shall be conclusive evidence that the Guarantee is irrevocable, unconditional and absolute. The undersigned may, at the option of Sotheby's, be joined in any action or proceeding commenced by Sotheby's against the Company in connection with and based upon the Agreement or any term, covenant or condition thereof. Recovery may be had against the undersigned in such action or proceeding or in any independent action or proceeding against the undersigned without Sotheby's first asserting, prosecuting, or exhausting any remedy or claim against the Company or any other guarantor. **The undersigned's obligations hereunder shall be absolute and unconditional, shall not be subject to any counterclaim, setoff, deduction or defense the Company may have against Sotheby's or any other person, and shall remain in full force and effect without regard to any event whatsoever.** There shall be no requirement of any notice to the undersigned of non-payment, non-performance or nonobservance by the Company, or proof thereof, whereby to charge the undersigned therefor, all of which the undersigned hereby waives. The undersigned shall perform their obligations hereunder upon demand. The undersigned hereby agree that this Guarantee shall remain and continue in full force and effect notwithstanding any waiver, amendment, modification, extension or substitution of or for the Agreement. **This Guarantee shall be binding upon the undersigned and his heirs, beneficiaries, personal representatives, successors and assigns.** No assignment of this Guarantee through operation of law or otherwise shall relieve the undersigned from their obligations hereunder.

See Dkt. 72 at 13-14 (emphasis added). The Guarantee, like the Agreement, is governed by New York law and provides for jurisdiction in this court. *See id.* at 14.

It is undisputed that Chambers LLC borrowed \$2,166,000 from Sotheby's under the Agreement, and that Mao, on behalf of Chambers LLC, purchased art with that money and resold some of the art for \$250,520.⁷ Of the \$250,520, \$187,245.66 was remitted to Sotheby's. It also is undisputed that the outstanding principal loan balance is approximately \$2,142,455. As of early August 2015, more than \$1.1 million in interest has accrued, increasing the amount owed by Chambers LLC to Sotheby's to more than \$3.2 million. Defendants do not dispute that Chambers LLC is in default on this payment obligation.

On June 25, 2015, Sotheby's commenced this action by filing a summons and motion for summary judgment in lieu of complaint (Motion Seq. 001). *See* Dkt. 2. Chambers LLC and Mao were named as defendants. Sotheby's submitted the Agreement and the Guaranty, which Sotheby's averred constitute agreements for the payment of money only under CPLR 3213, and claimed that Chambers LLC and Mao are liable for the outstanding amounts thereunder. Sotheby's made clear that it was claiming that Mao was personally liable as a guarantor. *See* Dkt. 6 at 2.

On July 1, 2015, Sotheby's moved by order to show cause to compel defendants to deliver the artwork to Sotheby's, for books and records disclosure, and for proof of insurance (Motion Seq. 002). *See* Dkt. 11. On July 13, 2015, Sotheby's filed another motion by order to show cause for a temporary restraining order requiring defendants to deliver a certificate of

⁷ Sotheby's claims, and defendants dispute, that Mao sold other art for \$350,000, none of which was remitted to Sotheby's.

insurance or to release the artwork to Sotheby's (Motion Seq. 003). *See* Dkt. 16. Motion 3 was resolved and rendered moot. *See* Dkt. 39.

On July 23, 2015, defendants opposed Motions 1 and 2. Notably, defendants took the position that the June 25, 2015 date when Sotheby's commenced this action was "four days before the statute of limitations was set to expire." *See* Dkt. 40 at 2. By order dated August 13, 2015, the court denied Sotheby's motion for summary judgment in lieu of complaint and converted it to a complaint because the Agreement is far more than an agreement for payment of money only. *See* Dkt. 46 (order) & Dkt. 48 (8/13/15 Tr.). The court further held, *inter alia*, that the artwork, as required by the Agreement, must be moved to a Manhattan storage facility and made available for inspection by Sotheby's. *See* Dkt. 47.⁸

On August 18, 2015, Sotheby's filed the AC, which adds Chambers Inc. as a defendant and contains the following causes of action: (1) breach of the Agreement against Chambers LLC; (2) breach of the Agreement against Mao; (3) breach of fiduciary duty against Chambers LLC and Mao; (4) constructive trust against Mao and Chambers Inc.; (5) aiding and abetting breach of fiduciary duty against Chambers Inc.; (6) tortious interference with contract against Chambers Inc.; (7) breach of the Guaranty against Mao; and (8) fraudulent inducement against Chambers LLC and Mao. *See* Dkt. 49. Sotheby's seeks to hold all three defendants liable under veil piercing and alter ego theories. Sotheby's' proffered basis to disregard the corporate form of Chambers LLC and Chambers Inc. is that Mao dissolved Chambers LLC on January 3, 2011, without notifying Sotheby's, and continued to operate his art business through Chambers Inc., a newly formed New York corporation. Sotheby's further claims that Chambers Inc. may be held

⁸ It should be noted that, in January of 2016, defendants had yet to fully comply with this directive. *See* Dkt. 82 (1/7/16 Order).

liable under both the Agreement and Guaranty, which expressly provide that they are to be binding on Chambers LLC's and Mao's successors and assigns. *See* Dkt. 72 at 12, 14.

On September 8, 2015, defendants filed the instant motion to dismiss on the grounds that Sotheby's claims are time-barred and fail to state a claim (Motion Seq. 005). *See* Dkt. 63. On September 17, 2015, Sotheby's filed opposition to the motion and cross-moved for partial summary judgment on its first, second, and seventh causes of action (i.e., the claims for breach of the Agreement and the Guaranty). *See* Dkt. 69. The court reserved on the motion and cross-motion after oral argument. *See* Dkt. 84 (2/23/16 Tr.)

II. Legal Standard

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames, id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the

motion will succeed if “the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 NY2d at 562. Upon the completion of the court’s examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

III. Discussion

Defendants contend that, other than the constructive trust claim (which, as discussed below, fails to state a claim), all of Sotheby’s claims are time-barred.

With the sole exception of the tortious interference claim, which has a three year statute of limitations [CPLR 214(4); *see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 141 (2009)], all of Sotheby's claims are subject to a six-year statute of limitations. *See* CPLR 213. The breach of contract claims accrued when Sotheby's had the right to demand payment. CPLR 213(2); *see ACE Secs. Corp. Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.*, 25 NY3d 581, 594 (2015), citing *Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 403 (1993); *see also Hahn Automotive Warehouse, Inc. v Am. Zurich Ins. Co.*, 18 NY3d 765, 767 (2012). The fraud claim accrued when defendants committed the alleged fraud and, if Sotheby's could not have discovered the fraud within the 6-year limitations period, then it accrued two years after the alleged fraud could have been discovered with reasonable diligence. CPLR 213(8); *see Sargiss v Magarelli*, 12 NY3d 527, 532 (2009) ("With respect to the timeliness of plaintiff's action, a fraud-based action must be commenced within six years of the fraud or within two years from the time the plaintiff discovered the fraud or 'could with reasonable diligence have discovered'"). The breach of fiduciary duty claim, which is subject to a six-year limitations period since it is predicated on fraud, also accrued at the time of breach or two years from when it was discoverable. *See IDT Corp.*, 12 NY3d at 139 ("where an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213(8)"), citing *Kaufman v Cohen*, 307 AD2d 113, 119 (1st Dept 2003).

As set forth above, Sotheby's was entitled to demand payment on the amount due on the Loan upon the earlier of June 29, 2009 or the occurrence of an Event of Default. *See* Dkt. 72 at 2 ("The Loans will be repayable by you to Sotheby's ... on the earlier of the following (the "Maturity Date"): (i) the occurrence of an Event of Default (as defined below) or (ii) June 29,

2009.”). Sotheby’s commenced this action on June 25, 2015.⁹ Originally, defendants took the position that Sotheby’s claim for breach of the Agreement was timely. *See* Dkt. 40 at 2.

Defendants now argue that “the last distribution of funds by Sotheby’s pursuant to the [Agreement] occurred in or around February 2007, when the last artwork was purchased”, and thus “Sotheby’s legal right to demand payment from Chambers [LLC] on the [Agreement] and from the [G]uarantee signed by Mr. Mao occurred as early as February 2007 and no later than July 2007.” *See* Dkt. 64 at 14 (emphasis omitted).¹⁰ Consequently, defendants aver, “[t]he six-year statute of limitations for breach of contract actions expired in July 2013, long [i.e., approximately two years] before Sotheby’s commenced” this action. *See id.* at 15.

In opposition, Sotheby’s correctly notes that defendants do not explain “how or why their receipt of the last distribution of funds was a breach of the [Agreement] that would cause any of Sotheby’s causes of action to accrue or (2) what purported breach took place in July 2007 that would have given rise to a cause of action.” *See* Dkt. 70 at 5. In other words, Sotheby’s argues that defendants have not established that an Event of Default occurred prior to June 29, 2009, which would cause the running of the statute of limitations from that earlier date.

⁹ It should be noted that defendants’ contention that timeliness is determined based on the date the AC was filed, August 18, 2015, borders on the frivolous. The claims in the AC all relate back to the commencement of this action on June 25, 2015, which, as discussed, always expressly sought to impose liability on Chambers LLC under the Agreement and Mao under the Guaranty. Under CPLR 203(f), the claims in the AC are subject to the relation back rule. *See Giambrone v Kings Harbor Multicare Center*, 104 AD3d 546, 548 (1st Dept 2013), citing *Buran v Coupal*, 87 NY2d 173, 177 (1995) (relation back rule applies when original pleading “give[s] notice of the transactions, occurrences, or series of transactions or occurrences” at issue in new claims in amended pleading).

¹⁰ The doctrine of judicial estoppel does not apply because defendants’ earlier statute of limitations position did not result in a court ruling in their favor. *See Baje Realty Corp. v Cutler*, 32 AD3d 307, 310 (1st Dept 2006) (judicial estoppel does not apply absent “formal grant of relief based upon [defendant’s] prior statement.”)

In reply, for the first time, defendants contend they committed numerous breaches constituting Events of Default as defined by paragraph 3 of the Agreement, such as failing to remit proceeds from their sale of art, failure to pay accrued interest, and breaches of their representations and warranties. Sotheby's, however, did not have an opportunity to address these alleged breaches since they were raised for the first time in reply. *See Blackstone Advisory Partners L.P. v Gupta*, 121 AD3d 411, 412 (1st Dept 2014), citing *JPMorgan Chase Bank, N.A. v Luxor Capital, LLC*, 101 AD3d 575, 576 (1st Dept 2012) (court should not consider arguments made for the first time in reply brief). To be sure, it does appear that the AC is alleging (although specific dates are not identified) that Sotheby's had the right to demand repayment of the Loan prior to Maturity. While defendants aver these breaches occurred sometime in 2007, they proffer no proof of when they breached. Neither the AC nor any of the submissions on the instant motion clearly establishes an Event of Default occurring in 2007. In essence, defendants are seeking to strategically concede earlier breaches to evade liability. While defendants may well be correct about their breach in 2007, their failure to provide proof and failure to raise the issue until reply warrants denial of dismissal on statute of limitations ground at this juncture.¹¹ Furthermore, the cause of action for breach of the Agreement encompasses more than mere non-payment of money (i.e., the reason why relief under CPLR 3213 was inappropriate), such as turnover and sale of the collateral (i.e., the art). The Agreement provides that the UCC is applicable. *See* Dkt. 72 at 5-7. Neither party substantively addresses the UCC, which has its own statute of limitations. *See Wuhu Import & Export Corp. v Capstone Capital, LLC*, 39 AD3d 314, 315 (1st Dept 2007). Simply put, it is premature to dismiss the claim for breach of the

¹¹ It should be noted that fact discovery has mostly been completed since the instant motions were filed, so the argument can be addressed on summary judgment with the benefit of a full factual record.

Agreement as time-barred, even if most (if not all) of the claims thereunder may ultimately be barred by the statute of limitations.

However, dismissal of the claims for breach of the Agreement – claims for which Chambers LLC is the only contractual counterparty – is of no moment. As noted, Chambers LLC no longer exists and likely is judgment proof. However, Mao and, perhaps, Chambers Inc., remain liable. The Guaranty, unlike the Agreement, is absolute and unconditional and waives all possible affirmative defenses, including the statute of limitations. Dkt. 72 at 13-14; *see Sterling Nat'l Bank v Biaggi*, 47 AD3d 436, 436-37 (1st Dept 2008), citing *Citibank v Plapinger*, 66 NY2d 90 (1985). As recently reiterated by the Court of Appeals:

Guaranties that contain language obligating the guarantor to payment without recourse to any defenses or counterclaims, i.e., guaranties that are ‘absolute and unconditional,’ have been consistently upheld by New York courts. Absolute and unconditional guaranties have in fact been found to preclude guarantors from asserting a broad range of defenses.

Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro, 25 NY3d 485, 493 (2015) (internal citations and quotation marks omitted). Indeed, as the Court noted, the “guarantor may not raise as a defense the expiration of the statute of limitations against the primary obligor.” *Id.*, citing *Am. Trading Co. v Fish*, 42 NY2d 20, 26-27 (1977) (guaranty is undertaking separate from underlying contract and not necessarily “subject to the same Statute of Limitations as the underlying obligation”). Hence, while dismissal of Sotheby’s’ claims under the Agreement may ultimately be required by the statute of limitations, such dismissal would not absolve Mao and, possibly, Chambers Inc., of liability. In other words, “the subject guaranty effectively provides that, even if the principal is able to escape liability, the guarantee is still enforceable.” *Hyman v Golio*, 134 AD3d 992 (2d Dept 2015), citing *Manufacturers Hanover Trust Co. v Green*, 95

AD2d 737 (1st Dept 1983); see *Gard Entm't, Inc. v Country in N.Y., LLC*, 96 AD3d 683 (1st Dept 2012) (same).

That being said, the tortious interference and fraud claims (and the fiduciary duty claim premised on such fraud) are clearly time barred.¹² All of the tortious conduct is alleged to have taken place prior to June 29, 2009, and Sotheby's does not even bother to contend that it could not have discovered the alleged fraud when it occurred.¹³ After all, if there really were pervasive breaches as alleged by Sotheby's, Sotheby's surely was on inquiry notice.

While defendants do not contend that the constructive trust claim is time barred, they correctly aver that it must be dismissed for failure to state a claim. "The elements necessary for the imposition of a constructive trust are a confidential or fiduciary relationship, a promise, a transfer in reliance thereon, and unjust enrichment." *Abacus Fed. Savings Bank v Lim*, 75 AD3d 472, 473-74 (1st Dept 2010). "[T]he purpose of [a] constructive trust is prevention of unjust enrichment." See *Genger v Genger*, 121 AD3d 270, 278 (1st Dept 2014). Hence, a claim for the imposition of a constructive trust is a quasi-contract claim, which cannot be maintained where, as

¹² For this reason, the court has no reason to assess whether such claims are properly pleaded. It should be noted, however, that the fraud claim would fail because the fraud alleged is nothing more than defendants' alleged intention to breach the Agreement without any factual substantiation of their intent. See *MP Innovations, Inc. v Atlantic Horizon Int'l, Inc.*, 72 AD3d 571, 573 (1st Dept 2010) ("a fraud claim does not lie where it simply 'alleges that a defendant did not intend to perform a contract with a plaintiff when he made it.'"), quoting *Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 (1st Dept 1988). Likewise, the tortious interference with contract claim would be barred by the economic interest doctrine. See *White Plains Coat & Apron Co. v Cintas Corp.*, 8 NY3d 422, 426 (2007). Moreover, given Chambers Inc.'s liability under the Agreement, a tortious interference claim would not be viable. See *Ahead Realty LLC v India House, Inc.*, 92 AD3d 424, 425 (1st Dept 2012) ("To the extent this cause of action alleges tortious interference with the [contract], it fails, because asserting that a defendant tortiously interfered with its own contract quite clearly does not state a legally sufficient cause of action.") (citation and quotation marks omitted).

¹³ The only exception is the formation of Chambers Inc. in 2011, but that itself is not a tort and, given the Agreement's imposition of successor liability, has no effect on Sotheby's right to collect from Mao's art business, no matter the identity of the incorporated entity.

here, written agreements govern the subject matter of the claim. *See IDT Corp.*, 12 NY3d at 142, accord *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 (1987).

Finally, the court declines Sotheby's request to convert the motion to one for partial summary judgment. As discussed, there are questions of fact regarding the statute of limitations on Sotheby's claims under the Agreement. Moreover, since the instant motion was filed, the parties conducted and substantially completed discovery. Summary judgment should be decided with the benefit of a full record, especially since defendants have yet to answer the complaint. *Myung Chun v N. Am. Mtg. Co.*, 285 AD2d 42, 45 (1st Dept 2001). A summary judgment briefing schedule is currently in place, and expert discovery is on track to be completed beforehand. *See* Dkt. 83. Since the final monetary judgment in this action would effectively be a deficiency judgment based on the value of artwork to be turned over minus the outstanding amount due on the Loan (inclusive of interest), it is sensible to entertain the entry of judgment at the same time, and not in piecemeal fashion. Accordingly, it is

ORDERED that the motion by defendants Christophe Mao, Chambers Fine Art, LLC, and Chambers 2010, Inc. to dismiss the Amended Complaint is granted with respect to the third (breach of fiduciary duty), fourth (constructive trust), fifth (aiding and abetting breach of fiduciary duty), sixth (tortious interference with contract), and eighth (fraudulent inducement) causes of action, which are hereby dismissed, and the motion is otherwise denied; and it is further

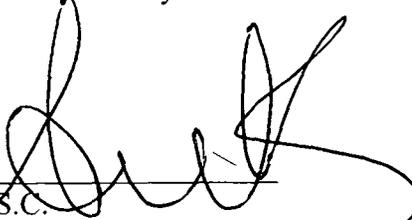
ORDERED that defendants shall file an answer to the complaint within 20 days of the entry of this order on the NYSCEF system; and it is further

ORDERED that plaintiff Sotheby's, Inc.'s cross-motion for partial summary judgment is denied without prejudice and with leave to re-file with respect to the surviving claims in accordance with the operative briefing schedule (Dkt. 83); and it is further

ORDERED that a telephone conference will be held on April 19, 2016 at 3:00 pm, at which time the parties will update the court on the status of discovery.

Dated: April 11, 2016

ENTER:



J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.