

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

DEAN LEVIN

Plaintiff,

v.

ROBERT BLUMENTHAL GALLERY LLC
AND ROBERT BLUMENTHAL

Defendants.

Index No.

SUMMONS

TO THE ABOVE NAMED DEFENDANT:

Robert Blumenthal Gallery LLC
1045 Madison Avenue
New York, New York 10075

You hereby are summoned and required to serve upon the undersigned attorneys for plaintiff an answer to the complaint in this action within twenty days after service of this summons, exclusive of the day of service, or within thirty days after service is complete if this summons is not personally delivered to you within the State of New York. In case of your failure to answer, judgment will be taken against you by default for the relief demanded in the complaint.

The basis of the venue designated is CPLR §503, the location of defendant's principal place of business.

Date: New York, New York
February 13, 2015

BOWLES LIBERMAN & NEWMAN LLP



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Attorneys for Plaintiffs

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Mr. Robert Blumenthal
1045 Madison Avenue
New York, New York 10075

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COMPLAINT

Plaintiff, Dean Levin (“Plaintiff” or “Levin”), by his attorneys, Bowles Liberman & Newman LLP, for his Complaint against defendants Robert Blumenthal Gallery (“Blumenthal”) and Robert Blumenthal Gallery LLC (the “Gallery”)(together “Defendants”) alleges as follows:

NATURE OF ACTION

1. This action arises from the Defendants’ blatant and unlawful failure to pay Plaintiff, a New York based artist, for his share of the sale proceeds under a consignment agreement between Plaintiff and Defendants, which should have been held in trust pursuant to the New York Arts & Cultural Affairs Law, but which apparently have been misappropriated by Defendants. Plaintiff brings this action to secure the full and complete payment of all monies owed (together with an award of attorney’s fees as expressly authorized by the New York Arts & Cultural Affairs Law).

THE PARTIES

2. Dean Levin is a visual artist residing at 328 Broome Street, New York, New York 10002.

3. Upon information and belief, Robert Blumenthal is an individual residing in New York with offices at 1045 Madison Avenue, New York, New York 10075.

4. Upon information and belief, Robert Blumenthal Gallery LLC is a limited liability company organized under the laws of New York with a principal place of business at 1045 Madison Avenue, New York, New York 10075.

5. At all relevant times, Blumenthal has been an “art merchant” within the meaning of New York Arts and Cultural Affairs Law § 11.01 and § 12.01.

6. At all relevant times, Plaintiff has been an “artist” within the meaning of New York Arts and Cultural Affairs Law § 11.01 and § 12.01.

VENUE

7. This Court has personal jurisdiction pursuant to C.P.L.R. § 301 over Defendants because Defendants maintain their principal place of business in New York and committed the wrongful acts complained of herein in New York City.

8. Venue is proper in this Court pursuant to C.P.L.R. § 503 because both Plaintiff and Blumenthal reside in New York County.

MATERIAL FACTUAL ALLEGATIONS

9. Beginning in or about April of 2014, Plaintiff entrusted his artworks, both created and owned by Plaintiff, to the Defendants. Defendants were authorized by Plaintiff to seek sales of these artworks and were entitled to receive a commission on any sale generated by Defendants.

10. This entrustment of works of art was embodied in a consignment agreement (the “Consignment Agreement”) between Plaintiff and Defendants, dated May 1, 2014.¹

11. The terms of the Consignment Agreement state that, in connection with an exhibition at the Gallery titled “Dean Levin 1x1” from May 1, 2014 to May 30, 2014 (the Exhibition”), Plaintiff would provide the Gallery with thirty artworks (the “Artworks”) that Defendants would be authorized to display and sell in accordance with the terms of the Consignment Agreement.

12. The consigned Artworks were identified in the Consignment Agreement and were comprised of ten (10) 66x44 inch surface stain paintings for \$8,500 per artwork and twenty (20) 40x30 inch surface stain paintings for \$6,500 per artwork, bringing the total, agreed upon value of the consigned Artworks to \$215,000.

13. Under the Consignment Agreement, all gross proceeds resulting from the sale of the Artworks were to be split equally (50/50) between the Plaintiff and Defendants and Plaintiff was to be paid by Defendants for all amounts due within thirty (30) days of Defendants’ receipt of funds for the respective Artwork.

14. Under the Consignment Agreement, Defendants were required to obtain Plaintiffs’ approval for all minimum sales prices for all consigned Artworks, but in no event would those Artworks be discounted more than fifteen percent (15%) from the retail price specified in the Consignment Agreement.

15. Plaintiff never gave Defendants written or oral approval for any discounted price for the Artworks sold under the Consignment Agreement.

¹ Plaintiff has intentionally refrained from attaching a copy of the Consignment Agreement, as the terms of the agreement require confidentiality and covenants of the parties not to publish the agreement.

16. The terms of the Consignment Agreement state that, upon Plaintiff's request, Defendants shall promptly provide a list of buyers of the Artworks within one hundred and fifty (150) days following the Exhibition, which ended on May 30, 2014.

17. As Plaintiff is an artist and Blumenthal is an art merchant, and because the Artworks were entrusted by Plaintiff to Defendants within New York State, the status of the entrusted works, the proceeds of any sale of the entrusted works, as well as the relationship between Plaintiff and Defendants, are all governed by and determined under the New York Arts and Cultural Affairs Law (hereinafter "NYACAL").

18. Pursuant to NYACAL § 12.01(1)(a)(ii), all of the artworks entrusted by Plaintiff to Defendants were and are trust property in the hands of Defendants for the benefit of Plaintiff.

19. As the artworks were trust property and trust funds in the hands of Defendants, Plaintiff has an absolute ownership right to the Artworks entrusted to Defendants (up to and until any authorized sale) and in the event of any authorized sale an absolute ownership right to the proceeds of such sale.

20. Pursuant to NYACAL § 12.01(a)(i), (ii), and (iii), with respect to every Artwork entrusted to Defendants by Plaintiff that were consigned for sale, Defendants were Plaintiff's agent, with responsibility for the conservation of such trust property and the remittance of any trust funds from any and every sale of a consigned artwork.

21. As Plaintiff's agent for the conservation and sale of such Artwork, and for the remittance of any trust funds from any sale of an artwork consigned to them by Plaintiff, Defendants were fiduciaries on behalf of Plaintiff, and subject to all requirements such a

relationship entails, including, but not limited to, an obligation to accurately and fully account for any and all transactions and to promptly remit any trust funds due to Plaintiff.

22. On or about June 2, 2014, Defendants delivered a check to Plaintiff in the amount of \$18,500, which was applied by Plaintiff to Defendants' balance owed pursuant to the Consignment Agreement.

23. Defendants have sold all thirty (30) consigned Artworks (having a total agreed upon retail value of \$210,000) but have failed, after repeated demand, to remit the remaining sales proceeds belonging to Plaintiff.

24. In addition, Defendants have refused to provide to Plaintiff an accounting of all sales made pursuant to the Consignment Agreement, which has been demanded repeatedly by Plaintiff.

PLAINTIFF'S FIRST CAUSE OF ACTION
(Accounting)

25. The allegations contained in the preceding paragraphs of this Complaint are repeated and realleged with the same force and effect as if set forth fully herein.

26. Under the Consignment Agreement and pursuant to NYACAL § 12.01, Defendants were and continue to be Plaintiff's agent with respect to the Artworks owned by the Plaintiff and are subject to fiduciary obligations/duties pursuant to that agency relationship.

27. Defendants breached such obligations/duties, with the precise damages known only to Defendants.

28. Plaintiff has demanded and Defendants have failed to provide a full and legally sufficient accounting for any and all sales and for any artworks and the commissions

charged by Defendants in connection with the Artworks consigned under the Consignment Agreement.

29. By reason of the foregoing, Plaintiff is entitled to an equitable accounting, which should: (i) identify with particularity all artworks belonging to the Plaintiff that Defendants have sold, or for which Defendants have collected any fee of any kind, and set forth each such artwork the date of such transaction, the name and address of the purchaser and the price for which the artwork sold or fees or other expenses deducted by Defendants from amounts paid to Plaintiff; and (ii) identify with particularity any artworks in Defendant's possession that remain unsold.

30. Plaintiff has suffered, is suffering and will continue to suffer irreparable harm absent the grant of relief sought herein.

31. Plaintiff has no adequate remedy at law.

PLAINTIFF'S SECOND CAUSE OF ACTION
(Violation of NYACAL § 12.01)

32. The allegations contained in the preceding paragraphs of this Complaint are repeated and realleged with the same force and effect as if set forth fully herein.

33. Plaintiff was the sole creator and owner of all Artworks he consigned to Defendants.

34. By delivering or causing the consigned Artworks to be delivered to Defendants, a trust relationship was created under NYACAL § 12.01, under which Defendant was obligated to hold the consigned Artworks and all sales proceeds therefrom as trust property for the benefit of Plaintiff.

35. Plaintiff has demanded a full and legally sufficient accounting and Defendants have refused such demand.

36. Plaintiff has demanded payment for the Artworks consigned to Defendants and Defendants have refused such demand.

37. Defendants' actions constitute a breach and violation of their statutory obligations to Plaintiff under the NYACAL § 12.01. More specifically, Defendants have, among other things:

- a. Refused to provide a fully and legally sufficient accounting with respect to the consigned works, despite Plaintiff's demands therefor;
- b. Improperly and unlawfully failed to remit sales proceeds from sales of consigned artworks owned by Plaintiff;
- c. May have committed other acts of misconduct that are not currently known to Plaintiff but will be learned upon further discovery.

38. By reason of the foregoing, Plaintiff is entitled to: (i) a full, legally sufficient, and sworn accounting; and, (ii) compensatory damages in an amount to be proven at trial, but, upon information and belief, of not less than \$191,500 plus prejudgment interest, pursuant to C.P.L.R. § 5001.

**PLAINTIFF'S THIRD CAUSE OF ACTION
(Breach of Contract)**

39. The allegations contained in the preceding paragraphs of this Complaint are repeated and realleged with the same force and effect as if set forth fully herein.

40. The Consignment Agreement was a legally binding agreement between the parties.

41. Defendants sold all thirty (30) of Plaintiff's Artworks pursuant to the Consignment Agreement for a total price of \$210,000.

42. Defendants have failed to pay sales proceeds to Plaintiff as required by the Consignment Agreement.

43. Defendants have failed to provide Plaintiff with a list of buyers of the Artworks upon his request, pursuant to the terms of the Consignment Agreement.

44. By reason of the above, Defendants have materially breached the Consignment Agreement, and caused damages to Plaintiff in an amount to be determined at trial, but, upon information and belief, of not less than \$191,500 plus prejudgment interest pursuant to C.P.L.R. § 501.

PLAINTIFF'S FOURTH CAUSE OF ACTION
(Unjust Enrichment)

45. The allegations contained in the preceding paragraphs of this Complaint are repeated and realleged with the same force and effect as if set forth fully herein.

46. Defendants have been enriched by retaining the proceeds owed to Plaintiff from sales of the Artworks consigned to them by Plaintiff.

47. Such enrichment is at the expense of Plaintiff.

48. Equity and good conscience require restitution to Plaintiff.

49. By reason of the foregoing, Plaintiff is entitled to damages in an amount to be determined at trial, but, upon information and belief, of \$191,500, plus prejudgment interest.

50. By reason of the malicious and/or reckless nature of Defendants' conduct, Plaintiff is also entitled to punitive damages in an amount to be determined at trial.

WHEREFORE, Plaintiff prays for judgment as follows:

- a. An award of damages equal to the total amount of sales proceeds due to Plaintiff, plus interest from the date of any such purchase price proceeds were received by Defendants.
- b. An accounting for any additional monies owed to Plaintiff as a result of any acts by Defendant which would entitle Plaintiff to additional funds;
- c. An award of punitive damages in an amount determined by the Court;
- d. An award of attorney's fees pursuant to NYACAL § 12.01(2) and (3);
- e. Costs;
- f. And such other relief that this Court deems just and proper.

Dated: February 13, 2015

BOWLES LIBERMAN & NEWMAN LLP
Attorneys for Plaintiff Dean Levin



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