AiA Art News-service

SULLIVAN & WORCESTER

Authentication Lawsuit Against Keith Haring Foundation is Dismissed

By Nicholas O'Donnell on March 11th, 2015Posted in Authentication

The lawsuit arising out of the Keith Haring Foundation's refusal to authenticate a painting a Haring work, and the Foundation's related efforts to prevent the exhibition of works it did not consider to be authentic, has been dismissed. The case is the latest in a series of civil cases related to the authentication of art—contemporary art in particular. While this case is resolved pending any appeal, the high-stakes nature of contemporary art assures that it will not be the last.

Keith Haring died in 1990, and bequeathed his collection of his own art, and all copyrights and trademarks in his case, to the Keith Haring Foundation. Haring's work is valuable, and has clearly created a temptation for forgery that has proven too hard for some to resist. As a result, most auction houses will not sell a work as a Haring without a certificate of authentication, but the blessing of the Foundation will often suffice.

Plaintiff Elizabeth Belinksi owns over 100 works that she has asserted were made by Keith Haring. In 2007, through an art dealer (Lucas Schoormans), Bilinksi submitted documentation concerning 41 of them to the Foundation, seeking confirmation of their authenticity. The Foundation swiftly rejected the paintings as not authentic. Bilinski submitted additional evidence of the provenance, but the Foundation was unconvinced. Furthermore, the Foundation demanded that Bilinksi stop selling the work as a Haring.

Bilinksi brought the works to Sotheby's and the Gagosian Gallery, according to the opinion, but they declined to market the paintings. She then returned to the Foundation, which agreed at least to review and reconsider its earlier opinion. During this same interval, Guernsey's expressed the opinion that the works were genuine, and from the mid-1980s.

In 2013, the plaintiffs displayed the paintings at a Miami exhibition. Two days after the show began, the Foundation filed suit and sought a temporary restraining order and injunction. That Complaint unequivocally declared the works to be forgeries. A press release accompanied a subsequent agreement between the exhibition and the Foundation, which continued to declare

is mission to prevent forgeries from being sold as Haring works (but which not mention the plaintiffs or their paintings by name).

As a result of the publicity surrounding the lawsuit, the plaintiffs claimed to have lost opportunities to sell the works, and sued the Foundation under a variety of theories. In this week's opinion, the Court dismissed all of them. Fundamentally, the Complaint alleged that the defendants had colluded to deprive the plaintiffs of the value of the paintings. But the Court did not consider the allegations to state a claim for anti-trust violations, focusing on the Sherman Act's requirements of an "unreasonable restraint" on trade:

Plaintiffs describe the conspiracy, formed sometime in the early 90s, as being between "Defendants and their allies," specifically art galleries, dealers, and major auction houses who "severely restrict the supply of Haring artwork in the marketplace." All named defendants are employees of, or associated with, the Foundation. The only "ally" identified by name is Deitch, an art dealer who sold two Harings at a Sotheby's auction in 2014. Under the theory advanced in the Complaint, any refusal by an auction house, dealer, or gallery to sell a Haring without authentication by the Foundation could be a conspiratorial act. Such broad allegations do not give the defendants fair notice of the claim against them.
Interestingly, the Court went to great lengths to distinguish the 2009 *Simon-Whelan* case against the Andy Warhol Foundation. The Court here made much of the absence of a Haring*catalogue raisonnée*. From there it characterized the factual context of the two cases as "so dissimilar." I'm not so sure. If alleging a conspiracy to limit the market for Warhol is sufficient, why is publication of a catalogue essential? *Most* artists don't have *catalogues raisonnée*. Nor should the fact that the Foundation ceased authentication in 2012 matter; the plaintiff has a duty to mitigate but as a matter of pleading, her damages wouldn't be erased by the end of authentications by the Foundation. To be clear, none of this should be read to suggest that I believe there was any conspiracy, but I found the reasoning on this issue in the opinion assessing the adequacy of the allegations to state a claim to be a little puzzling.
The Court made quick work of the plaintiffs' trademark and Lanham Act claims, noting the absence of a connection between the press release and any proposed transaction.

The plaintiffs also brought several state law claims, mostly alleging injury from the Miami publicity. Having dismissed all the federal law claims, the court was first faced with the question of whether to continue to exert jurisdiction over the state law claims that ordinarily could not be brought in federal court. Interestingly, the court chose to do so—and then proceeded to dismiss the claims on the merits. That means they cannot be brought again in a state court.

The defendants asserted the litigation privilege in defense. The litigation privilege, which exists in some form everywhere and is required in some sense by the First Amendment, holds that "statements made in the course of legal proceedings are absolutely privileged if pertinent to the litigation." It's an extremely important principle that allows parties and their attorneys to vindicate their rights. I have had to invoke it more than once against litigation opponents. The Court here held that the statements in the Complaint were absolutely privileged (meaning that they cannot form the basis for liability, even if stated with malice).

The press release stands on different legal footing, and required analysis of the "fair reporting" privilege, which protects anyone reporting the course of a judicial proceeding so long as it is substantially accurate. Critically, while the press release noted the goal of removing fake works, it did not describe the plaintiffs' works specifically as fake. The Court also relied on the general nature of the press release in dismissing the disparagement claims, concluding that a reasonable person would not conclude that the press release was about the plaintiffs' paintings.

This is not a case that will necessarily cast a long shadow in the authentication wars, since it related so specifically to the Miami show lawsuit and press release, and the questions of privilege that came from them. And, even if the proposed New York law had been passed, it's debatable whether it would even have applied to this fact pattern. The antitrust theory was certainly novel, but short of evidence of an actual agreement to suppress the market for a specific artist, probably not one that will be repeated elsewhere. If anything, the case will likely accelerate the trend of foundations declining to issue opinions at all, since this matter was surely more trouble than it was worth for the Foundation.