

16 September 10

In the fall of 2009, the art world was abuzz over the potential discovery of a lost masterpiece by Leonardo da Vinci - and the fact that it had been sold at auction at Christie's only eleven years earlier for less than \$22,000. Almost one year later, the interest surrounding this discovery has not abated, but has shifted focus. All eyes are now on a New York federal district court as it considers a lawsuit brought against Christie's by the consignor of the alleged da Vinci for damages in connection with its misattribution as an anonymous 19th century German drawing.

The drawing and its 'discovery'

In 1998, prominent art dealer Kate Ganz paid just under \$22,000 at a Christie's auction for a pen-and-ink drawing on fine parchment of a young woman listed in the auction catalogue as being executed in the 19th century by a member of a German school of artists known for imitating Italian Renaissance painters.

In January 2007, Ganz sold the drawing at her gallery to an undisclosed purchaser acting through Peter Silverman, a Canadian collector. Suspecting that it was a true Renaissance work rather than a 19th century imitation, Silverman submitted the drawing for radiocarbon dating. Testing indicated that the parchment was dated between 1440 and 1650, making it conceivable that it was executed by Leonardo da Vinci, who lived from 1452 to 1519. Silverman then submitted the drawing to leading da Vinci scholar Martin Kemp, who, after more than a year of study, pronounced the drawing to be a genuine da Vinci and named it La Bella Principessa.

Kemp's pronouncement of authenticity caused a rift among scholars and connoisseurs of da Vinci, including the director of the Museo Ideale Leonardo da Vinci who publicly confirmed Kemp's identification, and the curator of drawings at the Metropolitan Museum of Art who publicly doubted Kemp's pronouncement. Amid this controversy, a forensic art expert claimed to have identified a fingerprint on La Bella Principessa that matched a fingerprint on a known da Vinci. The consignor of the drawing brought suit against Christie's.

The Case against Christie's: Marchig v. Christie's

In April 2010, Jeanne Marchig brought suit against Christie's in connection with the consignment and sale of the drawing, seeking unspecified damages under four legal theories: (i) breach of fiduciary duty; (ii) breach of warranty; (iii) negligence; and (iv) negligent misrepresentation.

The circumstances surrounding the consignment

According to Marchig, the drawing originally belonged to her late husband, an art restorer, when they married in 1955, and she became the sole owner in 1983 after his death. Marchig and her late husband had a relationship with Christie's dating back to 1966, having consigned several works of art for sale prior to Marchig's consignment of the drawing.

Marchig alleges that she informed Christie's at the time of the consignment that her late husband believed the drawing to be the work of Domenico Ghirlandaio, an early Italian Renaissance painter and teacher of Michelangelo who had apprenticed under Andrea del Verrocchio at the same time as Leonardo da Vinci. Marchig further alleges that François Borne, the then-resident Christie's expert on Old Master Drawings, spent fifteen minutes examining the drawing and concluded that it was a German drawing dating from the 19th century, which attribution Marchig reluctantly accepted.

Christie's response to the attribution controversy

From 1998 to 2009, Marchig consigned additional works of art for sale at Christie's and maintained a correspondence with the Honourary Chairman of Christie's, Noël Annesley. In July 2009, Marchig received a telephone call from Annesley informing her of the claims by Kemp and others that the drawing was the work of Leonardo da Vinci.

Annesley then sent Marchig a series of emails and letters regarding the new attribution and even travelled to Geneva from London to meet with her in person to discuss the issue.

The four theories of liability on which the plaintiffs base their case

1) Breach of fiduciary duty

It is well-established law in New York that an auction house has a fiduciary relationship with its consignors. Marchig asserts that Christie's breached its fiduciary duty to her by failing to investigate her belief that the drawing could be attributed to an Italian Renaissance artist; by failing to investigate the age of the drawing using carbon dating; and by failing to accurately assess the age of the drawing using routine methods of analysis and connoisseurship. The Plaintiffs suggest that had Borne taken Marchig's suggested attribution seriously, it is likely that the drawing would have at least been identified as a 15th century Italian drawing valued far in excess of \$22,000, regardless of the artist to whom it was attributed.

2) Breach of warranty

Marchig's breach of warranty claim arises from her consignment agreement with Christie's. While that agreement provided that 'Christie's makes no representations or warranties to Seller with respect to the Property, its authenticity, condition or otherwise', it did not expressly disclaim any warranties with respect to attribution. Accordingly, Marchig argues that Christie's breached its warranty of attribution to her detriment by failing to identify the drawing as being of 15th century Italian origin.

3) Negligence

Here, Marchig claims that Christie's failed to exercise due care and to act as a reasonably prudent expert, and so breached its duties (i) to correctly attribute the drawing to the artist who created it; (ii) to correctly estimate its age; and (iii) to obtain the best possible price for the drawing.

4) Negligent misrepresentation

Marchig asserts that Christie's fiduciary relationship with her gave rise to a special relationship of trust and confidence sufficient to sustain a claim of negligent misrepresentation. That is, Marchig contends that Christie's knew she required accurate information in order to sell the drawing at the highest possible price, and that she intended to rely on Christie's opinion regarding its attribution. Further, Marchig alleged that, to her detriment, Christie's was negligent in its misattribution of the drawing and in its rejection of Marchig's belief that the drawing was a work of the Italian Renaissance.

Christie's response

Christie's preferred a two-pronged response to Marchig's claims.

First, that each of Marchig's four claims is barred by the statute of limitations, as each of the four theories of liability accrued no later than the January 1998 date of the auction of the drawing and New York's applicable limitations periods are six years or less.

Second, Christie's contends that the Plaintiffs have failed to state a plausible claim for relief. That is, as to Marchig's claims of breach of fiduciary duty, negligence and negligent misrepresentation, Christie's contends that its obligations to her were defined by the consignment agreement and contract law alone.

As to Marchig's claim of breach of warranty, Christie's asserts that it did not breach any warranty to her under the consignment agreement because the agreement (i) did not contain any applicable warranty; and (ii) expressly disclaimed any warranties with respect to the consignment and sale of the drawing.

Implications of Marchig v. Christie's: how long does an auction house's fiduciary relationship with a consignor last?

The *Marchig v. Christie's* decision could have far-reaching implications in terms of the duties owed by an auction house to a consignor. The ruling will likely touch upon issues such as the length of time a fiduciary relationship between an auction house and consignor might exist, and if parties might alter that relationship by conduct as well as by contract.

Does the fact that a consignor continues to consign other works with an auction house toll the statute of limitations for claims regarding the fiduciary duty owed with respect to the original consigned work? Or, could a call from an auction house official revive a fiduciary relationship with a consignor long after the gavel has fallen? Does a disclaimer in a consignment agreement that an auction house makes no representations or warranties as to the authenticity of an object relieve the auction house from a duty to

correctly attribute such object? Stay tuned.