STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JULIE ELLEN NEWMAN, et al.,

Plaintiffs,

Case No. 15-146394-CZ
Hon. Wendy Potts

v

ELAINE KAREN LIPSCHUTZ, et al.,

Defendants.

_____/

OPINION AND ORDER RE: PLAINTIFFS' MOTION FOR SUMMARY DISPOSITION ON CLAIM FOR DECLARATORY JUDGMENT VOIDING DEFENDANTS' PURPORTED TRANSFER OF ART TO LW FAMILY INVESTMENTS, LLC (COUNT X) UNDER MCR 2.116(C)(10)

At a session of Court
Held in Pontiac, Michigan
OCT 11 2016

This matter is before the Court on Plaintiffs' motion for summary disposition on their claim for declaratory judgment. Plaintiffs request that the Court enter a judgment declaring that the Julie Trust and Elaine Trust are equal, undivided tenants in common and that the purported assignment of the art to LW Family Investment, LLC is invalid. Plaintiffs' motion is brought pursuant to MCR 2.116(C)(10), which tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Despite labeling Count X as a claim for declaratory judgment, Count X regarding the transfer of art sounds in breach of contract. Courts are not bound by the labels that parties attach to their claims. *Manning v Amerman*, 229 Mich App 608, 613; 582 NW2d 539 (1998). Indeed, "[i]t is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the

claim." *Adams v Adams* (On Reconsideration), 276 Mich App 704, 710-711; 742 NW2d 399 (2007). Defendants assert that Plaintiff's claim under Count X is redundant; however, both parties argue the merits of Plaintiff's claim for breach of contract regarding the Lipschutz's assignment of the art purportedly pursuant to the co-tenancy agreement. Thus, the Court will address the substance of those arguments.

"In interpreting a contract, our obligation is to determine the intent of the contracting parties. *Sobczak v Kotwicki*, 347 Mich. 242, 249; 79 NW2d 471 (1956). If the language of the contract is unambiguous, we construe and enforce the contract as written. *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich 558, 570; 596 NW2d 915 (1999). Thus, an unambiguous contractual provision is reflective of the parties' intent as a matter of law. Once discerned, the intent of the parties will be enforced unless it is contrary to public policy. *Id.*" *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). The co-tenancy agreement between Elaine Lipschutz, individually and as Trustee of the Elaine Karen Lipschutz Revocable Trust dated April 24, 2006, as amended, and Julie Winkelman, individually and as Trustee of the Julie Ellen Winkelman Revocable Living Trust dated April 24, 2006, as amended, was entered into on October 31, 2013 and provided that Elaine and Julie are the co-tenants and that they own the art as equal, undivided tenants in common.

Further, the agreement states that "[t]he parties desire to set forth their understanding and agreement regarding the use, possession, maintenance, and improvement of the Art, payment of costs, expenses, taxes, and insurance with respect to the Art, the sale of the Art, and the distribution of the Art or of proceeds upon sale of the Art." Julie and Elaine, pursuant to the co-tenancy agreement, agreed that Elaine would be the Manager of the Art with the powers of a

Manager as set forth in the co-tenancy agreement. Under the co-tenancy agreement, "[t]he Manager will have full management authority over the Art, and will have all powers necessary or advisable to protect and conserve the Art. The Manager will have the authority to take any and all action on behalf of the Co-Tenants as to the Art, including the leasing and lending of the Art or any portion of the Art. The Manager may appoint, employ, or otherwise contract with any persons on behalf of the Co-Tenants as to the Art, and the Manager may delegate to any person such authority to act on behalf of the Co-Tenants as the Mangers may from time to time deem appropriate." The co-tenancy agreement also provides that "[t]he Art may be sold to a third party by the Manager. In addition, the Art may be transferred to the Co-Tenants by the Manager. . . ."

In moving for summary disposition, Plaintiffs argue that the co-tenancy agreement unequivocally did not allow for Elaine to make a unilateral non-sale transfer of the art to a third party in the vein of a so-called "Assignment of Art Work to LW Family Investments, LLC." LW Family is a Delaware LLC that was formed by Kenneth and Elaine. Plaintiffs assert that the clear and unambiguous language in the co-tenancy agreement prescribes that Elaine could only transfer the Art by virtue of a sale to a third party or a non-sale distribution to the Julie Trust and Elaine Trust as co-tenants. Plaintiffs claim that there exists no genuine issue of material fact that Elaine was without authority to transfer the art to LW Family.

In response, the Lipschutz Defendants argue that the claim for declaratory relief has already ripened into a breach of a contractual duty and also argue defenses based on contract theory. The Lipschutz Defendants assert that the assignment of the art is permitted under the co-tenancy agreement because the beneficial ownership of the art subsequent to the assignment is no different than it was prior to the assignment. Defendants assert that the art is owned, directly or

indirectly, by the Elaine and Julie Trusts. Thus, Defendants allege that, consistent with the co-tenancy agreement, the assignment was either a non-transfer or a transfer to the co-tenants. Defendants attempt to use parol evidence and refer to the deposition testimony and the affidavit of Kenneth Lipschutz in support of their arguments. Defendants also claim that Kenneth's testimony asserting that there is no harm to Julie's property rights supports their argument that the Court need not judicially declare a breach of contract.

However, consideration of the extrinsic evidence Defendants provide "generally depends on some finding of contractual ambiguity." *City of Grosse Pointe Park v Michigan Municipal Liability and Property Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005). The parties have not argued, and the Court does not find, the existence of a contractual ambiguity in the co-tenancy agreement. Thus, the Court will not consider Kenneth Lipschutz's interpretation of the co-tenancy agreement or his interpretation of what the parties' understanding may have been. The Lipschutz Parties also assert that Julie retained her beneficial interest in the art, so there is no basis for the motion.

The co-tenancy agreement governs the parties' "desire to set forth their understanding and agreement regarding the use, possession, maintenance, and improvement of the Art, payment of costs, expenses, taxes, and insurance with respect to the Art, the sale of the Art, and the distribution of the Art or of proceeds upon sale of the Art." The unambiguous language in the agreement provides for specific instances of sale or distribution of the art and only states that the "Art may be sold to a third party by the Manager" or that the "Art may be transferred to the Co-Tenants by the Manager." LW Family is not a Co-Tenant under the co-tenancy agreement. The assignment of the art to third party LW Family was not a sale as provided in the agreement and was not a transfer to the Co-Tenants as provided in the agreement. Accordingly, the Court

finds that the Lipschutz parties breached the co-tenancy agreement by making a non-sale transfer to an entity not designated a Co-Tenant pursuant to the co-tenancy agreement. The Court grants Plaintiffs' motion and finds that the Lipschutz parties breach the co-tenancy agreement by transferring the art in contravention of paragraph 6 of the co-tenancy agreement. The Court declares that the purported assignment of the art to LW Family Investment, LLC is invalid.

IT IS SO ORDERED.

Dated: OCT 11 2016

Hon. Wendy Potts