Frenk v Solomon
2018 NY Slip Op 32208(U)
September 7, 2018
Supreme Court, New York County
Docket Number: 650298/2013
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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MARGIT FRENK,

Plaintiff,

-against-

YRIS RABENOU SOLOMON, Individually and as Executrix of the Estate of Charlotte Weidler, YRIS RABENOU CORPORATION d/b/a YRIS RABENOU GALLERY, DAVID Y. SOLOMON, Individually and as Executor of the Estate of Charlotte Weidler, DARIUS SOLOMON and TAMBOUR SOLOMON,

Defendants.

Index No.: 650298/2013

Mot. Seq. No. 003

Decision and Order

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MASLEY, J.:

In motion sequence number 003, defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Defendants, Yris Rabenou Solomon, individually and as Executrix of the Estate of Charlotte Weidler, Yris Rabenou Corporation d/b/a Yris Rabenou Gallery, David Y. Solomon, individually and as Executor of the Estate of Charlotte Weidler, Darius Solomon, and Teimour Solomon also seek to vacate all of plaintiff's confidentiality designations.

BACKGROUND

This matter sadly begins with the Nazi Holocaust, "the most tragic event of our time." (*Reif v Nagy*, 2018 NY Slip Op 31781[U], *1 [Sup Ct, NY County 2018].) This action involves the art collection of the late Paul Westheim, a Jewish art critic, who specialized in German expressionist art. Among over 3,000 paintings, sculptures, watercolors, drawings, and graphics, Mr. Westheim's collection allegedly included the five artworks at issue in this case: Paul Klee's *Opus 18*; Otto Mueller's *Drei Akte* (also known as *The Bathers*); Max Pechstein's *Portrait of Paul Westheim* (also known as *Portrait of a Standing Man*); Edgar Jene's *Plastische Imagination*; and Erich Heckel's

The Violinist (collectively, Five Works).

In 1933, Mr. Westheim fled Nazi Germany for Paris and left his collection with Charlotte Weidler, an art dealer in Berlin. (Paul Westheim, *Remembering a Collection*, 14 Das Kunstwerk [Issue 5/6] at 8-15 [1960/1961] [Westheim Article]), NYSCEF Doc. No. 7.) During World War II, Mr. Westheim fled from France to Spain, then Portugal. Ultimately, he settled in Mexico in 1941, where he met and was later married to Marianna Westheim-Frenk, plaintiff's mother. He also corresponded extensively, and in code, with Ms. Weidler during the war (*see generally* Opinion of Ines Rotermund-Reynard, Ph.D., NYSCEF Doc. No. 148)[1]; however, those "vivid" communications terminated, according to Mr. Westheim, after the war when he inquired as to the whereabouts of his art collection. (Letter from Paul Westheim to Prof. Hans Maria Wingler, dated June 20, 1959, NYSCEF Doc. No. 3.) Indeed, Mr. Westheim's restitution claim, filed in West Germany in the 1950s, was thwarted by an affidavit of Ms. Weidler's sister, who affirmed that Mr. Westheim's entire collection had been destroyed during the war in a bombing; thus, Mr. Westheim was prevented from establishing Nazi persecution as the cause of the loss. (*See* affidavit of Melitta Weidler, dated July 6, 1962, NYSCEF Doc. No. 172; Letter from Mr. Westheim to Prof. Wingler, dated August 3, 1959, NYSCEF Doc. No. 4.)

In this action, plaintiff asserts that Mr. Westheim's art collection was not destroyed; rather, she alleges that Ms. Weidler stole the collection and began to sell artworks from it soon after Mr. Westheim died. (Complaint [Compl.] ¶ 46.) Mr.

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[1] Using the Special Archive Moscow/Russian State Military Archive/RGVA, not open to the public until 1992, Professor Rotermund-Reynard reports on the 1933 to 1939 correspondence between Mr. Westheim and Ms. Weidler.

Westheim passed away in 1963, Ms. Weidler passed away in 1983, and Ms. Westheim-Frenk passed away in 2004.

1973 Action and Release

In 1973, Ms. Westheim-Frenk learned that Ms. Weidler had sold a painting from Mr. Westheim's collection, *Portrait of Dr. Robert Freund*, to a gallery in New York City. Ms. Westheim-Frenk commenced an action against Ms. Weidler and others (1973 Action) for damages and for "possession of all items of [Mr. Westheim's] art collection" in Ms. Weidler's custody. (Ms. Westheim-Frenk's 1973 Action unverified complaint, *Marianna Westheim v Serge Sabarsky Gallery, Inc. et al.*, Index No. 16877/1973 [Sup Ct, NY County], NYSCEF Doc. No. 138.) In the 1973 Action, Ms. Westheim-Frenk also sought an account of Ms. Weidler's actions regarding Mr. Westheim's art collection and "whatever sums of money are found to be due...on the basis of said account." (*Id.*)

A pre-answer motion to dismiss was served in the 1973 Action, but–before the motion was decided or any discovery was exchanged–the 1973 Action was discontinued "with prejudice" by stipulation, dated March 21, 1974. (*See* NYSCEF Doc. Nos. 138, 141-142.) Ms. Westheim-Frenk, who was represented by New York counsel, contemporaneously executed a blanket release (Release) discharging Ms. Weidler and Ms. Weidler's

> "heirs, executors, administrators, successors and assigns of and from all manner of actions, causes of action, suits, debts, dues, sums of money, accounts, reckoning, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law, in admiralty, or in equity which against . . . [Ms.] Weidler, [that Ms. Westheim-Frenk] ever had, now have, or which [Ms. Westheim-Frenk] or [her] heirs, executors, or administrators, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents." (Release,

NYSCEF Doc. No. 141.)

The Release specified that it "may not be changed orally" (*id.*), and no other documents set forth the terms of the settlement of the 1973 Action. In consideration for the Release, Ms. Westheim-Frenk received $7,500.[2]

The Present Action

Defendants Ms. Solomon and her now-deceased husband, defendant Mr. David Y. Solomon, were the executors of Ms. Weidler's will, and their sons, defendants Darius Solomon and Teimour Solomon, were Ms. Weidler's sole heirs. Plaintiff, Ms. Westheim-Frenk's daughter, now alleges that, in August 2010, defendants admitted that they did possess (or, in the case of *The Violinist*, had possessed before its sale at auction in 1998) the Five Works. (Compl. ¶¶ 7, 39-40.) Plaintiff initiated this action in January 2013 against the defendants seeking a judgment declaring her rightful ownership of the Five Works, replevin, and an accounting, as well as damages for unjust enrichment, conversion, and violation of both a bailment and a constructive trust. (Compl. ¶¶ 45-86.)

In December 2013, defendants' pre-answer motion to dismiss the complaint was denied except to the extent that plaintiff's claim for breach of warranty of title was dismissed without prejudice. (12/18/13 order [Oing, J.], NYSCEF Doc. No. 39; tr of 12/18/13 proceeding at 46:24-26, NYSCEF Doc. No. 43). That decision was affirmed on appeal by the First Department, which stated: "[g]iven plaintiff's allegation raising the inference that the stipulation of

[2] The $7,500 sum in 1973 is equivalent to $40,000 today; the court takes judicial notice of the inflation rate according to the United States Bureau of Labor Statistics. (*See* https://www.bls.gov/data/inflation_calculator.htm.)

discontinuance with prejudice and the general release of claims in [the 1973 Action] were not intended to encompass the instant claims, and her allegations of fraudulent inducement raising equitable considerations," dismissal without discovery would be premature. (123 AD3d 416, 416 [1st Dept 2014].)

DISCUSSION

Summary judgment is a drastic remedy. To succeed, a movant must establish a prima facie case entitling her to judgment as a matter of law and tender evidence showing "the absence of any material issues of fact." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The burden then shifts to the opposing party to demonstrate, with admissible evidence, that there are questions of material fact which require a trial. (*Zuckerman v City of New York*, 49 NY2d 557, 598 [1980].) "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions" are insufficient. (*Id.*).

Here, all parties ask this court to consider documents dating back to the 1930s; for example, to establish that the Five Works belonged to Mr. Westheim, plaintiff relies on two documents Paul Westheim drafted in the 1960s. (Westheim 06/15/1962 aff, NYSCEF Doc. No. 169; Westheim Article, NYSCEF Doc. No. 188.) Defendants' conclusory attack on plaintiff's documents as fraudulent, inaccurate, and invalid is without merit and lacks an admissible factual basis. Notably, in violation of Commercial Division Rule 13, the opinion of defendants' expert (Expert Opinion) is unsigned and undated, except for a translator's certificate of accuracy, dated December 5, 2016. (NYSCEF Doc. No. 148.) Both parties, however, rely on documents referenced in the Expert Opinion. While the

court cannot rely on the unsworn Expert Opinion, the documents cited therein could presumably be offered at trial as ancient documents (*see Bendik v Dybowski*, 227 AD2d 228, 229 [1st Dept 1996]); thus, for the purposes of this motion, the court deems the various documents submitted by both parties, and those referenced in the Expert Opinion, to be ancient and admissible.

> "Under the 'ancient document' rule, a record or document which is found to be more than 30 years of age and which is proven to have come from proper custody and is itself free from any indication of fraud or invalidity 'proves itself.' This rule dispenses with the proof of the execution of a record or document on the proof of its antiquity. It presumes that the entrant of the record or document is dead after the passage of 30 years. If the genuineness of an ancient document is established, it may be received to prove the truth of the facts that it recites." (*Tillman v Lincoln Warehouse Corp.*, 72 AD2d 40, 44-45 (1st Dept 1979] [citations omitted].)

Nevertheless, the court acknowledges that there are evidentiary issues with certain submitted documents; for example, an unsigned letter, dated October 17, 1976, without letterhead, purportedly from Ms. Westheim-Frenk to Dr. Rathke. (NYSCEF Doc. No. 176.) While such issues could be resolved with testimony as to the discovery and chain of custody of these documents, no such admissible testimony was offered by either party in connection with this motion.

Doctrine of Entrustment

Defendants admitted that, between 1977 and 1983, Ms. Weidler sold, traded, or gave four of the Five Works to defendant Ms. Solomon. (NYSCEF Doc. No. 162 [defendants' response to interrogatories].) Further, Ms. Solomon admitted that, in 1998, she helped art collector Gour Shoshan sell the fifth artwork, *The Violinist*. (tr of Ms. Solomon's 10/29/2015 deposition at 140:18-142:13, NYSCEF Doc. No. 159.) Defendant Yris Rabenou Corporation is listed

on the auction's schedule of property as the "OWNER" of *The Violinist*. (NYSCEF Doc. No. 168.)

Citing the Uniform Commercial Code's Doctrine of Entrustment, defendants argue that Ms. Weidler held the power to transfer good title of the Five Works to defendants. Under this theory, because Mr. Westheim entrusted his art collection to Ms. Weidler, a merchant of art, Ms. Weidler had the power to transfer Mr. Westheim's full interest in the collection to buyers, like defendants, acting in the ordinary course of business. (*See e.g.* UCC § 2-403 [2].)

"A defendant's status as a buyer in the ordinary course is an affirmative defense." (*Overton v Art Finance Partners LLC*, 166 F Supp 3d 388, 401 [SDNY 2016] [citations omitted]; *see also Hann Financial Service Corp. v Republic Auto Credit Group, LLC*, 18 AD3d 434, 435 [2d Dept 2005]); however, defendants failed to plead this affirmative defense in their answer as required by CPLR 3018 (b). In any event, even if defendants had timely raised that defense, Mr. Westheim left the collection with Ms. Weidler when he fled persecution in Nazi Germany (Westheim Article at 1, NYSCEF Doc. No. 188); that does not constitute the ordinary, measured entrustment contemplated in the UCC (*cf Reif*, 2018 NY Slip Op 31781[U], *4 [noting that a "signature at gunpoint cannot lead to a valid conveyance"].) Any conveyances by gift, sale, or otherwise to Ms. Weidler under those circumstances are suspect. The inadmissible opinion of defendants' expert does not establish that Mr. Westheim intended that Ms.

Weidler would sell his art collection and send him the proceeds;[3] moreover, the Expert Opinion is based on "decod[ing] the special language that Weidler and Westheim had been using" and necessarily conclusory. (Expert Opinion at 3, NYSCEF Doc. No. 148.) The court rejects defendants' entrustment argument.

The Release

Defendants also rely on the Release and contemporaneous 1974 stipulation of discontinuance as grounds for summary dismissal of this action under the doctrines of contractual release and res judicata. According to defendants, nothing was uncovered during discovery to establish that the broad Release was intended to be narrowly applied to only one painting, rather than to the entire collection. As noted above, Ms. Westheim-Frenk learned that Ms. Weidler sold a painting from Mr. Westheim's collection through a gallery in New York in 1973; Ms. Westheim-Frenk commenced the 1973 Action against Ms. Weidler and others, but the case was settled in 1974 before an answer was submitted or discovery was conducted. In exchange for $7,500, Ms. Westheim-Frenk executed the Release.

"Generally, a valid release constitutes a complete bar to an action on a claim which is the subject of the release." (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011] [quotation marks omitted].) If an "agreement on its face is reasonably susceptible of only one

[3] Indeed, while the Expert Opinion details many art transactions, it is admittedly not about the Five Works at issue here; rather, the Expert Opinion is submitted to establish that the Westheim Article and Mr. Westheim's affidavit "are inaccurate and unreliable sources." (Expert Opinion at 3, NYSCEF Doc. No. 148.)

meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity" (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569-570 [2002]), and neither extrinsic nor parol evidence may be used to create ambiguity in complete, clear, and unambiguous contracts. (*South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 278 [2005]).

Additionally, stipulations that discontinue actions with prejudice are subject to the doctrine of res judicata. (*See e.g. Matter of Empire State Bldg. Assoc., L.L.C. Participant Litig.*, 133 AD3d 538,538 [1st Dept 2015], *lv denied* 27 NY3d 908 [2016].) Such stipulations bar "all other claims arising out of the same transaction or series of transactions . . . even if based upon different theories or if seeking a different remedy." (*Matter of State of New York v Seaport Manor A.C.F.*, 19 AD3d 609, 610 [2d Dept 2005] [quotation marks omitted]). The doctrine of res judicata binds, among other potential parties, "successors to a property interest." (*Watts v Swiss Bank Corp.*, 27 NY2d 270, 277 [1970].)

Here, the doctrines of contractual release and res judicata apply to the Release and 1974 stipulation of discontinuance. After filing a lawsuit involving "all items of [Mr. Westheim's] art collection," Ms. Westheim-Frenk chose to settle and discontinue the 1973 Action "with prejudice" on the advice of her New York counsel. Ms. Westheim-Frenk also contemporaneously executed the Release, supported by consideration, which bars "all manner of actions" against Ms. Weidler and Ms. Weidler's "successors and assigns." (Release, NYSCEF Doc. No. 175.) By its terms, the Release applies to all actions Ms. Westheim-Frenk's "heirs . . . can, shall or may have" involving "any matter, cause or thing

whatsoever from the beginning of the world to the day of the date of these presents." (*Id.*)

With these documents, defendants have established a prima facie defense of release, demonstrating entitlement to judgment as a matter of law. Accordingly, the burden shifts to plaintiff to demonstrate that there is a material issue of triable fact sufficient to defeat this motion. Regrettably, plaintiff has not met her burden.

Plaintiff argues that the Release does not bar this action because the Release was limited to only the painting, entitled *Portrait of Dr. Robert Freund*, the sale of which by the New York art gallery caused Ms. Westheim-Frenk to commence the 1973 Action. Plaintiff contends that the Five Works are not covered by the Release, and, even if they are so covered, she argues that a subsequent 1976 transaction constitutes waiver of the Release. Alternatively, plaintiff argues that Ms. Westheim-Frenk was fraudulently induced by Ms. Weidler to execute the Release, and also asserts that defendants should be equitably estopped from using the Release as a shield because plaintiff alleges that Ms. Weidler is a thief.

Defendants object to plaintiff's use of parol evidence to alter the terms of the Release. While plaintiff counters that she does not rely on parol evidence but on conduct subsequent to the release, the court is being asked to disregard the clear, unambiguous Release using evidence and inference as to the meaning of those documents and conduct. The parol evidence rule applies to releases. (*South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 278

[2005].) Its application to releases, however, is more flexible when the release

> "contain[s] standardized, even ritualistic, language and are given in circumstances where the parties are sometimes looking no further than the precise matter in dispute that is being settled. Thus, while it has been held that an unreformed general release will be given its full literal effect where it is directly or circumstantially evident that the purpose is to achieve a truly general settlement, the cases are many in which the release has been avoided with respect to uncontemplated transactions despite the generality of the language in the release form." (*Mangini v McGlurg*, 24 NY2d 556, 562-563 [citations omitted].)

As the Release here is clearly a standardized form, the court must be flexible in its application of the parol evidence rule.

Plaintiff identifies a later transaction between Ms. Weidler and Ms. Westheim-Frenk to support plaintiff's contention that the Release is limited to the Kokoschka painting, *Portrait of Dr. Robert Freund*. In 1976, another artwork, allegedly from Mr. Westheim's collection, appeared when Ms. Weidler brought the Otto Dix painting, entitled *To Beauty* (Dix Painting), to the German art dealer Ewald Rathke. (10/22/1976 letter from Dr. Rathke to Ms. Westheim-Frenk, NYSCEF Doc. No. 25.) Dr. Rathke obtained the Dix Painting from Ms. Weidler in 1972 to have the Dix Painting restored and to sell it on Ms. Weidler's behalf. (10/25/1976 letter from Dr. Rathke to Ms. Westheim-Frenk, NYSCEF Doc. No. 26.) Ms. Westheim confirmed to Dr. Rathke that the Dix Painting was from Mr. Westheim's collection. (10/17/1976 letter from Ms. Westheim-Frenk to Dr. Rathke, NYSCEF Doc. No. 24). Having learned of the "disputes surrounding the Kokoschka painting," Dr. Rathke offered to intervene and distribute the proceeds of any sale of the Dix Painting evenly between both Ms. Weidler and Ms. Westheim-Frenk. (NYSCEF Doc. No. 26.) Soon thereafter, the Dix Painting was

purchased by a museum in Germany, and Dr. Rathke paid Ms. Westheim-Frenk and Ms. Weidler $30,000 each. (NYSCEF Doc. Nos. 178-180, 182-183.)

Plaintiff asks why would either Ms. Weidler or Ms. Westheim-Frenk make that 1976 agreement having settled the 1973 case with the Release? To counter plaintiff's single-painting release thesis, defendants identify a contemporaneous letter from Ms. Westheim-Frenk to show that she understood that "nothing more can be done about any future pictures which may turn up."[4] In a subsequent letter to Dr. Rathke, Ms. Westheim-Frenk states her understanding that the Release only covered the Kokoschka painting, *Portrait of Dr. Robert Freund.* (NYSCEF Doc. No. 24.) The court notes, however, that these documents do not evidence a conflict between the understandings of Ms. Weidler and Ms. Westheim-Frenk; they demonstrate only the understanding of Ms. Westheim-Frenk, conflicted or not. The court, therefore, cannot draw the inference that plaintiff invites.

Further, plaintiff's argument that the Release pertains only to the

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[4] In a letter, dated July 28, 1974, Ms. Westheim-Frenk wrote to a Dr. Rathenau: "I told the New York attorney what I learned from Mrs. Nay. [H]e answers me to this: 'Unfortunately nothing more can be done about any further pictures which may turn up. The facts which you ascertained about a Nay painting would not be sufficient basis for a law suit. Mrs. Margaret Schultz was a good friend of my senior partner, Franz M. Joseph, and also personally known to me. I consider it very doubtful that Dr. Rathenau's intervention with her would have resulted in a better settlement.' Oh well, the matter is settled now anyways. . . . In any case I want to tell you shortly that the matter *Portrait Dr. Robert Freund* is settled. The court denied the other party's motion to dismiss the claim as not permissible. Then the other party offered a settlement, U.S. $7,500.00. My attorney advised me to accept the settlement and he also offered to only charge me 40% instead of 50% in this matter. I accepted it." (NYSCEF Doc. No. 143 at 3).

Kokoschka painting, *Portrait of Dr. Robert Freund*, is not supported by sufficient admissible evidence. Plaintiff's reliance on the settlement amount of $7,500 as evidence that the Release could have applied to only *Portrait of Dr. Robert Freund* is without any support or context inasmuch as there is no evidence submitted in connection with this motion from which to conclude anything about the value of that painting or the settlement figure itself. For instance, there is no expert report examining the 1974 economy, comparing the settlement value to similar transactions, or examining the effect of inflation.

Moreover, plaintiff's documentary evidence of conduct and intent is inconclusive. The unambiguous language in Ms. Westheim-Frenk's 1973 Action complaint and the Release is clear. The court cannot conclude that the Five Works were "uncontemplated" by the Release when Ms. Westheim-Frenk specifically sought "possession of all items of [Mr. Westheim's] art collection" in the 1973 Action's complaint.

Here, plaintiff has the burden to establish grounds upon which to disregard the Release. (*Mangini v McClurg*, 24 NY2d 556, 559 [1969].) While a release can be set aside on the basis of fraudulent inducement, fraudulent concealment, or misrepresentation (*Arbor Realty Sr. Inc. v Keener*, 988 F Supp 2d 254, 260 [EDNY 2013]), the fraud must be separate from the subject of the release. (*Board of Mgrs. of 325 Fifth Ave. Condominium v Continental Residential Holdings LLC*, 149 AD3d 472, 474 (1st Dept [2017]). "In order to set aside a release on such grounds, a plaintiff must establish the basic elements of fraud, namely a representation of material fact, the falsity of that representation,

knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury." (*Global Minerals & Metals Corp. v Holme*, 35 AD3d 93, 98 [1st Dept 2006].)

Plaintiff contends that questions of fact exist as to whether the Release was induced by fraud and was fairly and knowingly made. For support, however, plaintiff offers only conclusory allegations regarding Ms. Weidler's fraud at the time the Release was executed. The only documents plaintiff identifies are the 1973 Action complaint and a February 1973 letter.[5]

Circular citations to one's own allegations of fraud and theft in the complaint do not constitute admissible evidence. Further, the 1973 letter allegedly written by Ms. Weidler provides no cognizable basis upon which to infer fraud perpetrated by Ms. Weidler against Ms. Westheim-Frenk. The letter is addressed to a Margarethe Shultz, not to Ms. Westheim-Frenk or her attorneys. (NYSCEF Doc. No. 156.) The hearsay statement within that ancient document does not raise a triable issue of material fact.

None of plaintiff's allegations, read as a whole and afforded the light most favorable to plaintiff, are sufficient to raise a triable issue of fact as to fraud and

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[5] In a February 19, 1973 letter to Margarethe Schultz, Ms. Weidler wrote "This is to confirm to you and Mr. Serge Sabarsky . . . that the painting by Oskar Kokoschka[, only *Portrait of Dr. Robert Freund*,] which you bought from me in the summer of 1971 rightfully belonged to me and that I acquired this painting together with three other paintings from Mr. Paul Westheim. I paid for the paintings in dollars, which I had from my work in the USA. Mr. Westheim had resided in Berlin . . . and myself resided in Berlin. A few weeks ago, I received a letter from Mrs. Paul Westheim, the widow of Mr. Westheim . . . inquiring about the Kokoschka painting and what had become of it. I wrote to her to inform her of the fact that I had bought the painting from Mr. Westheim." The letter is on Ms. Weidler's letterhead and is signed. (NYSCEF Doc. No. 156.)

fairness at the time of the Release. The alleged fraudulent misrepresentation was precisely the subject of the terminated 1973 Action: whether there were more artworks from Mr. Westheim's collection. "[A] party that releases a fraud claim may later challenge that release as fraudulently induced only if it can identify a separate fraud from the subject of the release." (*Bellefonte Re Ins. Co. v Argonaut Ins. Co.*, 757 F2d 523, 527-528 [2d Cir 1985].) "Were this not the case, no party could ever settle a fraud claim with any finality." (*Centro Empresarial Cempresa S.A.*, 17 NY3d at 276.)

Plaintiff also fails to establish a misrepresentation by Ms. Weidler at the time of the Release. Ms. Westheim-Frenk failed to condition the Release on the truth of the information, if any, that was provided to her–*i.e.*, that there were no other artworks from Mr. Westheim's collection. (*See e.g. id.* [noting that "plaintiffs were allegedly aware that they lacked a full picture of Conecel's internal finances and that the relationship between the parties had become adversarial, yet they failed to condition the release on the truth of the information supplied by defendants, obtain representations or warranties to that effect, or insist on viewing additional information"].) While Ms. Westheim-Frenk may have been unsophisticated in such matters, she was represented by New York counsel during the 1973 Action and the Release. Moreover, there was no apparent reason to rush to settlement.

The court also rejects plaintiff's argument that Ms. Weidler waived or abandoned the Release through the alleged 1976 settlement with the art dealer, Dr. Rathke. To waive a contractual provision, a party must intentionally

relinquish a known right. (*Echostar Satellite L.L.C. v ESPN, Inc.*, 79 AD3d 614, 617 [1st Dept 2010].) Waiver must be "unmistakably manifested" and "should not be lightly presumed" or "inferred from a doubtful or equivocal act." (*Id.*) To establish abandonment, parties must exhibit "mutual, positive, [and] unequivocal" conduct that is "inconsistent with the intent to be bound." (*EMF General Contracting Corp. v Bisbee*, 6 AD3d 45, 46 [1st Dept 2004].)

To support her arguments, plaintiff first proffers an incomplete chain of correspondence between Ms. Weidler and Dr. Rathke. (NYSCEF Doc. Nos. 179-183.) The correspondence involves the Dix Painting, purportedly from Mr. Westheim's collection, that came into Dr. Rathke's possession by unspecified means. In a signed statement addressed to Dr. Rathke, Ms. Weidler "declares [her] consent" for Dr. Rathke to sell the Dix Painting and "discharges all claims" relating to that artwork in consideration of $30,000. (NYSCEF Doc. No. 179.) Ms. Weidler stated: "I expressly affirm that I will not take any legal action or lodge any appeal in connection with the sale of this painting." (*Id.*) None of those documents reference Ms. Westheim-Frenk or the Release.

Plaintiff next points to separate incomplete correspondence involving the Dix Painting between Dr. Rathke and Ms. Westheim-Frenk. (NYSCEF Doc. Nos. 176-177.) In those documents, Dr. Rathke proposes selling the Dix Painting, "which would yield 30,000 dollars each for [Ms. Westheim-Frenk] and [Ms.] Weidler," and informs Ms. Westheim-Frenk that "Ms. Weidler has accepted this offer." (NYSCEF Doc. No. 177.)

Plaintiff also cites an unsigned, undated, and typewritten statement that

she purports to be Ms. Westheim-Frenk's declaration of consent to the sale of the Dix Painting. (NYSCEF Doc. No. 178.) The statement, addressed to Dr. Rathke in language echoing Ms. Weidler's, also "discharge[d] all claims relating to this painting" upon receipt of 75,000 Deutsche Marks, and included a similar pledge to "not take any legal action or lodge any appeal in connection with the sale of this painting." (*Id.*) The statement makes no mention of the Release, and plaintiff provides no evidence showing that Ms. Westheim-Frenk actually received the 75,000 Deutsche Marks.

Even construing the entirety of this correspondence in the manner most favorable to plaintiff, the correspondence pertains to only a single painting and a single transaction–the 1976 transaction involving the Dix Painting. Neither of the two statements–including the unsigned, undated, and typewritten statement purportedly made by Ms. Westheim-Frenk–make any reference to the Release, and both statements are addressed to Dr. Rathke, who was not a party to the 1973 Action. Thus, the correspondence or the transaction contemplated therein do not demonstrate "unmistakable" or "unequivocal" conduct that would suggest that Ms. Weidler waived or abandoned the comprehensive Release in its entirety. The court finds that the conduct that can be inferred from the correspondence does support a finding that Ms. Westheim-Frenk and/or Ms. Weidler waived and/or abandoned the Release.

Finally, although plaintiff also urges the court to deny the motion under the doctrines of equitable estoppel and public policy, "a court is not free to alter [an unambiguous] contract to reflect its personal notions of fairness and equity."

(*Greenfield*, 98 NY2d at 570.)

The court sympathizes with plaintiff's position; nevertheless, plaintiff fails to rebut defendants' prima facie case by raising a question of material fact requiring a trial. It is for this reason that summary judgment is granted and the case is dismissed.

The Confidentiality Designations

For the purposes of discovery, the parties executed a confidentiality stipulation, dated May 7, 2014. (*See* NYSCEF Doc. No. 54.) Defendants ask the court to vacate plaintiff's confidentiality designations as not consistent with the definition of confidential information in the stipulation; *e.g.*, trade secrets. Plaintiff does not oppose de-designation, but she conditions this offer on defendants lifting their confidentiality designations, as well.

Since plaintiff has no business, customers, or clients, her counsel's designations do not satisfy the definition of confidential in the stipulation; thus, plaintiff's designations must be vacated. Although the court will certainly entertain a motion by plaintiff challenging defendants' confidentiality designations, no such motion is presently before the court.

Accordingly, it is hereby

ORDERED that the motion for summary judgment of defendants YRIS RABENOU SOLOMON, Individually and as Executrix of the Estate of Charlotte Weidler, YRIS RABENOU CORPORATION d/b/a YRIS RABENOU GALLERY, DAVID Y. SOLMON, Individually and as Executor of the Estate of Charlotte Weidler, DARIUS SOLOMON, and TAMBOUR SOLOMON is granted and the

complaint is dismissed; and it is further

ORDERED that plaintiff Margit Frenk's confidentiality designations are vacated.

DATED: September 7, 2018

ENTER:

HON. ANDREA MASLEY, J.S.C.

HON. ANDREA MASLEY