SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 651626/2011
KOMOLOV, ALEXANDER
vs.
SEGAL, DAVID
SEQUENCE NUMBER : 011
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 6/10/15
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 410-469
Answering Affidavits — Exhibits _____ | No(s). 470-528
Replying Affidavits _____ | No(s). 582-586

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 7/1/15

SHIRLEY WERNER KORNREICH, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SHIRLEY WERNER KORNREICH
J.S.C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ALEXANDER KOMOLOV, ALSKOM REALTY LLC, and HIGH VALUE TRADING, LLC,

Index No: 651626/2011

DECISION & ORDER

Plaintiffs,

-against-

DAVID SEGAL, MOHAMED SERRY, ARTIQUE MULTINATIONAL LLC, ARTIQUE INTERNATIONAL LTD., and SEGAL & SEGAL HOLDING, LLC,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 011 and 012 are consolidated for disposition.

Defendants David Segal, Mohamed Serry, Artique Multinational LLC (Artique Multinational), Artique International Ltd. (collectively, with Artique Multinational, the Artique Defendants), and Segal & Segal Holding, LLC, move, pursuant to CPLR 3212, for summary judgment against plaintiffs Alexander Komolov, Alskom Realty LLC (Alskom), and High Value Trading, LLC (High Value). Seq. 011. Plaintiffs oppose and move for partial summary judgment. Seq. 012. Defendants' motion is granted and plaintiffs' motion is denied for the reasons that follow.

I. Factual Background & Procedural History

As this court explained in its prior decision, dated August 14, 2013, this is the second action in which plaintiffs seek to assert claims that defendants committed contractual breaches with respect to transactions involving artwork,[1] antiques, and a condominium.[2] *See Komolov v*

[1] The art includes works allegedly by Claude Monet, Pierre-Auguste Renoir, Edouard Manet, Pablo Picasso, and Maurice de Vlaminck.

[2] The condominium is located in Manhattan at 25 Columbus Circle, Unit 58-G.

Segal, 40 Misc3d 1228(A) (Sup Ct, NY County 2013), *aff'd* 117 AD3d 557 (1st Dept 2014).[3] Justice Fried, who presided over the first action, held that all of plaintiffs' claims are subject to the statute of frauds and dismissed the action. *See Komolov v Segal*, 2011 WL 11071784, at *7 (Sup Ct, NY County 2011) ("Plaintiffs have failed to allege or provide any writing memorializing the alleged sale, defendants have not admitted to the sale of any Russian antiques to plaintiffs, nor have they agreed that payment was received for the sale of Russian antiques. Hence, the alleged agreement is unenforceable, pursuant to the statute of frauds and article 2 of the UCC."). Likewise, in this action, with respect to all of plaintiffs' claims – except for the claim relating to the condominium – it is undisputed that the parties never executed written agreements governing the sale of the artwork and antiques. That is why, as explained below, plaintiffs' quasi-contract and fraud claims arising from those transactions must be dismissed.

However, there is a contract for the sale of the condominium, but plaintiffs did not have possession of that contract when the original lawsuit was filed, and as a result, that cause of action was dismissed by Justice Fried. *See Komolov*, 2011 WL 11071784, at *10 ("The breach of contract cause of action must fail because Alskom, as the purported transferor of the condominium, cannot provide any written agreement regarding the transfer and cannot even identify the entity to which the condominium was transferred, which makes the agreement violative of the statute of frauds and unenforceable"). As this court previously explained:

> In the First Action, [Alskom] alleged that it sold the condominium to the Artique Defendants and that they failed to pay the full $4.1 million sale price. However, at the time the First Action was commenced, plaintiffs' counsel did not have a copy

[3] As discussed herein, the basis for dismissal of the unjust enrichment claim relating to the sale the condominium – that one cannot maintain quasi contract causes of action arising from a contractual claim barred by the statute of frauds – applies equally to all of plaintiffs' remaining claims. *See Komolov*, 117 AD3d at 557 ("The thirteenth cause of action for unjust enrichment is precluded in this case because it seeks precisely the same relief that was barred by the statute of frauds").

> of the sale contract because he was not involved in the underlying transaction and was having difficulty obtaining it from Alskom's prior counsel, who was convicted, disbarred, and incarcerated for committing bank fraud. In fact, when the motion to dismiss the complaint in the First Action was briefed, it was undisputed that a sale contract existed, that the condominium had been transferred, and that there had been partial payment of the sale price.

See Komolov, 40 Misc3d 1228(A), at *1-2.

Again, when they were first before Justice Fried, plaintiffs did not have a copy of the contract because their former attorney, who was disbarred and incarcerated, had not given it to them. It was only shortly after Justice Fried dismissed the original lawsuit on statute of frauds grounds that plaintiffs obtained a copy of the contract. *See id.* at *2.[4] Plaintiffs, however, did not move to vacate the judgment or renew the motion to dismiss. *See id.* Nor did plaintiffs appeal. *See id.* Instead, they filed the instant action.[5] *See id.* This court, therefore, granted defendants' motion to dismiss. *See* Dkt. 30 (11/3/11 order) & Dkt. 35-1 (11/3/11 Tr.).

The Appellate Division reversed. *See Komolov v Segal*, 96 AD3d 513 (1st Dept 2012). The Appellate Division ruled that "[d]ismissal of this action on grounds of res judicata and collateral estoppel, with the informal directive that plaintiffs seek relief to amend their pleadings by motion to renew before the court that presided over a prior action commenced by plaintiffs, was error." *See id.* at 513.[6]

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[4] Plaintiffs' counsel explained that he obtained a copy of the contract from the title company. *See* Dkt. 35-1 (11/3/11 Tr. at 10). He also explained that plaintiffs' former attorney told him that the FBI confiscated his records prior to his incarceration. *See id.* at 12.

[5] Plaintiffs have commenced additional related actions before different judges. *See Alksom Realty LLC v Baranik*, 47 Misc3d 1227(A) (Sup Ct, Kings County 2015) (Demarest, J.) (involving plaintiffs' accountant); *High Value Trading LLC v Shaoul*, 2014 WL 3543545 (Sup Ct, NY County 2014) (Madden, J.) (Renoir forgery claims).

[6] Notably, it appears that the Appellate Division did agree with this court's belief that plaintiffs' commencement of a second lawsuit was improper. *See Komolov*, 96 AD3d at 513 ("judicial economy and the discouragement of forum shopping would otherwise warrant dismissal of this

This court had been quite clear, both on the record (Dkt. 30) and in its order (Dkt. 35-1), that the filing of a second action, specifically to bring the case before another judge, was procedural gamesmanship that would not be countenanced. Indeed, in the RJI filed by defendants' counsel, the first lawsuit was listed as a related case. *See* Dkt. 8 at 2 (the "Relation to Instant Case" column reads: "Same parties, same causes of action, same transactions; repeat litigation"). After this action was assigned to this part, defendants' counsel filed a letter requesting transfer to Justice Fried. *See* Dkt. 20. Plaintiffs' counsel responded with a letter opposing transfer to Justice Fried because "this is not a 'repeat litigation' [and t]his case concerns different facts and parties." *See* Dkt. 21. As we now know, those were frivolous assertions. Most extraordinarily, plaintiffs' counsel accused defendants of "judge shopping." That being said, this court was perfectly clear about why it was dismissing the case – namely, that plaintiffs should make the appropriate motion before Justice Fried.[7]

Most confoundedly, the Appellate Division held that Justice Fried's dismissal of the artwork and antiques claims was on procedural grounds, but that the dismissal of the condominium claim was on substantive grounds. The Appellate Division explained:

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action"). One wonders how this sort of forum shopping can be dissuaded if a dismissal without prejudice may give rise to a new, virtually identical lawsuit in the same court, but before a different judge. Practically, in this case, Justice Fried's retirement would have eventually necessitated assignment to a different judge. Yet, permitting new lawsuits when a claim is dismissed without prejudice, as opposed to requiring that an amended pleading be filed in the same action before the original judge, incentivizes the very sort of forum shopping the Appellate Division condemns.

[7] Plaintiffs' argument that entry of judgment in the prior action necessitated a new lawsuit is erroneous. Plaintiffs could have filed a motion to vacate the judgment. *See* CPLR 5015(a)(2) ("The court which rendered a judgment or order may relieve a party from it upon such terms as may be just ... **upon the ground of newly-discovered evidence** [the condominium contract] which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404") (emphasis added).

> The dismissal of the prior action should have been without prejudice since the claims in that action were dismissed for pleading deficiencies and not on the merits ... [and] since the prior action was dismissed with no indication that the dismissal was without prejudice or not on the merits, this action is not barred by res judicata or collateral estoppel. Collateral estoppel does, however, bar plaintiffs' sixteenth cause of action alleging breach of contract in connection with the sale of a condominium since that claim was dismissed in the prior action for non-compliance with the statute of frauds.

See Komolov, 96 AD3d at 513 (citations omitted).

To summarize, the Appellate Division held that (1) the artwork and antiques claims should have been permitted to be repleaded; but (2) the condominium claim could not be revived because dismissal on statute of frauds grounds is substantive. *See id.* In so holding, the Appellate Division overlooked the fact that Justice Fried had dismissal *all* of plaintiffs' claims on statute of frauds grounds. *See Komolov*, 2011 WL 11071784, at *7 (UCC 2-201 statute of frauds applies to contracts for the sale goods for a price of at least $500); *see also id.* at *10 (statute of frauds [GOL § 5-703] requires real estate contracts to be in writing). Yet, when the Appellate Division was confronted with this case for the first time – on appeal in *this* action, since plaintiffs did not appeal Justice Fried's dismissal of the first action – they permitted plaintiffs to revive the artwork and antiques claims, even though no contract existed, but refused to revive the condominium claim, even though a contract indisputably existed.

The ensuing discovery on plaintiffs' artwork and antiques claims was a costly, time-consuming ordeal,[8] due to the lack of contracts or any clear writings documenting the transactions. Of course, this is precisely what the statute of frauds is meant to prevent. The difficulties were increased by the dismissed condominium claim, which is based on defendants'

[8] It should be noted that the conduct of counsel has greatly improved over the course of this litigation. While the early stages of discovery were inexcusably contentious, Mr. Popik, Mr. Maas, and Mr. Goldman deserve credit for their cooperation, which enabled the completion of fact and expert discovery in a timely manner after the original round of disputes was resolved.

admitted failure to pay the balance of the approximately $4 million purchase price and concerns defendants' contention that they paid plaintiffs with artwork and goods.

That being said, the court now turns to claims before it – namely, those in plaintiffs' operative pleading, the May 30, 2013 amended complaint (the AC). *See* Dkt. 297. The AC contains sixteen causes of action, numbered here as in the AC: (1-3) unjust enrichment, conversion, and fraud relating to the antiques; (4-6) unjust enrichment, conversion, and fraud relating to works allegedly by Renior and Manet; (7-9) unjust enrichment, conversion, and fraud relating to works allegedly by Monet; (10) conversion of a work allegedly by Picasso; (11) conversion of a work allegedly by Vlaminck; (12) a declaratory judgment that the conveyance of the condominium to Artique is null and void and that Alskom is entitled to the $4.2 million in escrow; (13) unjust enrichment (dismissed in the August 14, 2013 order); (14) fraud relating to the condominium; (15) rescission of the condominium sale contract; and (16) a declaratory judgment concerning subsequent sale of the condominium (withdrawn with prejudice).

Now, plaintiffs move for partial summary judgment on the twelfth cause of action. Defendants move for summary judgment on all of plaintiffs' claims. Oral argument was held on May 14, 2015. *See* Dkt. 587 (5/14/15 Tr.).

II. Discussion

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing

requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

A. Condominium Claims

If a cause of action for breach of the condominium contract was before the court, the court would hold that questions of fact exist as to whether the supposed payment-in-goods satisfied defendants' condominium payment obligation, and, therefore, the condominium claim would go to trial. However, because of the Appellate Division's decision, there cannot be a contract claim on the condominium transaction. Consequently, plaintiffs' condominium claims must be dismissed.

That being said, on appeal of this decision, the Appellate Division, perhaps, might consider reinstating the condominium contract claim because that is the one claim where it appears plaintiffs may well be in the right.[9] There is currently $4.2 million in escrow from defendants' subsequent sale of the condominium, which could be awarded to plaintiffs if the

[9] As judiciously noted on Sesame Street, "Everyone makes mistakes, yes they do..."

condominium contract claim was reinstated. *See* Dkt. 172. Yet, only the Appellate Division has the power to permit a trial on that claim. This court is bound to follow the Appellate Division's ruling, which dismissed the condominium contract claim on collateral estoppel grounds.

As the Second Circuit recently noted, "collateral estoppel is an equitable doctrine – not a matter of absolute right. Its invocation is influenced by considerations of fairness in the individual case." *Bermudez v City of New York*, 2015 WL 3650756, at *4 n.2 (2d Cir June 15, 2015), quoting *PenneCom B.V. v Merrill Lynch & Co.*, 372 F3d 488, 493 (2d Cir 2004). Consequently, a court may decline to apply the collateral estoppel doctrine if its application would be inequitable. *See id.* Likewise, the Court of Appeals has explained that:

> The equitable doctrine of collateral estoppel is grounded in the facts and realities of a particular litigation, rather than rigid rules ... The doctrine, however, is a flexible one, and the enumeration of [the relevant] elements is intended merely as a framework, not a substitute, for case-by-case analysis of the facts and realities. "In the end, **the fundamental inquiry is whether relitigation should be permitted in a particular case in light of ... fairness to the parties**, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results. No rigid rules are possible, because even these factors may vary in relative importance depending on the nature of the proceedings."

Buechel v Bain, 97 NY2d 295, 303-04 (2001) (emphasis added; citations omitted), quoting *Staatsburg Water Co. v Staatsburg Fire Dist.*, 72 NY2d 147, 153 (1988); *see also People v Applied Card Sys., Inc.*, 11 NY3d 105, 123 (2008) ("Ultimately, we must determine whether the severe consequences of preclusion ... strike a fair result under the circumstances.").

There is no question of fact that plaintiffs have not had "a full and fair opportunity" to litigate their condominium contract claim. *See Buechel*, 97 NY2d at 303. That claim was dismissed on statute of frauds grounds before the contract could be produced. The claim should

be decided on the merits, not on the basis of plaintiffs' former counsel's bad acts and current counsel's sharp practices.

Nonetheless, at this juncture, this court is powerless to permit a trial on the condominium claim. Since plaintiffs' condominium claims concern the sale of real estate, quasi contract and fraud claim may not be used to recover the unpaid purchase price when the contract claim was deemed defective on statute of frauds grounds. The declaratory judgment claim is duplicative of the previously dismissed breach of contract claim because such claim merely seeks a declaration that the condominium contract was breached. The rescission claim is not viable because rescission is a remedy, not an independent cause of action. Nor is the claim for fraudulent inducement of the condominium contract viable. Plaintiffs claim defendants lied about their intentions of paying the balance of the purchase price after closing. That is a lie about future performance of the condominium contract, which is not a valid fraud claim. *See MP Innovations, Inc. v Atlantic Horizon Int'l, Inc.*, 72 AD3d 571, 573 (1st Dept 2010).

B. The Remaining Claims

At the outset, it should be noted that the parties' myriad arguments that do not go to the actual viability of plaintiffs' claims do not merit extensive discussion. Simply put, plaintiffs have standing having pled the existence of their joint venture in the AC and have alleged damages; defendants' statute of frauds defense has been properly preserved; and the single motion rule does not prohibit a summary judgment motion addressing matters not raised on the motion to dismiss. The court now turns to the merits.

1. Unjust Enrichment, Conversion, and Fraud (Antiques & Artwork)

In the first through ninth causes of action, plaintiffs assert unjust enrichment, conversion and fraud claims with respect to the antiques and artwork that were the subject of plaintiffs' breach of contract claims in their original lawsuit. Those contract claims, as discussed earlier, were dismissed by Justice Fried on statute of frauds grounds. *See Komolov*, 2011 WL 11071784, at *7. Plaintiffs do not dispute that, pursuant to UCC 2-201, all of these goods are subject to the statute of frauds. That is why plaintiffs did not plead breach of contract claims.[10] Plaintiffs, nonetheless, assert quasi contract and tort claims to seek recovery for defendants' alleged delivery of nonconforming goods – *i.e.*, forgeries. However, as this court explained in a prior decision, as did the Appellate Division in affirming that decision, claims for damages that arise from contracts rendered unenforceable by the statute of frauds may not be maintained. *See Komolov*, 40 Misc3d 1228(A), at *4, *aff'd* 117 AD3d at 557 (claim for "unjust enrichment is precluded in this case because it seeks precisely the same relief that was barred by the statute of frauds"). In other words, quasi contract and tort claims are "not viable when [they] merely seek[] the enforcement of the unenforceable contract itself." *Komolov*, 40 Misc3d 1228(A), at *4; *see also Kocourek v Booz Allen Hamilton Inc.*, 71 AD3d 511, 512 (1st Dept 2010) ("The unjust enrichment claim was also properly dismissed, as litigants may not use such a claim to evade New York's statute of frauds"); *Nemelka v Questor Mgmt. Co.*, 40 AD3d 505, 506 (1st Dept 2007) ("Plaintiffs' remaining claims were properly dismissed as arising out of an alleged

[10] Plaintiffs now claim that "there has been no suggestion, explicit or otherwise, pleaded or inferred, that the parties had a **written or oral** contract in respect to artworks and paintings." *See* Dkt. 528 at 14 (emphasis added). This is a frivolous assertion. Not only did plaintiffs originally assert breach of contract claims with respect to the artwork in the original action (*see* Index No. 652042/2010, Dkt. 1 at 15), they also invoked the UCC by asserting claims for breach of warranty. *See id.* at 15-16. Of course, in the absence of an agreement to transfer title to the subject artwork from defendants to plaintiffs, plaintiffs have no basis to assert rights in the artwork.

breach of an unenforceable agreement"); *Andrews v Cerberus Partners*, 271 AD2d 348 (1st Dept 2000) (same).

Plaintiffs' fraud claims are equally infirm. The fraud claims are based on the allegation that plaintiffs were lied to about what they were purchasing (i.e., authentic works instead of forgeries). While fraudulent inducement is different in the sense that plaintiffs seek to undo the contract, rather than enforce it, the same rationale for prohibiting the claim applies. *See Farash v Sykes Datatronics, Inc.*, 59 NY2d 500, 508 (1983) ("However his claim is worded, it should be beyond dispute that plaintiff is seeking damages for defendant's breach of an oral contract ... Since this type of contract is barred by the Statute of Frauds, plaintiff should not be allowed to do indirectly what he cannot do directly."), citing *Dung v Parker*, 52 NY 494, 497 (1873), and *Roberts v Champion Int'l Inc.*, 52 AD2d 773 (1st Dept 1976) ("Nor will plaintiff's attempt to plead a cause sounding in tort or in another form save the complaint for, '**Whatever the form of the action at law may be, if the proof of a promise or contract, void by the statute (of frauds), is essential to maintain it, there can be no recovery**.'") (emphasis added), quoting *Dung*, 52 NY at 497; *see also Club Chain of Manhattan, Ltd. v Christopher & Seventh Gourmet, Ltd.*, 74 AD2d 277, 284 (1st Dept 1980) (Under [*Dung*], the principle has been stated that a lease void under the statute of frauds cannot be used as the predicate for an action in fraud), quoting *Dung*, 52 NY at 499 ("**He cannot say he was defrauded, and make that the substantive ground of his recovery, because he had no right to rely upon a contract which, when made, the law declared to be void**") (emphasis added).

Dung and its progeny recognize that it makes little sense to prohibit the enforcement of a contract violative of the statute of frauds but permit a claim to rescind it. This is particularly true

with contracts for the sale of art, where the contracting parties either expressly choose to warrant the art's authenticity or sell it "as is". A claim for fraudulent inducement based on oral representations of the art's authenticity is, effectively, no different than a claim for breach of an oral contractual warranty of authenticity. For these reasons, plaintiffs cannot recover any of their alleged losses incurred with respect to the transactions involving the antiques and the works purportedly by Renior, Manet, and Monet.[11]

2. Conversion of the "Picasso" and "Vlaminck" Works

In regard to the works allegedly by Picasso and Vlaminck, plaintiffs claim they own the works and that defendants stole them from Komolov's office. Hence, plaintiffs assert conversion claims to recover the works. *See Colavito v N.Y. Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 (2006) ("A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession."). As set forth below, the record on this motion demonstrates that plaintiffs lack any proof of ownership or right of possession superior to defendants.

To explain, before the parties' relationship deteriorated, Komolov worked in a second floor office at defendants' art gallery on East 16th Street in Manhattan (the Gallery). Defendants used the main floor and mezzanine to conduct business, and they stored inventory in the

[11] The dismissal of these claims obviates the need for the court to address a difficult question regarding plaintiffs' art forgery claims, namely, the level of due diligence required when a purchase, made outside of an auction house, is made in reliance on a certificate of authenticity. The question is whether a purchaser may rely on the authenticity of the certificate or if due diligence on the certificate must be conducted by contacting the issuer (in this case, the Wildenstein Institute). Here, it is undisputed that the certificate was forged. The cases cited by the parties do not squarely address this precise scenario. The court will not rule on this issue because the fraud claims are dismissed on other grounds.

basement. In the AC, Komolov alleges that in March 2010, when he returned to the Gallery after a business trip, he discovered that the Picasso and Vlaminck works were taken from his office.

The "Picasso" is "a glass work, measuring approximately 5 feet long, 4 feet high and 3 inches in depth and weighing at least 350 pounds." Dkt. 469 at 15; *see* Dkt. 454 at 5 (photograph). On February 3, 2008, Artique Multinational purchased the "Picasso" from a company in Florida, non-party Deco Dream Vintage, Inc. (Deco Dream), for $20,000. *See* Dkt. 454 at 7 (invoice). The affidavit of Deco Dream's President, Yves Beehnainou, sets forth the circumstances of the sale:

> Attached ... is a photograph that I understand Mr. Komolov represented to be the Glass Painting. I recognize the artwork in this photograph and confirm that Deco Dreams sold this piece to Artique Multinational during the Miami Antique Show. However, I never represented that this piece was a "Picasso." Attached ... is Deco Dreams Invoice No. 7027 dated February 3, 2008 (the "Invoice"), which I personally prepared at the Miami Antique Show. As reflected on the Invoice, I referred to this piece as a "Dunand Panel" because when I purchased this piece in France in 1993, the name of the owner was Mr. Dunand. I do not know the artist or maker of the Dunand Panel. I recall that the Dunand Panel measured approximately 5 feet long, 4 feet high and 3 inches in depth and weighed approximately 350 pounds. Deco Dreams sold the Dunand Panel to Artique Multinational for $20,000.00, along with two other items – a "Bronze Art Deco" for $10,000 and a "Bronze Orientalist" for $20,000. Artique Multinational paid for the three items listed on the Invoice by Check No. 296 dated February 3, 2008 in the amount of $50,000.

See Dkt. 454 at 1-2.

The "Picasso" was transported from Miami to New York by a non-party shipping company, Milani Packing Inc. (Milani). Komolov concedes that when the "Picasso" arrived at the Gallery on or about February 11, 2008, it belonged to Artique Multinational. Komolov, however, alleges that he purchased the "Picasso" from Artique Multinational in June 2008 for $6 million. He claims to have paid the $6 million "via a wire transfer to Pacific Platinum LLC, a

'shell' company used by Segal and Serry." *See* AC ¶ 60. Komolov does not possess a contract for the sale of the "Picasso", nor does he allege one ever existed. The only document Komolov claims evidences his purchase of the "Picasso" is a $6 million wire transfer.

Discovery has shown the AC's allegations regarding the "Picasso" to be false. To begin, Komolov is claiming to have paid $6 million for a painting that had just been sold for $20,000. Moreover, while Komolov did wire $6 million to Pacific Platinum, he did so on February 8, 2008, three days before the "Picasso" even arrived at the Gallery and four months before the AC alleges that Komolov purchased it. *See* Dkt. 459 at 3. Additionally, the wire transfer record indicates the money was for a "CONTRACT GOLD INVESTMENT" from January 15, 2008. *See id.* Komolov provides no explanation for these discrepancies.

His only supporting fact is that the Milani shipping invoice lists the value of the works shipped at $540,000, an amount that is still far below the supposed purchase price of $6 million. In any event, Beehnainou testified that he did not provide Milani with this dollar figure. *See* Dkt. 454 at 1-2. Nor did Nicolas Milani, at his deposition, stand behind his prior affidavit, where he claimed that the "value of $540,000 was given by the dealer" (Beehnainou). Compare Dkt. 456 at 5, with Dkt. 454 at 12.[12] Komolov does not contend otherwise or explain the circumstances of this invoice. Regardless, all Komolov can prove is that he paid $6 million to one of defendants' companies, which is unsurprising since the parties were involved in other lucrative art and real estate deals. After four years of discovery, no evidence was produced tying the $6 million wire transfer to the "Picasso". Nor does evidence, other than Komolov's own testimony, which

[12] It should be noted that Milani is alleged to have stolen money from Komolov. By order dated October 21, 2013, a default judgment was entered against Milani in a lawsuit concerning such allegations. *See* Dkt. 511 (*Komolov v Milani*, No. 13-Civ-573 (SDNY)).

differs in chronology from his original pleadings, exist to support the claims that the $6 million wire transfer was for the "Picasso", and not some other deal, gold related or otherwise.

Under these circumstances, no reasonable juror could conclude that Komolov purchased the "Picasso" from defendants. Indeed, a claim that defendants breached their obligation to provide Komolov with the "Picasso" would be barred by the statute of frauds. While Komolov's conversion claim is more akin to theft than breach of contract, his proof of ownership is fundamentally based on a contractual transaction for the purchase of the "Picasso". The statute of frauds precludes recovery in these circumstances without a contract. And this is the case for good reason – so someone like Komolov does not seek to claim that a wire transfer receipt for $6 million, designated for another, prior gold investment, is evidence of a subsequent sale of art worth $20,000. *See Zuckerman,* 49 NY2d at 562 (mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat summary judgment motion).

Similarly, Komolov has no proof that he ever purchased the Vlaminck from defendants. There is no contract. Nor, in the case of the Vlaminck, is there an invoice or wire transfer. In the AC, Komolov alleged that on July 10, 2008, he made a $2.3 million payment to Segal's account at Washington Mutual. *See* AC ¶ 60. Komolov further alleged that on October 9, 2008, he made two payments totaling $2.65 million to Segal's account at Citibank. *See id.* Unlike the $6 million wire transfer,[13] which Komolov's affidavit maintains is related to the "Picasso", the Washington Mutual and Citibank payments mentioned in the AC are not discussed in his affidavit. Komolov provides no other explanation for how he supposedly paid for the Vlaminck. His memorandum of law provide no legal theory of ownership aside from the perfunctory assertion that there are questions of fact.

[13] Which Komolov solely attributes to the "Picasso." *See* Dkt. 471 at 8.

Segal, moreover, not only denies selling the Vlaminck to Komolov, but denies ever owning it. Regardless, even if Segal currently possesses the Vlaminck, Komolov cannot assert a claim for it because he lacks any evidence of ownership. The only document Komolov relies on is an appraisal of the Vlaminck that Komolov claims to have received form Segal in May 2008. Putting aside whether the appraisal even existed in May 2008 (or if, based on Wikipedia data, it was not created until seven months later), receipt of an appraisal by a prospective purchaser is not proof that a sale occurred. At best, it evidences interest in purchasing the art. Komolov, critically, has no proof that he actually purchased the Vlaminck.[14] His claims for conversion are dismissed.

In sum, the first through ninth causes of action – unjust enrichment, conversion, and fraud – are not viable because they concern transactions governed by the statute of frauds. There is no question of fact that no contracts exist for the art and antiques. The tenth and eleventh causes of action are dismissed because plaintiffs have no evidence that they own the works allegedly taken from them. The twelfth cause of action is dismissed because it is nothing more than the condominium contract claim reframed as a declaratory judgment claim. The fourteenth cause of action is dismissed because representations about future performance of a contract cannot form the basis for a fraud claim. Finally, the fifteenth cause of action is dismissed because rescission is a remedy, not a cause of action, and the predicate fraud claim is not viable. Accordingly, it is

[14] It should also be noted that non-party Raul Giansante, who took other items from Komolov's office (which are not in dispute in this action) and placed them in the basement, took photographs of everything he removed from Komolov's office. Giansante produced a flash drive with all of those photographs. There was no picture of the Vlaminck.

ORDERED that the motion by defendants David Segal, Mohamed Serry, Artique Multinational LLC, Artique International Ltd., and Segal & Segal Holding, LLC for summary judgment against plaintiffs Alexander Komolov, Alskom Realty LLC, and High Value Trading, LLC is granted, plaintiffs' motion for partial summary judgment is denied, and the Clerk is directed to enter judgment dismissing the Amended Complaint with prejudice; and it is further

ORDERED that defendants may move to have the condominium sale funds released from escrow after all appeals of this decision have concluded.

Dated: July 1, 2015

ENTER:

SHIRLEY WERNER KORNREICH J.S.C.