SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

----------X

ART WORKS, INC.,

Plaintiff,

- v -

DIANA AL-HADID,

Defendant.

----------X

INDEX NO. 651267/2021

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26

were read on this motion to DISMISS.

LOUIS L. NOCK, J.

This dispute concerns ownership of a cast bronze sculpture created by defendant Diana Al-Hadid. In motion sequence no. 001, defendant moves, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the complaint.

BACKGROUND

The following facts are drawn from the complaint unless noted otherwise and are assumed to be true for purposes of this motion. Plaintiff operates the Marianne Boesky Gallery (NYSCEF Doc No. 11, Wendy J. Lindstrom [Lindstrom] affirmation, Ex F at 1). Plaintiff served as defendant's gallery representative until 2019 (NYSCEF Doc No. 6, Lindstrom affirmation, Ex A, ¶¶ 6 and 8). During that time, plaintiff advanced funds, such as studio rent and fabrication, and framing and crating costs, to defendant to further her career (*id.*, ¶ 7).

In 2009, defendant created a bronze sculpture fabricated in a limited edition consisting of five sculptures (*id.*, ¶¶ 9 and 13). An undated contract between defendant and nonparty Graphicstudio (Graphicstudio) states that Graphicstudio would fabricate the sculptures, three of

which were numbered as 1/3, 2/3 and 3/3 and two numbered as "Artist's Proofs" AP 1/2 and AP 2/2 (NYSCEF Doc No. 9, Lindstrom affirmation, Ex D). The project was initiated in September 2009 and completed in February 2011 (*id.*).

In spring 2011, plaintiff; defendant as "Artist"; and Graphicstudio executed a separate two-page agreement (the Agreement) governing the production and sale of the sculptures (NYSCEF Doc No. 7, Lindstrom affirmation, Ex B). Section 2 provides for a consignment period and reads that "[d]uring the period of February 17, 2011, through February 17, 2012, Marianne Boesky Gallery has exclusive rights to sell sculptures 1/3 – 3/3, AP 1/2 & AP 2/2. Graphicstudio and Artist retain the right to extend the consignment agreement" (*id.* at 1). Section 3 discusses publication, production, and marketing costs. Graphicstudio agreed to pay the costs for research and development of the sculptures, for which it would be reimbursed by receiving the proceeds from the sale of sculpture 1/3 (*id.*). The production cost for each sculpture was $25,000; and a $12,000 deposit, to be applied toward the cost of production, was required before Graphicstudio would fabricate the other four sculptures (*id.*). Graphicstudio would be reimbursed for its production costs before any sales proceeds were to be distributed to plaintiff or defendant (*id.*). Plaintiff agreed to pay the costs for marketing and selling the sculptures during the consignment period and for insurance, packing, and transportation costs, "including return shipping if sculptures are unsold at the end of the consignment period" (*id.*). As for pricing, plaintiff and defendant agreed to consult with Graphicstudio to establish a list price, and plaintiff agreed to consult defendant and Graphicstudio on discounts and price changes (*id.*). According to section 5, plaintiff was "authorized to execute, on behalf of the Artist and Graphicstudio, Bills of Sale" (*id.* at 2). This section repeats that Graphicstudio would receive all sales proceeds for sculpture 1/3 (*id.*). As to the remaining four sculptures, section 5 states:

> • Receipts from the sale of installation will be distributed as follows: Graphicstudio will be reimbursed $25,000 production costs ($12,000 initial deposit paid by Marianne Boesky Gallery will be applied to these production costs) before distribution of receipts. Graphicstudio, Artist, and Marianne Boesky Gallery will then each receive one-third of net after discounts and production.
> • Graphicstudio will not begin production of sculptures 2/3, 3/3, AP 1/2 & AP 2/2 until a sale has been confirmed and the $12,000 deposit has been received.
> • Marianne Boesky Gallery agrees to pay Artist and Graphicstudio directly from receipts within 30 days of receipt of payment. Graphicstudio and the Artist must approve any payment plans. Graphicstudio will invoice Marianne Boesky Gallery for Graphicstudio's share of receipts.

(*Id.*) A merger clause reads, "Complete Agreement: Signatures below acknowledge conditions set forth within this agreement and supersedes and makes null and void any and all prior understandings, and shall not be subject to any change or modification except by the execution of a written instrument subscribed to by the parties hereto" (*id.*).

Plaintiff alleges the Agreement created a joint ownership scheme whereby it, defendant, and Graphicstudio own equal shares in the sculptures (NYSCEF Doc No. 6, ¶ 1). Plaintiff claims it has a right to a share of the sale proceeds (*id.*, ¶ 29). One sculpture remains unsold (*id.*, ¶ 18). Plaintiff alleges it paid Graphicstudio the deposit to fabricate the unsold sculpture (the Work) (*id.*, ¶ 16). Plaintiff further alleges it purchased Graphicstudio's ownership interest in the Work, and as a result, it now owns a two-thirds share (*id.*, ¶ 17).

In 2019, plaintiff terminated its representation of defendant (*id.*, ¶ 19). At that time, defendant owed plaintiff a "substantial six-figure sum" for the costs advanced on her behalf (*id.*, ¶¶ 8 and 20). The parties executed a settlement agreement dated April 9, 2020 (the Settlement Agreement) to resolve their dispute over this unpaid sum (*id.*, ¶ 20; NYSCEF Doc No. 11 at 1). According to the terms, "[t]he Parties further agree to mediate all disputes concerning [redacted] without waiving any rights or remedies available to either Party in law or in equity in the event

that mediation does not result in a mutual resolution of such dispute"[1] (NYSCEF Doc No. 11 at 2). The Settlement Agreement also provides that "[t]he prevailing Party in any action or proceeding arising out of a dispute concerning the Agreement shall be entitled to recover such Party's costs and reasonable attorneys' fees (including fees incurred recovering its expenses) from the non-prevailing Party" (*id.* at 3).

Plaintiff alleges the parties agreed to attend informal mediation on March 8, 2021, and to exchange documents concerning ownership of the Work in advance of the session (NYSCEF Doc No. 6, ¶¶ 22-23). Plaintiff alleges it produced relevant documents except for those that have been deleted or are otherwise unavailable without undertaking a costly forensic search (*id.*, ¶¶ 25-26). Defendant allegedly refused to exchange any documents or move forward with the scheduled mediation session (*id.*, ¶ 27).

Plaintiff commenced this action on February 23, 2021, by filing a summons and complaint asserting three causes of action for: (1) a judgment declaring that plaintiff has an ownership interest in the unsold Work and is entitled to share in the proceeds from any sale; (2) anticipatory breach of the Agreement; and (3) anticipatory breach of the Settlement Agreement. In lieu of serving of an answer, defendant moves to dismiss the complaint.

DISCUSSION

On a motion brought under CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiff[ ] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court need not extend such consideration to bare legal conclusions or claims that are contradicted by documentary evidence (*Myers v*

[1] Much of the Settlement Agreement is redacted, including the topic subject to mediation. The parties, however, do not dispute they agreed to mediate all disputes concerning the Work.

Schneiderman, 30 NY3d 1, 11 [2017], *rearg denied* 30 NY3d 1009 [2017]). Dismissal is warranted where "the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

Dismissal under CPLR 3211 (a) (1) is appropriate where the documentary evidence utterly refutes the plaintiff's claims and conclusively establishes a defense as a matter of law (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 37 NY3d 169, 175 [2021], *rearg denied* 37 NY3d 1020 [2021]). To qualify as documentary evidence, the evidence must be "unambiguous and of undisputed authenticity" (*Constant v Public Adm'r of Queens County*, — AD3d —, 2022 NY Slip Op 02249, *1 [2d Dept 2022]), and "contain facts that are essentially undeniable" (*Whitestone Constr. Corp. v F.J. Sciame Constr. Co., Inc.*, 194 AD3d 532, 534 [1st Dept 2021]). A contract or an undisputed email that unambiguously contradicts the plaintiff's allegations constitutes documentary evidence for purposes of CPLR 3211 (a) (1) (*see Gottesman Co. v A.E.W., Inc.*, 190 AD3d 522, 524 [1st Dept 2021], *lv denied* 37 NY3d 916 [2021]; *Madison Equities, LLC v Serbian Orthodox Cathedral of St. Sava*, 144 AD3d 431, 431 [1st Dept 2016]).

A. The First Cause of Action for a Declaratory Judgment

CPLR 3001 provides, in part, that the "court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." A declaratory judgment action requires an actual controversy (*see Long Is. Light. Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253, 253 [1st Dept 2006], *appeal dismissed* 9 NY3d 1003 [2007]). On a pre-answer motion to dismiss a declaratory judgment action, the court's only consideration is

"'whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration'" (*M.H. Mandelbaum Orthotic & Prosthetic Servs., Inc. v Werner*, 126 AD3d 857, 858 [2d Dept 2015] [citation omitted]).

It is well established that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). A contract is unambiguous "if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion'" (*id.* [internal citation omitted]). A contract is ambiguous if "the contract, read as a whole, fails to disclose its purpose and the parties' intent, or when specific language is susceptible of two reasonable interpretations" (*Donohue v Cuomo*, 38 NY3d 1, 13 [2022] [internal quotation marks and citation omitted]). The court must look at the language used within the four corners of the document to determine whether a contract term is ambiguous (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 NY3d 398, 404 [2009]).

A review of the Agreement reveals that it is silent on the issue of ownership. Generally, "[a] contract's silence on an issue does not 'create an ambiguity which opens the door to the admissibility of extrinsic evidence to determine the intent of the parties'" (*Donohue*, 38 NY3d at 13 [citation omitted]). Indeed, "[a]n omission … in a contract does not constitute an ambiguity" (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]). Rather, the court must look at "what the parties intended, but only to the extent that they evidenced what they intended by what they wrote" (*Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 7 [1st Dept 2012]).

Applying these precepts, the court finds that the Agreement does not employ any language conveying or transferring a partial ownership interest in the sculptures to plaintiff nor

do the terms clearly evince an intent to do so. The Agreement contemplates a consignment whereby plaintiff would sell the sculptures for defendant in exchange for one-third of the sales proceeds. Thus, the Agreement is unambiguous as it does not confer or transfer an ownership interest in the sculptures to plaintiff.

Moreover, defendant has shown that plaintiff's ownership claim runs afoul of the Arts and Cultural Affairs Law. Pursuant to Arts and Cultural Affairs Law § 11.01 (1), an "artist" is "the creator of a work of fine art or, in the case of multiples, the person who conceived or created the image which is contained in or which constitutes the master from which the individual print was made." An "art merchant" is partially defined as:

> a person who is in the business of dealing, exclusively or non-exclusively, in works of fine art or multiples, or a person who by his occupation holds himself out as having knowledge or skill peculiar to such works, or to whom such knowledge or skill may be attributed by his employment of an agent or other intermediary who by his occupation holds himself out as having such knowledge or skill.

(Arts and Cultural Affairs Law § 11.01 [2].) "On consignment" under Arts and Cultural Affairs Law § 11.01 (12),

> means that no title to, estate in, or right to possession of, the work of fine art or multiple that is superior to that of the consignor vests in the consignee, notwithstanding the consignee's power or authority to transfer or convey all the right, title and interest of the consignor, in and to such work, to a third person.

"Fine art" is a painting, sculpture, drawing, or work of graphic art, and print (Arts and Cultural Affairs Law § 11.01 [9]). A "'[l]imited edition' means works of art produced from a master, all of which are the same image and bear numbers or other markings to denote the limited production thereof …" (Arts and Cultural Affairs Law § 11.01 [10]).

Arts and Cultural Affairs Law § 12.01 governs artist-merchant relationships and "is designed to protect the property rights of an artist by specifying that the art merchant holds the

art work and the proceeds of any sales in trust for the benefit of the artist" (*Mesbahi v Blood*, 172 AD3d 1580, 1581 [3d Dept 2019]). The statute provides, in relevant part:

> 1. Notwithstanding any custom, practice or usage of the trade, any provision of the uniform commercial code or any other law, statute, requirement or rule, or any agreement, note, memorandum or writing to the contrary:
> (a) Whenever an artist or craftsperson, or a successor in interest of such artist or craftsperson, delivers or causes to be delivered a work of fine art, craft or a print of such artist's or craftsperson's own creation to an art merchant for the purpose of exhibition and/or sale on a commission, fee or other basis of compensation, the delivery to and acceptance thereof by the art merchant establishes a consignor/consignee relationship as between such artist or craftsperson, or the successor in interest of such artist or craftsperson, and such art merchant with respect to the said work, and:
> (i) such consignee shall thereafter be deemed to be the agent of such consignor with respect to the said work;
> (ii) such work is trust property in the hands of the consignee for the benefit of the consignor;
> (iii) any proceeds from the sale of such work are trust funds in the hands of the consignee for the benefit of the consignor;
> (iv) such work shall remain trust property notwithstanding its purchase by the consignee for his own account until the price is paid in full to the consignor; provided that, if such work is resold to a bona fide third party before the consignor has been paid in full, the resale proceeds are trust funds in the hands of the consignee for the benefit of the consignor to the extent necessary to pay any balance still due to the consignor and such trusteeship shall continue until the fiduciary obligation of the consignee with respect to such transaction is discharged in full; and
> (v) such trust property and trust funds shall be considered property held in statutory trust, and no such trust property or trust funds shall become the property of the consignee or be subject or subordinate to any claims, liens or security interest of any kind or nature whatsoever of the consignee's creditors.

It is undisputed that defendant is an "artist," plaintiff is an "art merchant," and the sculptures are "fine art." When defendant delivered the sculptures to plaintiff for sale, this created a consignment relationship whereby plaintiff held the sculptures, including the Work, and any proceeds from their sale in trust for defendant's benefit, with ownership remaining

solely with defendant (*see Mesbahi*, 172 AD3d at 1581 [concluding that an agreement between plaintiff and decedent created a consignment relationship during which time the art remained the decedent's property]; *Wesselmann v International Images*, 172 Misc 2d 247, 251 [Sup Ct, NY County 1996], *affd* 259 AD2d 448 [1st Dept 1999], *lv dismissed* 94 NY2d 796 [1999] [stating that a "consignment relationship arises whenever the artist 'delivers or causes to be delivered' a print of his own creation"]; *Zucker v Hirschl & Adler Galleries*, 170 Misc 2d 426, 433 [Sup Ct, NY County 1996] [finding that Arts and Cultural Affairs Law § 12.01 [1] [a] [v] prohibited defendant's claim that it held a security interest in the unsold art as collateral for the plaintiff's unpaid debt]). In accordance with Arts and Cultural Affairs Law § 11.01 (12), plaintiff had the authority to execute bills of sale for defendant and Graphicstudio. Email correspondence from April 2011 also shows that plaintiff viewed the Agreement as a consignment agreement (NYSCEF Doc No. 8, Lindstrom affirmation, Ex. C at 2). Thus, the Agreement cannot have created joint ownership in the sculptures or the Work, as plaintiff has alleged.

Furthermore, under the Agreement, plaintiff was entitled to receive part of the sales proceeds for the Work, but this right was conditioned upon a sale of the piece during the consignment period. The Agreement provides that this period may be extended beyond February 17, 2012, but only in writing. Significantly, the complaint does not allege that the Agreement has been modified in writing to extend this period or to allow plaintiff to recover any future sales proceeds after the Agreement expired on February 17, 2012. As plaintiff concedes the Work has not been sold, it is not entitled to share in the proceeds from a sale. Accordingly, defendant has demonstrated that the complaint fails to state a cause of action for a declaratory judgment.

Plaintiff's arguments in opposition are unpersuasive. An ambiguity must arise from the language in the contract (*see Donohue*, 38 NY3d at 13), and the fact that the Agreement does not

discuss ownership does not render it ambiguous on that issue. Here, plaintiff fails to point to a specific provision or term in the Agreement that lacks a definite or precise meaning. Contrary to plaintiff's assertion, the plain words used in the Agreement do not evince an intent to create joint ownership in the Work.

Plaintiff urges the court to consider the post-execution conduct of defendant and Graphicstudio as additional evidence of intent. For instance, plaintiff purchased Graphicstudio's interest in the Work in 2013, and Graphicstudio confirmed plaintiff had "ownership of the final sculpture (mainly for insurance purposes)" (NYSCEF Doc No. 17, Paul Cossu [Cossu] affirmation, Ex 1 at 2). Plaintiff contends that defendant also has never challenged its assertion that it "co-own[ed]" the Work (NYSCEF Doc No. 18, Cossu affirmation, Ex 2 at 1) or its description of itself as a "purchaser" in the quarterly accounting statements provided to plaintiff from 2016 to 2018 (NYSCEF Doc Nos. 19-24, Cossu affirmation, Exs. 3-8).

"The parties' course of performance under the contract is considered to be the 'most persuasive evidence of the agreed intention of the parties'" (*Federal Ins. Co. v Americas Ins. Co.*, 258 AD2d 39, 44 [1st Dept 1999] [citation omitted]; *see also United States Fid. & Guar. Co. v Delmar Dev. Partners, LLC*, 14 AD3d 836, 838 [3d Dept 2005] [looking at the parties' subsequent conduct to determine intent]). Extrinsic evidence, though, may be used only to resolve an ambiguity in a contract. Because the Agreement does not reference or confer ownership, plaintiff cannot rely on extrinsic evidence to create an ambiguity where none exists. In any event, it is the intent of the parties at the time they executed a contract that is key (*Newin Corp. v Hartford Acc. & Indem. Co.*, 62 NY2d 916, 919 [1984]). The documents upon which plaintiff relies post-date execution of the Agreement, and thus, they do not reflect the parties' intent at the time of contracting.

Plaintiff's purchase of Graphicstudio's share in the Work also does not render it an owner. The fabrication agreement between defendant and Graphicstudio does not reference ownership in any way. That contract primarily discussed the materials used and the process employed to fabricate the sculptures.

Plaintiff's assertion that the Agreement is not a true consignment agreement is equally unpersuasive. Plaintiff cites *United States v Nektalov* (440 F Supp 2d 287, 299 [SDNY 2006] [internal quotation marks and citation omitted]) for the proposition that the court must "look to certain indicia traditionally associated with the consignment relationship … [including whether] the consignor retains ownership and sets the sale price; the consignee receives a commission and not the profits of the sale." Under the Agreement, defendant, in conjunction with plaintiff and Graphicstudio, set the sale price and plaintiff received a portion of the sales proceeds. *Nektalov*, however, is distinguishable as that action involved a consignment agreement in the diamond industry (440 F Supp 2d at 299), whereas the subject Agreement concerns the art industry. Critically, plaintiff ignores application of Arts and Cultural Affairs Law § 12.01, which expressly states that "[n]otwithstanding … any agreement … to the contrary," artwork delivered from an artist to an art merchant establishes a consignor/consignee relationship. While the statute does not apply where a contract does not involve the delivery of tangible works for sale (*see Morgan Art Found. Ltd. v Brannan*, 2020 WL 469982, *11, 2020 US Dist LEXIS 14043, *29 [SDNY, Jan. 28, 2020, No. 18-CV-8231 (AT) (BCM)] [reasoning that Arts and Cultural Affairs Law § 12.01 was inapplicable because the contracts involved the transfer of intellectual property, not the delivery of actual artwork]), plaintiff does not dispute that defendant delivered the sculptures to it for sale. That plaintiff received sales proceeds as opposed to commissions also does not render Arts and Cultural Affairs Law § 12.01 inapplicable (*see Wesselmann*, 172 Misc 2d at 252

[stating that the defendant's deductions for expenses before dividing the sales proceeds "is simply another basis of compensation"]).

Furthermore, plaintiff's right to receive a share of the sales proceeds was a conditional interest, i.e, plaintiff was entitled to receive a portion of the proceeds if the sculptures were sold during the consignment period (*see Indemnity Ins. Co. of N. Am. v Art Students League of N.Y.*, 225 AD2d 398, 399 [1st Dept 1996] [stating that "[t]he gallery had only a conditional interest in the painting and would earn a commission only if a sale were consummated. This did not occur"]). Plaintiff has admitted that the Work has not been sold.

In addition, "[w]here an art merchant claims ownership of consigned work, the merchant bears the burden of establishing that full payment was made for that work to the artist or the artist's estate" (*Khaldei v Kaspiev*, 135 F Supp 3d 70, 77 [SD NY, 2015], citing *Grosz v Serge Sabarsky, Inc.*, 24 AD3d 264, 265 [1st Dept 2005]). Therefore, unless the art merchant has made full payment for the art, the consignment relationship between an artist and an art merchant stands even "when the art merchant makes a financial investment in the art" (*Wesselman*, 172 Misc 2d at 252 [concluding that the defendant's financial investment "does not negate the consignment or trust relationship because it is not full payment for the prints"]; *Naber v Steinitz*, 1992 NY Misc LEXIS 685, *5 [Sup Ct, NY County, Jan. 27, 1992, Arber, J., index No. 21918/91] [reasoning on a motion for a preliminary injunction that plaintiff artist's "title and right to possession" as a consignor was superior to that of the defendant gallery as a consignee, even though defendant had paid $100,000 for plaintiff to produce the sculpture]). The complaint does not allege that plaintiff has paid for the Work in full. Accordingly, the branch of the motion seeking to dismiss the first cause of action is granted, and the first cause of action is dismissed.

B. The Second and Third Causes of Action

"'An anticipatory breach of contract by a promisor is a repudiation of [a] contractual duty before the time fixed in the contract for … performance has arrived'" (*Princes Point LLC v Muss Dev. L.L.C.*, 30 NY3d 127, 133 [2017] [internal citation omitted]). The repudiating party must "declare[ ] his intention not to fulfill a contractual duty" (*Kaplan v Madison Park Group Owners, LLC*, 94 AD3d 616, 618-619 [1st Dept 2012], *lv dismissed* 19 NY3d 1012 [2012], *lv denied* 20 NY3d 858 [2013] [internal quotation marks and citation omitted]). The repudiating party's intent not to perform must be "positive and unequivocal," and may take the form of "statement by the obligor to the obligee indicating that the obligor will commit a breach … or a voluntary affirmative act which renders the obligor unable or apparently unable to perform" (*Princes Point LLC*, 30 NY3d at 133 [internal quotation marks and citations omitted]).

Defendant has demonstrated the complaint fails to state cause of action for anticipatory breach of the Agreement. In *Rachmani Corp. v 9 E. 96th St. Apt. Corp.* (211 AD2d 262, 267 [1st Dept 1995]), the Court explained that "once a contract comes to an end, either by operation of its terms or by declaration of an anticipatory breach as a result of its repudiation, the Statute of Limitations begins to run." Here, the Agreement terminated on February 17, 2012, but plaintiff waited 9 years to sue. Plaintiff failed to advance any arguments addressing this cause of action. By failing to oppose this part of the motion, plaintiff has abandoned the second cause of action, and the second cause of action is dismissed (*see Saidin v Negron*, 136 AD3d 458, 459 [1st Dept 2016], *lv dismissed* 28 NY3d 1069 [2016], *rearg denied* 28 NY3d 1168 [2017], *cert denied* 138 S Ct 108 [2017], *reh denied* 138 S Ct 725 [2018] [stating that plaintiff had abandoned his claim against the individual defendant by failing to oppose that part of the motion to dismiss]).

The documentary evidence also utterly refutes the third cause of action for anticipatory breach of the Settlement Agreement. As an initial matter, the Settlement Agreement does not address what the mediation process or procedure would entail, and thus, it is unclear whether the parties had agreed to involve a neutral third-party or whether an informal session without a third-party would suffice. The Settlement Agreement states only that the parties would mediate all disputes concerning the Work.

The email correspondence between counsel does not clearly and unequivocally communicate defendant's intent not to mediate. To begin, the emails confirm defendant's agreement to mediate, and upon plaintiff's suggestion, the parties agreed to engage in informal mediation without the assistance of a third-party first before they retained an outside mediator (NYSCEF Doc No. 10, Lindstrom affirmation, Ex E at 8-9). Defendant's counsel conditioned defendant's participation in this informal session upon the exchange of "correspondence and documents … that would allow both sides to better evaluate the dispute" (*id*. at 8). Plaintiff exchanged its documents on February 19, 2021. Defendant's counsel objected to this minimal production, since defendant had produced an email from October 11, 2019, in which plaintiff wrote, "[I] have many internal emails about this. [A]nd im [sic] shocked that you are trying to suggest that we are anything other than 50/50 partners in this piece" (*id*. at 4). Defendant's counsel indicated defendant would not agree to an informal session and would commence mediation through JAMS, to which plaintiff responded it would attend only if defendant paid for it (*id*. at 1-2). These communications do not clearly and unequivocally express defendant's intent to forego performance, which is required for an anticipatory repudiation (*see 1625 Mkt. Corp. v 49 Farm Mkt., Inc*., 165 AD3d 426, 426 [1st Dept 2018] [finding that the defendant did not support its anticipatory repudiation with a definite, final communication]). Moreover, the

Settlement Agreement fails to set forth a specific date by which mediation must take a place. Absent a clear time for performance, defendant cannot have repudiated the Settlement Agreement (*see Condor Funding, LLC v 176 Broadway Owners Corp.*, 147 AD3d 409, 411 [1st Dept 2017] [rejecting an anticipatory repudiation argument where the plaintiff did not unequivocally declare its intention not to perform before the time stated in the parties' contract]). Plaintiff points to no other communication between the parties that evinces defendant's clear intent not to perform. Accordingly, the motion insofar as it seeks dismissal of the third cause of action is granted, and the third cause of action is dismissed.

D. Attorneys' Fees

Ordinarily, parties are responsible for their own attorneys' fees unless recovery is authorized by an agreement between them, by statute or by a court rule (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). Paragraph 9 in the Settlement Agreement allows the prevailing party in any action arising out of a dispute over that agreement to recover its costs and attorneys' fees from the non-prevailing party. As defendant has established that the third cause of action fails to state a claim for anticipatory breach of the Settlement Agreement, defendant is entitled to recover her costs and attorneys' fees from plaintiff, with the amount to be determined by a Special Referee to hear and report.

Accordingly, it is

ORDERED that the motion brought by defendant Diana Al-Hadid to dismiss the complaint is granted, and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is, accordingly,

ADJUDGED and DECLARED that plaintiff Art Works, Inc. has no ownership interest in and is not entitled to share in the proceeds from a sale of the unsold sculpture, identified as the "Work," of the "Sculpture Edition" as those terms are defined in the complaint; and it is further

ORDERED that the issue of the amount of attorneys' fees, costs and expenses incurred by defendant Diana Al-Hadid on the third cause of action, to which she is entitled to recover from plaintiff Art Works, Inc., is to be determined by a Judicial Hearing Officer ("JHO") or Special Referee; and it is further

ORDERED that the issue of such reasonable attorneys' fees is severed and a JHO or Special Referee shall be designated to conduct an inquest and determine the amount of attorneys' fees, costs and expenses incurred by defendant Diana Al-Hadid on the third cause of action which is hereby submitted to the JHO/Special Referee for such purpose; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of filing of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical

thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (*see* Rule 2 of the Uniform Rules).

This constitutes the decision and order of the court.

ENTER:

5/9/2022
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:	[x]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[X]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[X]	**REFERENCE**