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Bilinski v. Keith Haring Foundation, Inc., No. 14CV1085 DLC, 2015 WL 996423 (S.D.N.Y. Mar. 6, 2015)

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BILINSKI V. KEITH HARING FOUNDATION, INC., NO. 14CV1085 DLC, 2015 WL 996423 (S.D.N.Y. MAR. 6, 2015)

I. INTRODUCTION

In *Bilinski v. Keith Haring Foundation, Inc., Elizabeth Bilinski* (hereinafter "*Bilinski*") filed suit against the Keith Haring Foundation, its individual officers and directors, including Julia Gruen and Studio LLC, which operated the authentication committee for the Foundation, as well as the Estate of Keith Haring. Bilinski sued for interference with the exhibition and sale of her Haring artwork, in violation of federal and state antitrust claims under the Sherman Act and the Donnelly Act, respectively, as well as false advertising under the Lanham Act.[1] Bilinski also sought relief under New York law for defamation, conspiracy to defame, tortious interference with prospective business relations, trade libel, intentional infliction of economic harm/prima facie tort, and unjust enrichment.[2] Bilinski owned a number of Keith Haring artworks which she believed were authentic.[3] Bilinski submitted the artworks to the Foundation for a certification of authenticity, which they denied to provide.[4] Bilinski sought to sell the paintings and display them in an exhibition in Miami, both of which were prevented by injunctions from the Foundation.[5] The Court for the Southern District of New York dismissed all the claims in their entirety for failure to state a claim.[6]

II. BACKGROUND

The Keith Haring Foundation sold various Haring works for a total of $4,598,697 between 2008 and 2011.[7] Three paintings by

[1] *Bilinski v. Keith Haring Foundation, Inc.*, No. 14CV1085 DLC, 2015 WL 996423, at *1 (S.D.N.Y. Mar. 6, 2015).
[2] *Bilinski*, 2015 WL 996423 at *1.
[3] *Id.* at *2.
[4] *Id.*
[5] *Id.* at *2-3.
[6] *Id.* at *13.
[7] *Id.*

Keith Haring were sold through Sotheby's in 2014.[8] Because many auction houses require a certificate of authentication prior to selling a work of art, when the Foundation's Authentication Committee dissolved in 2012 the value of previously authenticated works increased.[9] The lack of an authentication certificate significantly reduces the price that can be acquired for art.

All of Bilinski's 111 Haring works of art were acquired through Angelo Moreno and Delta Cortez, personal friends of Keith Haring.[10] Both Moreno and Cortez provided Bilinski with letters of provenance indicating the ownership history of the Haring works.[11]

III. The Case

In 2007, Bilinski submitted transparencies of her collection to the Keith Haring Foundation, along with letters of provenance from the previous owner Angelo Moreno, but the Foundation rejected the works as "not authentic."[12] In 2008, the Foundation accused Bilinski of selling or making "available for sale items you are representing to be original works by Keith Haring when you have been duly warned they are not," and threatened legal action if Bilinski did not desist.[13] The Foundation failed to respond when Bilinski made attempts to reconcile.[14] In 2010, Bilinski tried to sell the collection through Sotheby's, and although a Sotheby's representative believed that the works were authentic, they refused to help her because of Julia Guen's interference.[15] The same result occurred with the Gagosian Gallery in New York.[16] Bilinski then tried to resubmit the collection to the Foundation for authentication, having acquired more evidence of their authenticity, but the Foundation refused to reconsider their prior

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[8] *Id.*
[9] *Id.* at *1-*2.
[10] *Id.* at *2.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*

judgment.[17] In 2013, Bilinski's collection was featured in an exhibition in Miami.[18] Partway through the run of the exhibition, the Foundation filed suit against the exhibition organizers seeking a temporary restraining order.[19] The "Miami Complaint" described the works as "fakes, forgeries, counterfeits and/or infringements."[20] In a subsequent press release, the Foundation characterized the lawsuit as an "effort to stop the display of fake Haring works at the exhibition."[21]

IV. LEGAL ANALYSIS

The District Court was asked to consider a motion to dismiss all claims made by the Foundation's complaint. In so doing, the court is guided by Rule 12(b)(6) of the Federal Rules of Civil Procedure, which states that a court must "accept all allegations in the complaint as true and draw all inferences in the non-moving party's favor."[22] Additionally, according to the landmark case of *Ashcroft v. Iqbal,* to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."[23] Rather, a complaint "must do more than offer naked assertions devoid of further factual enhancement."[24]

A. Antitrust Claims

The antitrust claims asserted in the Complaint consist of violations of Sections 1 & 2 of the Sherman Act, and the corresponding New York State antitrust statute, the Donnelly Act.[25] Since the Donnelly Act is generally "coextensive" with the

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[17] *Id.*
[18] *Id.* at *3.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Bilinski*, 2015 WL 996423 at *3. (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
[24] *Id.*
[25] *Id.* at *4.

Sherman Act, the court's Opinion analyzed the claims collectively.[26]

1. Conspiracy in Restraint of Trade

Section 1 of the Sherman Act declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations."[27] In order to state a claim under Section 1, a plaintiff must allege: "(1) a contract, combination, or conspiracy between two legally distinct entities, (2) in restraint of trade, and (3) affecting interstate commerce."[28] To survive a motion to dismiss, the Complaint must allege "enough facts to support the inference that a conspiracy actually existed."[29]

The District Court found that the Complaint failed to state a claim under Section 1 of the Sherman Act.[30] The court reasoned that Bilinski failed to allege "sufficient facts that would support the inference of interdependent, rather than independent, conduct by the alleged conspirators."[31] Under the theories and broad characterizations provided in the Complaint, "any refusal by an auction house, dealer, or gallery to sell a Haring without authentication by the Foundation could be a conspiratorial act."[32] The court found that this ambiguous legal conclusion did not give the defendants fair notice of the claim against them.[33]

Moreover, the conduct of the auction houses and galleries could have entirely legal motives since "the decision by any individual entity not to sell artwork that may not be authentic is an act consistent with lawful, independent action."[34] The court reasoned that while Bilinski claimed that an art dealer's refusal to sell

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[26] *Id.* at *4 n.6.
[27] *Id.* at *4.; *see also* 15 U.S.C. § 1.
[28] *Id.* at *4.
[29] *Bilinski*, 2015 WL 996423 at *4. (quoting *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 135-36 (2d. Cir. 2013).
[30] *Id.* at *4.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.* at *5.

artwork it believes is authentic is against it's self-interest, Bilinski did not state "in a non-conclusory fashion any facts indicating what benefit the auction houses derive from participating in a group boycott of works they believe to be authentic but that have not been authenticated by the Foundation."[35]

The court was directed to look at "the competitive reality rather than the legal organization to determine if a conspiracy may exist within one legal entity."[36] Thus, the fact that some of the Foundation's directors owned some Haring works does not make them co-conspirators, nor separate competitors to the market as a result of their compensation for their work with the Foundation.[37]

2. *Monopolization*

To state a claim for monopolization under Section 2 of the Sherman Act, the Complaint must allege: "(1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[38] The core element of a monopolization claim is market power, which may be demonstrated "either through direct evidence that the defendant can control prices or exclude competition, or through defendant's share of the relevant market."[39] Bilinski defined the relevant market as "the worldwide market for the sale of Haring works," and claimed that the Foundation "continue[d] to act as an informal market regulator by threatening or initiating pre-textual lawsuits to preclude authentic Haring works from being exhibited or sold," especially as the owner of virtually all intellectual property rights relating to Keith Haring.[40] However, the court found that the Complaint did not provide any factual basis for this contention,

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[35] *Id.*

[36] *Id.* at *5 (quoting *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 195 (2010).

[37] *Id.* at *6.

[38] *Id.* at *7 (quoting *Pepsico, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 105 (2d Cir. 2002)); *see also* 15 U.S.C. § 2.

[39] *Id.* at *7.

[40] *Id.*

since they do not allege that defendants have participated in the market more recently than 2011, or their market share.[41] According to the court, while the defendants have monopoly power via their intellectual property rights, and actively work to protect those rights, that fact alone does not establish unlawful monopoly power.[42]

B. The Lanham Act

The court also found that the pleading was insufficient for false advertising in the Miami Press Release and Miami Complaint under § 1125 of the Lanham Act, which deals with the misrepresentation of facts.[43] The requirements of commercial advertising or promotion under the Lanham Act are: "(1) commercial speech, (2) made for the purpose of influencing consumers to buy defendant's goods or services, and (3) . . . they must be disseminated sufficiently to the relevant purchasing public."[44] Here, however, Bilinski did not allege all the elements required for a violation of the Act, and failed to draw "a sufficient connection between either the Press Release or Miami Complaint and a proposed commercial transaction."[45]

C. State Tort Law Claims

The District Court chose to exercise supplemental jurisdiction over the state law claims regarding the Miami Complaint and Press Release, which include defamation and conspiracy to defame, tortious interference with business relationships, trade libel, intentional infliction of economic harm/prima facie tort, and unjust enrichment.[46] However, the court first applied the rule of absolute privilege for "statements made during judicial proceedings and the statutory privilege according to anyone who makes a 'fair report'

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[41] *Id.* at *7.
[42] *Id.* at *8.
[43] *Id.*; 15 U.S.C. § 1125.
[44] *Id.* (quoting *Gmurzynska v. Hutton*, 355 F.3d 206, 210 (2d. Cir. 2004)).
[45] *Id.*
[46] *Id.* at *9-13.

of a lawsuit."[47] The court found that the statements in the Miami Complaint, which describe Bilinski's Haring works as fakes or counterfeits, are privileged and may not be the basis for a tort claim since they are "directly relevant to the central dispute."[48] On the other hand, the court reasoned that "a reasonable jury could find that the Press Release stated that the parties had agreed that the works were inauthentic," despite that being an incorrect characterization of the actual agreement.[49] As such, the Press Release did not make a fair report of the lawsuit and was not privileged.[50]

Defamation or libel require a plaintiff to show: "(1) a written defamatory factual statement concerning the plaintiff; (2) publication to a third party; (3) fault; (4) falsity of the defamatory statement; and (5) special damages or per se actionability."[51] However, New York law distinguishes between defamation of a person and defamation of a product, so that a statement against one doesn't automatically affect the other.[52] In this case, the statements in the Press Release named only the organizers of the Miami exhibition of displaying fake Haring's, not the owners of the works.[53] This reference "by implication" related only to Bilinski's "property," not herself, and thus is not the basis for defamation.[54]

To prevail on a tortious interference with business relations claim, a plaintiff must demonstrate that: (1) it had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or used dishonest, unfair, or improper means; and (4) the defendant's interference caused injury to the relationship.[55] The court briefly but strictly applied these requirements and dismissed the claim because it neither identified a potential buyer, nor alleged "that the defendants knew of the

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[47] *Id.* at *9.
[48] *Id.*
[49] *Id.* at *10.
[50] *Id.*
[51] *Id.* (quoting *Chau v. Lewis*, 771 F.3d 118, 126-27 (2d Cir. 2014)).
[52] *Bilinski*, 2015 WL 996423 at *10.
[53] *Id.* at *11.
[54] *Id.*
[55] *Id.*

business relationship at the time they filed their lawsuit or issued the Press Release."[56]

In considering the claims for both trade libel and intentional infliction of economic harm, the court focused on special damages. Special damages are one of the requirements for recovery for disparagement of goods, along with a "defamatory statement directed at the quality of a business's goods."[57] Special damages have been defined as "the loss of something having economic or pecuniary value."[58] However, the court found that the plaintiffs made a poor attempt at itemizing damages, by including only very general information and by failing to name the anticipated sales price or the potential buyer.[59]

Finally, the court found that the claim for unjust enrichment should also be dismissed. The necessary elements for the claim are proof that: "(1) the defendant was enriched; (2) at plaintiff's expense; and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover."[60] Specifically, the benefit gained by the defendant must be specific and directly related to the alleged loss, an aspect the court found lacking.[61] The court characterized Bilinski's argument that the defendants' Haring works increased in value as a result of their acts as both "indirect and hypothetical."[62] Indeed, the benefit would not flow directly to the defendants and to the detriment of Bilinski.[63]

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[56] *Id.* at *12.
[57] *Id.* (quoting *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 312 F.3d 48, 59 (2d Cir. 2002)).
[58] *Bilinski*, 2015 WL 996423 at *12 (quoting *Albert v. Loksen*, 239 F.3d 256, 271 (2d Cir. 2001) (citation omitted)).
[59] *Bilinski*, 2015 WL 996423 at *12.
[60] *Id.* at 13 (quoting *Briarpatch Ltd., L.P v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004).)
[61] *Bilinski*, 2015 WL 996423 at *13.
[62] *Id.*
[63] *Id.*

V. FUTURE IMPLICATIONS

This case demonstrates that despite the fact that many authentication committees throughout the art world no longer operate or consider new works, they still hold considerable sway over sales. Prior to this case, the Keith Haring Foundation decided to stop accepting requests to review potential Haring artworks, joining a growing club which includes the Andy Warhol Foundation for the Visual Arts, the Roy Lichtenstein Foundation, the Noguchi Museum, and the Basquiat estate, all of whom no longer conduct authentication analyses.[64] All of these foundations and museums have stopped authenticating art in an effort to avoid litigation.[65] Litigation can be prohibitively expensive for these organizations, and often times the benefits do not outweigh the risks.[66] In 2009, the Warhol Foundation spent $7 million defending itself in a lawsuit concerning a silk-screen it had denied to include in their catalogue raisonne.[67] The case rested on a claim for conspiring to restrain trade and monopolize the Warhol market.[68] This type of antitrust claim has become the popular strategy for collectors looking to take on these behemoth art authentication committees, a trend which Bilinski continues.[69] Even though the plaintiffs rarely win, the time and legal expense is a serious deterrent for authentication committees to keep operating, and has

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[64] Irina Tarsis, *The Keith Haring Foundation Announces Its Decision to Disband Authentication Committee,* CENTRE FOR ART LAW, Jan. 25, 2012, http://itsartlaw.com/2012/09/20/the-keith-haring-foundation-announces-its-decision-to-disband-authentication-committee/.

[65] Patricia Cohen, *In Art, Freedom of Expression Doesn't Extend to 'Is It Real?'*, THE NEW YORK TIMES, June 19, 2012, http://www.nytimes.com/2012/06/20/arts/design/art-scholars-fear-lawsuits-in-declaring-works-real-or-fake.html?_r=0.

[66] *Id.*

[67] *Id.*; *see also Simon-Whelan v. Andy Warhol Foundation for the Visual Arts, Inc.*, 2009 WL 1457177 (S.D.N.Y. 2009).

[68] Charles & Thomas Danziger, *On the Case: Exploring Real World Art Law Issues*, ART NET NEWS, April 23, 2014, https://news.artnet.com/market/on-the-case-exploring-real-world-art-law-issues-11677.

[69] *Id.*

now contributed to a large number of their closures.[70] Interestingly, the Bilinski court declined to extend the reasoning in *Simon-Whelan v. Andy Warhol Foundation for the Visual Arts, Inc.*, because they found the two cases to be too factually dissimilar.[71] In Simon-Whelan, the plaintiff "alleged a conspiracy between the Warhol Foundation, which published a catalogue raisonne, and the Board, which authenticated or declined to authenticate submitted works."[72] In Bilinski, the conspiracy was instead alleged to be between the Foundation and art dealers, auction houses, and galleries.[73] Regardless, both the Warhol Foundation and the Keith Haring Foundation stopped their authentication business after these proceedings.[74] Joel Wachs, the Andy Warhol Foundation's director, noted that the cost to defend itself became too great, especially when they would "rather be giving it [the money] to artists."[75]

However, because of the lack of art knowledge generally held by the courts, the judicial system holds authentication committees in especially high regard. This is demonstrated by the standard of review, where the plaintiffs can only be successful against an "expert" (as these committees are) based on a high standard, or greater than the preponderance of the evidence. A plaintiff suing an authenticator like the Foundation here would need to specify "the facts supporting each part of each claim and prove the claim by clear and convincing evidence (a higher hurdle than preponderance)."[76] A New York State appellate court in a case concerning the artist Alexander Calder commented that "courts have neither the education to appropriately weigh the experts' opinions nor the authority to independently gather all available

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[70] *See* Cohen, *In Art, Freedom of Expression Doesn't Extend to 'Is It Real?'*, THE NEW YORK TIMES, June 19, 2012, http://www.nytimes.com/2012/06/20/arts/design/art-scholars-fear-lawsuits-in-declaring-works-real-or-fake.html?_r=0.

[71] Bilinski, 2015 WL 996423 at *6.

[72] *Id.*

[73] *Id.*

[74] Stacy Perman, *This is Bad News for People Who Spend Millions on Art*, FORTUNE, Sept. 24, 2015, http://fortune.com/2015/09/24/art-fakes-lawsuits/.

[75] *Id.*

[76] Danziger, *supra* note 68.

appropriate information."[77] The court continued to note that the courts could not impact the injury to the plaintiffs of not being able to sell a painting because the art market itself places its own value on the opinions of authentication committees and foundations, not the courts.[78] That sentiment holds true for the Bilinski case as well, since Bilinski would not be able to sell her paintings at the value she sought regardless of whether the suit was successful or not because that is a remedy that the law cannot offer. Indeed, as the court points out, a refusal to sell by art galleries does not necessarily point to illegal collusion, but "is consistent with both independent and interdependent conduct. . .[and] an assessment of a number of factors."

To be sure, the authenticator of a work of art and the authentication boards serve their own market function.[79] The Court in *Thome v. Alexander & Louisa Calder Foundation*, 890 N.Y.S.2d 16, 26 (N.Y. App. Div. 2009) criticized this function by reasoning that "Plaintiff's problem can be solved only when buyers are willing to make their decisions based upon the Work and the unassailable facts about its creation, rather than allowing the Foundation's decisions as to what merits inclusions in its *catalogue raisonne* to dictate what is worthy of purchase."[80] For now, however, the stakes in authentication remain incredibly high because of the record-breaking prices for art and the security authentication certificates provide the seller and auction house from liability.[81] This past year, Paul Gauguin's portrait, *Nafea Faa Ipoipo,* sold for $300 million in a private sale while Picasso's *Les femmes d'Alger (Version "O")* sold for $179 million at Christie's.[82]

The question that remains is if an authenticator was sufficiently protected from suit, would they go back into business? Should

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[77] *Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88, 101 (N.Y. 2009)

[78] *Id.*

[79] PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW, 424 (3d ed. 2012).

[80] *Thome*, 70 A.D.3d at 103.

[81] *See* Perman, *This is Bad News for People Who Spend Millions on Art*, FORTUNE, Sept. 24, 2015, http://fortune.com/2015/09/24/art-fakes-lawsuits/.

[82] *Id.*

they? Should the market attempt to place value on a work of art for art historical purposes, rather than purely for market purposes? Unfortunately, independent experts and historians are being pushed out of their business because they too fear potential legal repercussions.[83] In the place of authentication committees, there is the potential for fakes and forgeries to rise up and fill the gap and ambiguity in the market.[84]

VI. CONCLUSION

Elizabeth Bilinski filed suit against the Keith Haring Foundation for violation of federal and state antitrust statutes stemming from alleged interference with Bilinski's attempt to sell her Keith Haring paintings. The District Court for the Southern District of New York dismissed all claims brought by Elizabeth Bilinski against the Keith Haring Foundation, finding that the claims were without merit, especially since Bilinski failed to state a claim upon which relief could be granted. This suit is another in a long line of suits against art authentication committees, most of which are meritless, but which have contributed to a large number of authentication committees refusing to continue their services due to the expense that litigation brings.

*Lauren Bursey**

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[83] *Id.*

[84] Only this past summer, fakes and forgery groups were busted in France and Spain, respectively. *Id.*

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