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To be Argued by:
JOSEPH A. PATELLA
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New York Supreme Court

Appellate Division—First Department

Appellate Case No.: 2018-968

ESTATE OF MARGARET KAINER, and the following individuals as heirs of MARGARET KAINER: KURT BECK a/k/a Curt Beck as Executor of the Estate of ANN BECK, JANET CORDEN as Executor of the ESTATE of GERALD CORDEN, MARTIN CORDEN as Executor of the Estate of GERALD CORDEN, SIMON CORDEN as Executor of the Estate of GERALD CORDEN, WARNER MAX CORDEN, FIRELEI MAGALI CORTES GRUENBERG, MATILDE LABBE GRUENBERG, HERNAN LABBE GRUENBERG, PETER LITTMAN, HERNAN RENATO CORTES RAMOS and EQUITY TRUSTEES LIMITED as Executor of the Estate of ELLI ALTER,

Plaintiffs-Appellants,

– against –

UBS AG, a Swiss corporation, UBS GLOBAL ASSET MANAGEMENT (AMERICAS), NORBERT STIFTUNG f/k/a Norbert Levy Stiftung, a purported Swiss foundation, EDGAR KIRCHER and CHRISTIE'S INC.,

Defendants-Respondents,

– and –

JOHN DOES 1-X, including a possessor of a painting entitled *Danseuses* by Edgar Degas, c. 1896

Defendants.

BRIEF FOR DEFENDANT-RESPONDENT CHRISTIE'S INC.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether Appellants failed to state a cause of action, pursuant to N.Y. C.P.L.R. Rule 3211(a)(7), against Respondent Christie's Inc. ("Christie's") for unjust enrichment where the parties not only lacked a relationship sufficiently close to have caused reliance or inducement but had no relationship at all.

   The trial court answered in the affirmative.

2. Whether Appellants failed to state a cause of action, pursuant to N.Y. C.P.L.R. Rule 3211(a)(7), against Christie's for conspiracy to obtain unjust enrichment where such a claim is merely duplicative of the underlying unjust enrichment claim, which is not grounded in tort and fails on its own as a matter of law.

   The trial court answered in the affirmative.

3. Whether Appellants' Complaint should be dismissed, pursuant to N.Y. C.P.L.R. Rule 327, on the ground of *forum non conveniens* where the primary issue of determining ownership rights to the assets of the subject estate should be determined in the foreign jurisdiction whose laws apply to such a determination and in which proceedings have already been initiated by Appellants.

   The trial court answered in the affirmative.

PRELIMINARY STATEMENT

By filing this appeal, Appellants, who claim to be the sole heirs of the Estate (the "Estate") of Margaret Kainer ("Kainer"), cling to a case that should be litigated elsewhere and was therefore properly dismissed by the trial court on the ground of *forum non conveniens*. While almost the entirety of Appellants' brief is devoted to combatting dismissal on this ground, Appellants' sweep into its concluding pages a short, mostly recycled argument in support of its claims for unjust enrichment and conspiracy to obtain unjust enrichment against Christie's, which the trial court soundly rejected as a matter of law. As Appellants' had no dealings at all with Christie's, their unjust enrichment claim conflicts with black letter law which requires the existence of a close relationship between the parties. Appellants' claim of conspiracy to obtain unjust enrichment--to the extent such a claim even exists--is therefore equally deficient, as a conspiracy claim depends entirely on the viability of the underlying cause of action. Accordingly, this Court should not only affirm the trial court's dismissal of this action for being in an improper forum, but also affirm the dismissal of Appellants' unjust enrichment claims against Christie's.

PROCEDURAL HISTORY

Appellants originally commenced this action against UBS AG and UBS Global Asset Management (Americas), Inc. (collectively "UBS"), as alleged administrator of the Estate, and Norbert Stiftung (the "Foundation"),[1] a Swiss Foundation which obtained recognition from foreign courts to act as heir to Kainer's Estate.[2] Appellants allege that UBS and the Foundation committed "decades-long spoliation of [Appellants'] assets in contravention of their common law and contractual duties arising from possession of [Appellants'] assets." (R. 604). The assets in question included a nineteenth-century painting by French master Edgar Degas entitled *Danseuses* (the "Painting"). In 2009, the Painting was auctioned through Christie's in New York for $10,722,500.00 (the "2009 Sale").

Two pleadings and nearly 22 months later, Christie's was added as a defendant to Appellants' Second Amended Complaint ("SAC") on the ground that, prior to the 2009 sale, Christie's entered into a Restitution Settlement Agreement ("RSA") with parties that it should have known were not the rightful heirs to the Estate.[3] Specifically, Appellants alleged, *inter alia*, that Christie's "transform[ed]"

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[1] Christie's, UBS and the Foundation shall be collectively referred to herein as "Respondents."

[2] Kainer died intestate and without children in France in 1968, and her assets included a valuable 400-piece art collection which was looted by the Nazis in 1935 and has been the subject of reparations claims against Germany over the years.

[3] The fact that Appellants were fully aware of the RSA at the time of their initial Complaint supports Respondents' contention that Appellants added Christie's in a desperate attempt to

the Painting from "virtually unsaleable" to "saleable" by entering into the RSA and vouching for its authenticity. (R. 179-180). They further asserted that Christie's, despite actual or constructive knowledge that the Foundation was not the legitimate heir to the Estate, arranged for the sale of the Painting, knowing that such sale would be "damaging" to the legitimate heirs. (R. 180). According to Appellants, Christie's "enrichment," by "fees or monies" obtained from the sale and the RSA, has been at Appellants' expense and "equity and good conscience require Christie's to make restitution to Appellants." (R. 180).

All Respondents moved to dismiss the SAC on various grounds. The trial court granted the motions by UBS and the Foundation to dismiss for *forum non conveniens*, finding that the claims between the heirs as to their ownership rights to the assets of the Estate "should be determined in the foreign jurisdiction(s) whose laws will apply to the determination, and in which proceedings initiated by [Appellants] themselves are pending." (R. 34). With respect Christie's, the trial court dismissed Appellants' claims of unjust enrichment and conspiracy to obtain unjust enrichment, finding that Appellants failed to "allege any 'facts showing that

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establish a New York nexus in a case that is centered in foreign jurisdictions and should thus be dismissed here on the basis of *forum non conveniens*.

plaintiffs had any relationship or connection to [defendant], let alone the 'sufficiently close relationship' necessary to sustain this claim.'"[4] (R. 36).

ARGUMENT

I.

The Trial Court Properly Dismissed Appellants' Unjust Enrichment Claim Against Christie's

Appellants' claim for unjust enrichment cannot stand as a matter of law, as it lacks any facts to support a key element of unjust enrichment: a relationship between the parties that is sufficiently close that it "could have caused reliance or inducement" on the plaintiff's part to confer a benefit upon the defendant. *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182, 919 N.Y.S.2d 465 (2011). To maintain such a claim, it is necessary that the parties have had "dealings with each other," *Georgia Malone & Co., Inc. v. Rieder*, 19 N.Y.3d 511, 517-18, 950 N.Y.S.2d 333 (2012), or that there be "at least an awareness by the [defendant] of [plaintiff's] existence." *Mandarin Trading*, 16 N.Y.3d at 182. *See also ACC Concrete Corp. v. Core Continental Constr. Co., LLC*, 2013 N.Y. Misc. LEXIS 3724, at *12, 2013 NY Slip Op. 31958(U) (Sup. Ct. N.Y. Co. Aug. 21,

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[4] Though not part of this appeal, Appellants also asserted against Christie's claims of aiding and abetting breach of fiduciary duty, conversion and conspiracy to commit conversion, which the trial court ruled to be time-barred under New York law. However, the court left open the issue of whether the recently enacted Holocaust Expropriated Art Recovery ("HEAR") Act revives these claims. The trial court therefore stayed the case as to these causes of action until the foreign courts determine which party is the lawful heir to the Kainer estate. If Appellants prevail, they would be able to restore this case to the court's calendar.

2013) ("[A]t minimum, plaintiff must show defendants dealt with plaintiff and were aware [plaintiff] was conferring a benefit on them.) (citations omitted); *ASM Sports v. Walters*, 2014 N.Y. Misc. LEXIS 4540, at *15, 2014 NY Slip Op. 24310 (Sup. Ct. N.Y. Co. Oct. 9, 2014) (a "benefit" must have been bestowed by the plaintiff on the defendant and "*it must be pleaded and proven that the benefit conferring services were performed for the defendant*") (emphasis in original).

Appellants concede that they had no "direct dealings" with Christie's at the time of the RSA and the 2009 Sale. (Appel. Br. at 55). Appellants do not dispute that Christie's was unaware of their existence and therefore could not have induced Appellants to confer a benefit. Indeed, as alleged in the SAC, Appellants were not even recognized as heirs to the Estate until May 2012 (R. 150-151), two-and-a-half years *after* the alleged events in 2009 that form the basis of Appellants' claims against Christie's.

As they did before the trial court, Appellants completely ignore the requirement that *they* must have conferred a benefit upon Christie's with Christie's knowledge. Here, the alleged "benefit" to Christie's was "the fees or monies it obtained for securing the Restitution Settlement Agreement and effectuating the subsequent sales of the Painting." (R. 180). As Appellants clearly did not confer this benefit to Christie's, their unjust enrichment claim is subject to dismissal on that basis alone. *See IDT*, 12 N.Y.3d at 142 (dismissing unjust enrichment claim

seeking disgorgement of fees defendant earned from another party, as it was not plaintiff that paid the fees); *Fidelity Nat'l Title 650727/10E Ins. Co. v. NY Land Title Agency LLC*, 121 A.D.3d 401, 2014 N.Y. App. Div. LEXIS 6599 at **5-6, 2014 NY Slip Op. 06649 (1st Dep't Oct. 2, 2014) (dismissing unjust enrichment claim where the defendant's alleged benefit, a commission, had been paid not by the plaintiff, but by another party).

Appellants mimic their opposition to Christie's motion to dismiss by arguing on this appeal that Christie's was a conspirator with the other Respondents, which acted as Appellants' fiduciary, and therefore the other Respondents' alleged "schem[ing]" is "imputable to Christie's" (Appel. Br. at 54). When first making this argument to the trial court, Appellants cited just one case (cited again on this appeal), which is completely distinguishable.[5] Appellants fare no better on appeal, as they were able to find only one additional case, *L.I. City Ventures LLC v. Sismanoglou*, 158 A.D.3d 567, 71 N.Y.S.3d 462 (1st Dep't 2018), which is equally unavailing. In that case, plaintiff sought to recover a commission allegedly due on the sale of certain real property. Plaintiff asserted a claim of unjust enrichment

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[5] Appellants rely upon *Philips Int'l Investments, LLC v. Pektor*, 117 A.D.3d 1, 982 N.Y.S.2d 98 (1st Dep't 2014). There, the individual defendants who had a joint venture with plaintiff created limited partnerships as "vehicles" for the purpose of acquiring properties the joint venture was seeking to purchase. Thus, the limited partnerships were effectively the same as the individual defendants, with no purpose apart from the role the individual defendants had created for them. For obvious reasons, therefore, the acts of the individual defendants could be attributed to the limited partnerships, and their relationship with plaintiff was not "too attenuated." *Philips*, 117 A.D.3d at 7-8.

against the realty company, with which it had entered into an exclusive brokerage agreement, and three additional defendants who were not parties to the agreement. The court upheld plaintiff's unjust enrichment claim against the other defendants because they *created* the realty company and collectively "transferred the property via a two-step transaction for the purpose of evading discovery of the purchase and the payment to plaintiff of its commission." *Id*. at 568 (finding that "[t]he complaint states a cause of action for unjust enrichment against [all defendants] … because of the nature of their relationship in this alleged scheme to deprive plaintiff of a commission") *Id.* In the present case, Appellants cannot establish a similar connection between Christie's and the other Respondents. Christie's did not create the other Respondents and had no involvement at all in the administration of the Estate.

At bottom, the relationship between Appellants and Christie's was not just "attenuated" -- it was non-existent. Appellants nevertheless attempt to manufacture a relationship by somehow claiming that they should be considered parties to the RSA (which was executed in 2009) based on the recognition they allegedly obtained three years later (in 2012) as heirs to the Estate. Even if this tortured reasoning was to be considered, Appellants' unjust enrichment claim still fails because such a claim must involve an act by defendant that "caused plaintiff's reliance or induced its performance" in conferring a benefit upon defendant. *See*

ACC Concrete Corp., 2013 N.Y. Misc. LEXIS 3724, *12 ("To sustain an unjust enrichment claim plaintiff … must … demonstrate a relationship with defendants that caused plaintiff's reliance or induced its performance.") (citation omitted). As Appellants had no dealings or communications at all with Christie's, it obviously was not induced by some act of Christie's and most definitely did not confer any benefit upon Christie's. *See 4C Foods Corp. v. Package Automation Co.*, 2014 U.S. Dist. LEXIS 166049, *25 (S.D.N.Y. Nov. 18, 2014) (applying New York law) (as a relationship is necessary to demonstrate that defendant induced plaintiff to enrich defendant at its expense, "where no facts are pleaded to show any communication between the plaintiff and the defendant, it is impossible to sustain an unjust enrichment claim") (citations omitted). Accordingly, the trial court properly dismissed Appellants' unjust enrichment claim against Christie's.

II.

The Trial Court Properly Dismissed Appellants' Claim of Conspiracy to Obtain Unjust Enrichment Against Christie's

An allegation of conspiracy does not itself give rise to a cause of action, as the "actionable wrong lies in the tort, never on the agreement to commit it, standing alone." *Hoag v. Chancellor, Inc.*, 246 A.D.2d 224, 230, 677 N.Y.S.2d 531 (1st Dep't 1998). This means that, if a plaintiff has alleged a tort against a defendant, he cannot, as Appellants have done here, assert a separate claim against the same defendant for civil conspiracy to commit the same tort, repeating the

allegations of the underlying claim with the added allegation of a conspiracy. That added allegation creates no actionable claim and such a cause of action is merely duplicative of the underlying tort claim. *See, e.g., Herman v. Herman*, 2013 N.Y. Misc. LEXIS 713, *34-35, 2013 NY Slip Op. 30366(U) (Sup. Ct. N.Y. Co. Feb. 8, 2013) (civil conspiracy claims dismissed as duplicative of underlying tort claim against defendants who were named as direct tortious actors); *Bahiri v. Madison Realty Capital Advisors, LLC*, 30 Misc.3d 1208(A), 924 N.Y.S.2d 307, 2010 N.Y. Misc. LEXIS 6333, ***7-8 (Sup. Ct. N.Y. Co. Dec. 23, 2010) (same).

In the present case, Appellants claim of conspiracy to obtain unjust enrichment, as alleged in the SAC, copies allegations from Appellants' unjust enrichment claim, with the addition of a conspiracy allegation. (R. 181-183). As the case law makes clear, Appellants' conspiracy claim is needlessly duplicative. Otherwise, as the First Department noted in *Hoag*, Appellants would have the possibility of an impermissible double recovery for the same alleged tort, one for the underlying tort itself and a second based on the conspiracy allegations, which form no legal basis for separate recovery. *Hoag*, 246 A.D.2d at 230.

A plaintiff may seek to "connect" the actions of various defendants with respect to a tort through a common scheme. However, a plaintiff may seek to do so only in order to hold liable those persons who might otherwise escape liability because they conspired with the tortfeasors but did not commit the tort. *E.g.*,

Herman, 2013 N.Y. Misc. LEXIS 713, at *34-35. A plaintiff may *not* seek, through a conspiracy claim, to assert a *second* claim against the same defendant already sued on the underlying tort. *See Hoag*, 246 A.D.2d at 230; *Herman*, 2013 N.Y. Misc. LEXIS, at *34-35. That is what Appellants in the present case are trying to do to Christie's.

Further, because a conspiracy claim "stands or falls with the underlying tort," *see, e.g., Romano v. Romano*, 2 A.D.3d 430, 432, 767 N.Y.S.2d 841 (2d Dep't 2003), Appellants' claim of conspiracy to obtain unjust enrichment fails for two additional reasons. First, there is no underlying tort, as the trial court noted that "[t]he theory of unjust enrichment lies as a quasi-contract claim." (R. 36).[6] Second, even if unjust enrichment can be considered a tort, as discussed in the prior section, the trial court properly dismissed that claim as a matter of law. Accordingly, Appellants' companion conspiracy claim should suffer the same fate.

III.

The Trial Court Properly Granted the Motions by UBS and the Foundation to Dismiss Appellants' SAC on the Basis of *Forum Non Conveniens*

Christie's joins in and incorporates herein by reference the arguments made by UBS and the Foundation on this appeal in support of upholding the trial court's decision to dismiss Appellants' SAC for *forum non conveniens*. This action

[6] Indeed, Appellants cite to no case that even recognizes a claim of conspiracy to obtain unjust enrichment.

revolves around one key issue: whether Appellants are, as they claim, the lawful heirs of the Estate. Appellants' lengthy SAC catalogues a complex series of events beginning in 1927 with the will by Kainer's father, made in Germany under German law, leaving his estate to Kainer and which stipulates that, if Kainer died without children, three-fourths of whatever remained of the Estate would be used to set up a family foundation. The SAC then discusses: (i) the creation of two Swiss foundations; (ii) the administration of the Estate assets in Switzerland; (iii) a certificate of inheritance issued by a German court establishing one of the Swiss foundations as rightful heir to the Estate; (iv) a certificate of inheritance issued by a Swiss court, following a dispute in Switzerland, designating two Swiss political subdivisions as the sole heirs of the Estate; (v) a settlement between the Swiss public foundation and the two Swiss political subdivisions to divide the Estate among themselves; and (vi) a French "quasi-judicial" determination recognizing, under French law, Appellants - none of whom are alleged to reside in New York - as the rightful heirs of the Estate. (R. 141-143, 153-163).

None of the alleged events relevant to the issue of who is the lawful heir to the Estate have any connection to New York. As Appellants themselves acknowledge, questions under Swiss, French and German law govern that key issue. The witnesses and documents necessary to determine that issue are in Switzerland or in Germany. Courts in Switzerland, Germany and France have all

issued rulings identifying the heirs to the Estate. The entities presently acting as heirs are all Swiss. In addition, Appellants apparently already have pending litigation in Switzerland to determine their rights under Swiss law with respect to the Estate.

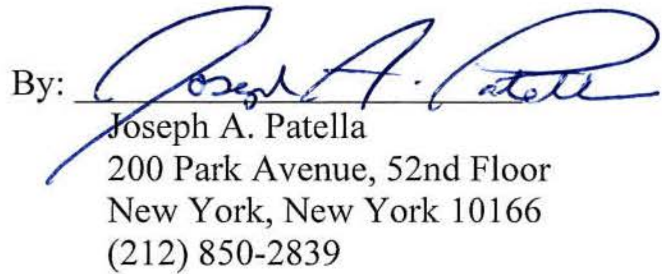
The only alleged nexus to New York concerns Christie's activities over a one-week period in 2009 in entering into the RSA and in arranging for the sale of the Painting. (R. 167-170). These events have no relevance to the issue of whether Appellants are the rightful heirs to the Estate. Significantly, Appellants do not allege that Christie's had any involvement with respect to the will of Kainer's father; the administration of the Estate; the formation or operation of the Swiss foundations; the disputes or settlements concerning the identity of the Estate's heirs; or the judicial determinations of the Estate's lawful heirs. Appellants' claims against Christie's are not only wholly subsidiary to the issue of whether Appellants have any rights with respect to the Estate but, indeed, *entirely dependent* upon a resolution of that issue. Accordingly, the trial court properly granted the motions by UBS and the Foundation to dismiss the SAC on the ground of *forum non conveniens*.

CONCLUSION

For the foregoing reasons, Respondent Christie's Inc. respectfully requests that this Court affirm the decision of the trial court in all respects.

Dated: New York, New York
November 15, 2018

HUNTON ANDREWS KURTH LLP

By: 

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