
NY Bill to Strengthen Statute Protecting Artist-Consignors

By Paul J. Mantell

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This past spring, twin pieces of legislation¹ were introduced in the New York Legislature to enhance the protection afforded artists² in their commercial dealings with art dealers and galleries. Senate Bill S4988 and Assembly Bill A7189 (“the Bill”) propose amendments to New York Arts and Cultural Affairs Law § 12.01,³ the artist consignment statute, to compel art dealer compliance with existing law⁴ requiring safeguarding of sales proceeds owed artists in trust accounts. This

requirement is often ignored, and it is not uncommon for money owed artists to be commingled with a dealer's operating funds, exposing it to loss. The Bill seeks to improve the effectiveness of the protection already in place, and give artists a stronger remedy in the case of loss of their property, in the form of an express statutory right to sue for damages.

THE ARTIST CONSIGNMENT STATUTE

Section 12.01 of the Arts and Cultural Affairs Law was enacted to give artists extraordinary protection when consigning works to art dealers. The law establishes that neither a dealer nor its creditors has any right to artwork consigned by the artist or the artist's share of sales proceeds. Although a discussion for another article, it is

1 2011 NY Senate-Assembly Bill S4988, A7189.

2 The interests of an artist's heirs and the personal representative of his or her estate are also protected under the statute.

3 The Bill also suggests changes to Arts and Cultural Affairs Law § 11.01, which provides definitions of key terms. Notably, the Bill adds definitions for “heir” and “personal representative,” stating that these terms will have the same meaning as provided in the Estates, Powers and Trusts Law. This new clarification is intended to eliminate interpretations of the consignment statute that made it difficult for an artist's children, as heirs of his or her estate, to recover consigned artwork or sales proceeds from an art dealer.

4 New York Estates, Powers and Trusts Law § 11-1.6 (a).

remarkable that the statute makes the Uniform Commercial Code inapplicable to artist consignments.⁵

Under the statute, when an artist delivers artwork, which includes fine art, craft, or a print, to an art dealer for sale or exhibition, and the dealer accepts delivery, an agency relationship is established.⁶ As an agent, the dealer is obligated to, among other things, prudently care for and manage the consigned artwork, account periodically to the artist concerning sales, and deal honestly and fairly with the artist. The statute deems all consigned works trust property, and the proceeds from the sale of any such works trust funds, held for the benefit of the artist.⁷ Importantly, clause (v) of paragraph (a) of subdivision 1 states that

“no such trust property or trust funds

⁵ Arts and Cultural Affairs Law § 12.01.1.

⁶ *Id.* § 12.01.1 (a) (i). Notably, the act of delivery by the artist and acceptance by the dealer are all that is required under the statute to establish a consignee-relationship. The provision does not require a written agreement between the parties, although, as a practical matter, neither the artist nor the dealer should proceed without one.

⁷ *Id.* § 12.01.1(a)(ii) and (iii).

shall be subject or subordinate to any claims, liens or security interest of any kind or nature whatsoever.”⁸

Hence, neither the art dealer nor its creditors has any claim to the artwork or proceeds from the sale of any piece. Further, because the art dealer never had any ownership interest in the artwork, if it files for bankruptcy, the trust property and funds remain safely beyond the grip of the bankruptcy trustee.⁹

Under the current law, an artist may waive in writing his or her right to have any proceeds held in trust, except for the first \$2500 received in any 12-month period.¹⁰ This trust waiver is invalid, however, when an art dealer subsequently purchases art initially consigned to it.¹¹ Importantly, the Bill seeks to eliminate entirely the waiver right.

⁸ *Id.* § 12.01.1(a)(v).

⁹ See *Ludvig v AM. Woolen Co.*, 231 US 522, 528 (1913).

¹⁰ Arts and Cultural Affairs Law § 12.01.1(b)(i).

¹¹ *Id.* § 12.01.1(b)(ii).

FAILURE TO PROTECT

Despite the statute's safeguards, artists are not being protected. In a report submitted to the Legislature in support of the Bill, the Art Law Committee of the New York City Bar Association commented on the lack of means to enforce the trust fund requirement:

“As a matter of law, the sales proceeds are property of the artist and galleries do not have discretion to use those proceeds for their own purposes. The existing provisions of Article 12 of NYACAL¹² recognize this principle by providing that sales proceeds are 'trust funds in the hands of the consignee for the benefit of the consignor.' The existing NYACAL provisions, however, do not include any measures to enforce the trust funds principle and do not include penalties for galleries' failure to treat

sales proceeds as trust funds. The lack of measures and penalties enables galleries to continue using consignors' sales proceeds to pay the galleries' own operating expenses. When these galleries fail financially, the artists lose the money to which they alone are entitled.”¹³

Similarly, the Bill's memorandum recognized the current law's shortcomings:

“The current law governing artist-art merchant relationships does not go far enough to protect the artist and his or her heirs from having the works of art [sic] they consign to art merchants taken from them without any financial compensation when the galleries of such merchants are mismanaged and or when the art merchant decides to use the funds gain [sic] from the sale of a work of

¹² An abbreviation for the New York Arts and Cultural Affairs Law.

¹³ Art Law Committee of the New York City Bar Association, *Report on Legislation by the Art Law Committee* (May 2011).

art for reasons other than to compensate the artist. For instance, in past bankruptcy proceedings, some art merchants, as the consignees of the works of art, have used the proceeds from the sales of such works to pay off claims of creditors, violating their fiduciary duties to Protect the consignor's work and to compensate him or her when the work is sold.”¹⁴

AMENDMENTS TO THE STATUTE

Bankruptcy of the Art Dealer

The Bill proposes new language that directly addresses the status of trust property and funds in the event of the bankruptcy of the art dealer. The following is the proposed amendment (new language in bold) to clause (v) of paragraph (a) of subdivision 1:

“such trust property and trust funds shall be considered property held in statutory trust

¹⁴ Memo of 2011 NY State Assembly Bill A7189.

as defined and contemplated by 11 U.S.C. 541 and other relevant bankruptcy law, 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.”¹⁵

Although unclear, it appears, by process of elimination, that within section 541 of the Bankruptcy Code the reference is to paragraph (1) of subsection (b), which states:

“[p]roperty of the estate does not include any power that the debtor may exercise solely for the benefit of an entity other than the debtor. . . .”¹⁶

Section 541(b)(1) has been interpreted as excluding trust property from the estate: In *In re Dally*, the court observed that “property of the estate does not include 'any

¹⁵ 2011 NY Senate-Assembly Bill S4988, A7189.

¹⁶ 11 U.S.C. § 541(b)(1) (2010).

power that the debtor may exercise solely for the benefit of any entity other than the debtor,' such as property over which the debtor is a trustee.”¹⁷ In addition to the Bankruptcy Code reference, the proposed language expressly states that trust property and funds never become the property of the art dealer.

Although the statute in its present incarnation proscribes trust property and funds from becoming part of the estate in the case of a dealer's bankruptcy, the amendment should leave nothing to chance. As the Art Law Committee noted, the amendment will “make explicit that works of art . . . are not, and shall not become, the property of the art merchant, or the art merchant's bankruptcy estate.”¹⁸

Breach of Fiduciary Duty: Crime, but Misdemeanor

¹⁷ *In re Dally*, 202 B.R. 724, 727 (Bankr. N.D. Ill. 1996) (accounts created by the debtor under the Illinois Uniform Transfers to Minors Act held not part of the bankruptcy estate).

¹⁸ Art Law Committee of the New York City Bar Association, *Report on Legislation by the Art Law Committee* (May 2011).

The Bill seeks to introduce a new subdivision to the consignment statute to make plain that an art dealer is subject to penalty for failure to uphold its fiduciary obligations to an artist. Proposed subdivision 2 states:

“If a consignee fails to treat the trust property or trust funds identified in paragraph (a) of subdivision one of this section in accordance with the requirements of fiduciaries in section 11-1.6 of the Estates, Powers and Trusts Law, such failure shall constitute a violation of this article and of section 11-1.6 of the Estates, Powers and Trusts Law and shall be subject to the penalties provided therein.”¹⁹

Estates, Powers and Trusts Law § 11-1.6 provides, in relevant part:

“(a) Every fiduciary shall keep

¹⁹ 2011 NY Senate-Assembly Bill S4988, A7189.

property received as fiduciary separate from his individual property.

...

(d) Any person violating any of the provisions of this section shall be guilty of a misdemeanor.”²⁰

As with the amendment to § 12.01.1 (a) (v), proposed § 12.01.2 does not change the law, but makes the art dealer's responsibilities to the artist-consignor unequivocal. The cross-reference to Estates, Powers and Trusts Law § 11-1.6 underscores the art dealer's role as a “fiduciary” – a term not usually associated with a dealer – in the consignment process, and that a failure to uphold its obligations is a crime, albeit a misdemeanor.

Express Statutory Right to Sue

The Bill offers another new subdivision that would give the artist an express statutory cause of action against an offending art dealer. Proposed subdivision 3 states:

²⁰ New York Estates, Powers and Trusts Law § 11-1.6 (a), (d).

“Any person who has been injured by reason of a violation of this article may bring an action in his or her own name to enjoin such unlawful act, to recover his or her actual damages, or both. The court may award reasonable attorneys' fees, costs, and expenses to a prevailing plaintiff in any such action. Upon a consignor's establishing in any such action a prima facie case that the consignor delivered or caused to be delivered such work of fine art, craft or print to a consignee as described in paragraph (a) of subdivision one of this section and made a demand for return of the work or sale proceeds, the consignee shall have the burden of proving its defenses to the consignor's claimed right to return of such work or sale proceeds therefrom.”²¹

This provision has some notable features.

²¹ 2011 NY Senate-Assembly Bill S4988, A7189.

First, it provides not only a right to sue for damages, but also the ability to seek an injunction to prevent an unlawful act, which, of course, would arrest the occurrence of injury. For example, suppose an artist demands the return of a consigned work of art, but instead of returning the piece, the art dealer sells it to a collector. Under subdivision 3, the artist could sue for damages after the sale, but could have also sought an injunction to stop the sale before it took place.

Second, the provision permits a court to award attorneys' fees and costs to a successful plaintiff. Conceivably, having to pay what amounts to a penalty may deter bad behavior on the part of an art dealer. Further, an art dealer that finds itself on the wrong side of the statute may be more

amenable to settling a claim rather than letting a case – with its mounting fees and costs – drag on. Third, it defines a plaintiff's prima facie case: a showing that artwork was delivered (and accepted, presumably) on consignment, and that a demand for the return of the piece or sale proceeds was unheeded. Certainly, this provision would lend itself well to a motion for partial summary judgment.

In sum, the amendments to the artist consignment statute called for in the Bill make explicit some of the established safeguards and add an express statutory cause of action. Assuming the Bill passes and the amendments become law, it remains to be seen what effect, if any, they will have in protecting artists.

Paul J. Mantell (paulm2917@gmail.com, (585) 472-9508) is a member of the Bars of Pennsylvania and Maryland.