

## Art Law Gallery

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### Court Says Don't Rely on Fortune Cookie for Art Valuation

Beware of "fortune cookies" for advice, even when it's not the kind you crack, read, and eat. Just ask Najung Seung, who claims that Mary Dinaburg, a partner at gallery Fortune Cookie Projects, duped her into buying a Julian Schnabel painting entitled *Chinkzee* for a price three times its market value. Initially, Seung paid Dinaburg \$118,000 for a John Wesley painting entitled *Bulls and Bed*, only to discover that Dinaburg had sold the painting to someone else. Rather than returning the payment, Dinaburg offered Seung a \$200,000 credit towards the purchase of *Chinkzee* at the "gallery" price of \$380,000, and further represented the painting was worth at least \$500,000. But Seung soon learned that *Chinkzee* had been sold months earlier at an auction for \$156,000 based on an estimate price range of only \$60,000 to \$80,000, and that the market value was no more than \$110,000. As a result, Seung filed suit against Fortune Cookie Projects, seeking the return of her money based on fraud, negligent misrepresentation, promissory estoppel, and unjust enrichment.

The New York Supreme Court said tough luck in *Seung v. Fortune Cookie Projects* (No. 600537/09; 10/22/09) and dismissed all four claims. Notably, the court explained that art dealers generally do not have special relationships with buyers. Unlike a lawyer, the ordinary art dealer does not have formal training and expertise that may instill a special relationship of confidence and trust with her client. Rather, the relationship between seller and buyer is simply an "arm's length business relationship." Given this context, the court dismissed the fraud claim because Seung's "blind reliance" on Dinaburg's statements as to the painting's value was "not reasonable as a matter of law." Seung, the court advised, should have considered Dinaburg's representations as mere opinion or "puffery," and should have taken independent action to obtain her own appraisal. Accordingly, it was the court's belief that Seung's "failure to proceed with diligence or to exercise caution with respect to a business transaction" should not relieve her of the potential consequences of her actions.

The court also dismissed Seung's claim for negligent misrepresentation because she did not offer facts showing that Dinaburg possessed unique or specialized expertise in the valuation of contemporary art beyond that typical of any dealer in the field. While Seung offered "persuasive authority" urging that art dealers automatically fall within a category supporting a negligent misrepresentation claim, the court countered that allegations of superior knowledge or expertise in the art field are "per se insufficient to establish existence of a fiduciary duty." Additionally, the court clarified that "vague allegations of general expertise" are not enough to support a special relationship, and dismissed the claim for negligent misrepresentation because the

underlying relationship of trust and confidence required in such a claim was absent.

Next, the court dismissed the claim for promissory estoppel and agreed with the defendant's assertion that Dinaburg made no promises; at most, she made statements concerning *Chinkzee's* value. And even if such statements may be viewed as promises, the court posited that Seung could not have reasonably relied on them considering she made no effort to independently ascertain the painting's value.

Finally, in terms of unjust enrichment, the Court referred to *Mandarin Trading Ltd. v. Wildenstein* to justify dismissal of such claim. In *Mandarin*, the plaintiff relied on an appraisal letter by the defendant estimating the value of an 1892 Paul Gauguin painting entitled *Paysage aux Trois Arbres* at between \$15 and \$17 million, although the painting obtained a high bid of only \$9 million at an auction two months shortly thereafter. Apparently, the defendant held an ownership interest in *Paysage aux Trois Arbres*, and issued an inflated appraisal for its own benefit. Still, the *Mandarin* court rejected the plaintiffs claim for unjust enrichment, particularly because the plaintiff could have obtained its own appraisal. Applying such reasoning to the present case yielded the same result: Seung could not show enrichment is unjust if she could have, but did not, seek independent appraisal. Citing *Mandarin*, the court further noted that Seung cannot use unjust enrichment as a "back door to recovery" based upon reliance on Dinaburg's appraisal, when it was not entitled to rely upon her appraisal in the first place.

According to the court, a sale of art is like any other business transaction. Buyers should never blindly rely on sellers without seeking independent advice. Perhaps this way, a bad appraisal may still result in good fortune.