

Famed NYT Cartoonist Illustrates Winning Argument in Breach of Contract Action

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by Bruce R. Ewing



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For more than seven decades, the Arts sections of the *New York Times* featured cartoons by the famous artist Al Hirschfeld, whose works were celebrated for their clean crisp lines, as well as the artist's penchant for embedding the name of his daughter, Nina, in his images. After a long, rich life, Hirschfeld died in 2003 at the age of 99. Unfortunately, as is often the case with many artists, Hirschfeld left behind him a series of agreements concerning the licensing, sale and disposition of his works that have given rise to litigation, as reflected in a recent decision from the U.S. District Court for the Southern District of New York in Al Hirschfeld Foundation v. The Margo

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Feiden Galleries, Ltd., Case No. 16 Civ. 4135.

Margo Feiden and her Galleries began selling Hirschfeld's works on consignment in 1969, and their relationship was formalized in an agreement that was in effect until 2000. In that year, after a dispute between Hirschfeld and the Feiden Galleries arose, the parties entered into a new agreement. After Hirschfeld's death, the plaintiff Al Hirschfeld Foundation succeeded to Hirschfeld's rights under that agreement, which remained in effect until 2016. In that year, the Foundation took steps to terminate the parties' agreement, claiming that Feiden and her Galleries had materially breached their contractual obligations in multiple ways. The Foundation also sought and obtained a temporary restraining order, and then a preliminary injunction, granting it certain relief attendant to the filing of its lawsuit seeking, among other things, a declaration that the Foundation's termination of the parties' agreement was proper. For their part, the Feiden Galleries asserted various counterclaims against the Foundation.

On November 7, 2017, the Court issued a decision and order granting partial summary judgment to the Foundation and against Feiden and her Galleries on several of the key contested claims and counterclaims in the case, namely whether the defendants had materially breached the parties' agreement such that the Foundation's termination was proper. Rather than addressing all of the contractual breaches alleged by the Foundation, the court focused on two: (i) whether the Galleries had sold unauthorized reproductions of several Hirschfeld works in a manner not permitted under the license conferred by the agreement; and (ii) whether the Galleries were unable to account for twenty Hirschfeld works transferred to their custody on consignment. On the second issue, the Court found that there were no genuine disputes of material fact that the twenty works had been transferred to the Galleries, but had gone missing. The Court had little difficulty concluding that the loss of these works was a material breach of the Galleries' contractual obligations sufficient to warrant termination.

Of greater interest to practitioners is the manner in which the first alleged material breach was addressed and resolved in favor of the Foundation. For many years, Feiden and her Galleries had sold giclee reproductions of certain Hirschfeld works, in some cases in unlimited quantities. A giclee is a high quality photostatic reproduction of a work of art made via an inkjet printer, and the Galleries took the position that they were permitted to sell giclee prints under various provisions of the parties' agreement, particularly one that allowed the Galleries to reproduce works "in connection with [the Galleries'] promotion, advertising and marketing in furtherance of [the Galleries'] rights under this Settlement Agreement." The Court concluded as a matter of law that this provision allowed the Galleries to reproduce Hirschfeld's works for purposes of advertising and promotion, but not to create a new category of sales they could exploit. The Court also concluded that the Galleries' interpretation conflicted with the overall structure of the agreement with respect to the categories of works the Galleries could sell and the financial terms on which such sales were permitted. Indeed, even though giclees were a form of reproduction in existence in 2000 when the agreement was signed, it made no mention of them in specifying what the Galleries could sell and exploit, and how. The Court went on to reject the Galleries' claim that the Foundation had waived this breach over time, finding that the presence of a "no waiver" provision in the agreement precluded that argument as a matter of law.

The Court's decision highlights the importance of clarity in this and any other licensing relationship as to the scope of the rights being licensed by the licensor to the licensee. Indeed, even though the parties' relationship had endured for decades, and even though the Galleries' sale of giclees was longstanding and publicly ascertainable, the Court found that the Galleries had exceeded the scope of the rights granted to them, and that this was a material breach. As of this writing, the case remains pending as to other issues.