

removed as per 10/13/06
EHL order

~~UNDER SEAL~~

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

FISK UNIVERSITY,)
)
 Petitioner)
)
 _____)
)
 THE GEORGIA O'KEEFFE)
 FOUNDATION,)
)
 Counterclaim-Plaintiff,)
)
 VS.)
)
 FISK UNIVERISTY,)
)
 Counterclaim-Defendant.)

NE
NO. 05-2994-III

FILED
2006 OCT -3 PM 3:24
CLEM & HASTER
DAVIDSON CO. CHANCERY CL.
D.C.&H.

MEMORANDUM AND ORDER

The above-captioned matter was filed by Fisk University seeking a declaratory judgment from this Court that it be permitted to sell two artworks given to Fisk by Georgia O'Keeffe: *Radiator Building—Night, New York* painted by Ms. O'Keeffe and *Painting No. 3* painted by Marston Hartley. In its complaint Fisk asserts that these were donated to the University, along with 99 other artworks, following the death of Alfred Stieglitz, a renowned art dealer for the modern art movement in America and personal collector of art, and husband of Georgia O'Keeffe. In its complaint Fisk requests the Court to free it of any condition placed on the artworks that the paintings not be sold.

Facing serious financial difficulties, Fisk asserts that the sale of the artworks is a necessity.

A motion to intervene was filed by the Georgia O'Keeffe Foundation. The Foundation's intervention in the lawsuit was succeeded to by the Georgia O'Keeffe Museum. The Intervenor opposes the sale on the grounds that Ms. O'Keeffe's gift of the artworks was subject to a number of written conditions that the collection be exhibited together and intact, and that there was a no sale condition. The Museum has also filed a counterclaim asserting that Fisk has violated the conditions of the gift and seeking a permanent injunction to prohibit Fisk from selling any of the artworks from the collection or other appropriate remedies. As the successor in interest to the estate of Georgia O'Keeffe, the Museum asserts it has the right to enforce the conditions.

The Court granted the motion of the Foundation and then the Museum to intervene, concluding that the Intervenor had stated a colorable claim.

Now having engaged in discovery, Fisk is before the Court challenging the Museum's right to be a party to the lawsuit. This matter is presently before the Court on the motion of Fisk to dismiss the Museum from the lawsuit and to dismiss the Museum's counterclaim, on two grounds.

First, with respect to *Painting No. 3*, Fisk asserts that it was part of the artwork conveyed to Fisk from the Stieglitz estate. Although Ms. O'Keeffe was given a life tenancy in the artwork under the will of Alfred Stieglitz, Fisk asserts that Ms. O'Keeffe did not convey the artwork of the Stieglitz estate to Fisk based upon her life tenancy but,

instead, in her capacity as executrix of the will of Alfred Stieglitz. Fisk argues, therefore, that when the estate was closed, Ms. O’Keeffe’s rights to and interest in the artwork, based upon a conveyance as executor, terminated with the probate of the Stieglitz estate. No ownership of the Stieglitz artwork ever passed to Ms. O’Keeffe such that there was no Georgia O’Keeffe interest in the artwork passed to the Museum for it to have standing to oppose the sale of *Painting No. 3* or prosecute its counterclaim.

With respect to *Radiator Building*, it is now undisputed that it was not owned by Alfred Stieglitz and was not conveyed to Fisk from his estate but, instead, was owned by Ms. O’Keeffe and housed at Fisk by her personally at or around the same time as the Stieglitz estate artwork was donated. Fisk asserts that the terms of the letter of June 8, 1949, in which Ms. O’Keeffe imposed the no sale condition on Fisk make clear that the no sale condition was imposed by Ms. O’Keeffe in her capacity as executrix of the artwork of the Stieglitz estate and does not apply to the paintings Ms. O’Keeffe personally transferred to Fisk, including that it does not apply to *Radiator Building*.

After considering the record and argument of counsel, the Court denies the motion. The facts and conclusions of law on which the Court bases its decision are as follows.

The Court concludes from the documents filed with the New York Probate Court and the correspondence between Ms. O’Keeffe and Fisk in connection therewith, that it is more likely than not that Ms. O’Keeffe transferred the artwork from the Stieglitz estate in

her capacity as life tenant under the second article of Alfred Stieglitz' will. The Court bases this conclusion on the numerous specific references in the probate documents and correspondence that Ms. O'Keeffe was transferring the artworks of the Stieglitz estate in her capacity as life tenant of the artworks. Those references are as follows:

1. In the November 29, 1948 sworn Petition for Accounting and for Construction of Will Ms. O'Keeffe stated that as the life tenant of the testator's property she was desirous of exercising her right to transfer the decedent's photographs and works of art to Fisk.
2. As part of the March 9, 1949 filing by Ms. O'Keeffe to substitute an amended schedule of works of art to be distributed to each of six institutions, Dr. Charles S. Johnson, then president of Fisk, filed an affidavit under oath in which he acknowledged that the distribution to Fisk was intended to be made by Ms. O'Keeffe as life tenant of the Stieglitz estate.
3. In the response of the special guardian dated April 1, 1949, to Ms. O'Keeffe's petition he concludes that Ms. O'Keeffe, as life tenant of the testator's property, is desirous of exercising her right to transfer during her lifetime the decedent's photographs and works of art.
4. The final decree entered by the New York Court notes that the transfer of the photographs and other works of art was pursuant to the second article of the Will as proposed by the petitioner. The second article is the one which gives Ms. O'Keeffe a life estate in the artworks.

While it is true that there are references to Ms. O'Keeffe as executrix in the above probate documents and correspondence, these references, the Court concludes, are not deliberate and are not specifically stated in connection with the transfer of the artwork as are the life estate references. The Court concludes that the use of the term "executrix" in the above probate documents and correspondence is incidental, is not mutually exclusive of conveyance of the artworks by the life tenant, and occurred in tandem with Ms.

O’Keeffe’s conveyance of the artwork as a life tenant. For example on Page 10 of the Stieglitz settlement decree in which Ms. O’Keeffe is discharged from a liability as executrix, the artworks of the Stieglitz estate are specifically included among the bequests approved by the court. Another example is that the June 8, 1949 letter, placing the no sale condition on the artworks of the Stieglitz estate, is signed by Ms. O’Keeffe with the title executrix.

The Court therefore concludes that it is more likely than not that the artwork from the Stieglitz estate was conveyed to Fisk by Ms. O’Keeffe in her capacity as life tenant, not as executrix, as asserted by Fisk. Therefore, on that ground, the Court denies Fisk’s motion that the Museum lacks standing.

The second part of Fisk’s motion for summary judgment is that the no sale condition imposed by Ms. O’Keeffe in her June 8, 1949 letter to Fisk and the acceptance of that condition by Fisk’s president on June 13, 1949, do not apply to the four paintings, including *Radiator Building*, which were not part of the artwork from the Stieglitz estate but which were owned by Ms. O’Keeffe and placed with Fisk at the same time of the Stieglitz estate artwork. On this point the Court must, as well, deny Fisk’s motion for summary judgment.

The Court concludes that the Museum has made a sufficient demonstration that the June 8, 1949 letter from Ms. O’Keeffe imposing the no sale condition applies to the four paintings owned by Ms. O’Keeffe so as to defeat summary judgment. The Court’s conclusion is based on Ms. O’Keeffe’s statement in the June 8, 1949 letter that “Fisk

University will not at any time sell or exchange any of the objects in the Stieglitz collection [emphasis added]” In a previous letter of January 31, 1949 to Fisk, Ms. O’Keeffe stated that four pictures belonging to her, including *Radiator Building*, were to be placed at Fisk University on permanent loan and specified that the four pictures were “part of the Alfred Stieglitz Collection.”

The Court concludes that from the use of “Stieglitz Collection” in the June 8, 1949 no sale condition letter, written after the designation of that term in the January 31, 1949 letter to include the four paintings from Ms. O’Keeffe, there is a clear implication that the no sale conditions apply to the O’Keeffe paintings.

In so concluding, the Court rejects Fisk’s assertion that the first paragraph of the June 8, 1949 letter is an indication that the no sale condition was limited to the artwork conveyed to Fisk as part of the Stieglitz estate and did not include the four paintings. The first paragraph of the June 8 letter takes care of the business of the formal conveyance of the artwork from the Stieglitz estate to Fisk in anticipation of entry of the final decree of the probate court. Significant to the Court, however, is that the no sale condition is contained in a separate paragraph of the letter, indicating that it is a separate item of business from the first paragraph. The Court has also considered that the letter is signed by Ms. O’Keeffe as executrix, but that can also be explained as incidental and necessary for the first paragraph.

The Court keeps coming back to and finds most convincing as evidence of Ms. O’Keeffe’s intent is that the use by Ms. O’Keeffe of the term “the Stieglitz Collection” in imposing the no sale condition repeats the precise term “Stieglitz Collection” used by Ms.

O’Keeffe in the designation in her January 31, 1949 letter that her paintings be considered as part of the collection.

Thus, just from the text alone of the January 31, 1949 and June 8, 1949 letters, the Court is able to decide that there is a sufficient implication that the no sale condition applies to the four paintings owned by Ms. O’Keeffe to defeat summary judgment.

There is, though, further proof in the summary judgment record that removes any ambiguity and provides a clear implication. It is Fisk’s actions over the course of 50 years after the gift and indicia from the collection itself.

All the Fisk officials deposed to date in this case—Walter Leonard, the president of Fisk from 1977 through 1984; Kevin Grogan, the director of Fisk University Galleries from 1992 through 1999; and Opal Baker, the director of Fisk University Galleries from 1999 through 2002, testified that they knew that *Radiator Building* did not come from the Stieglitz estate but instead came from Ms. O’Keeffe directly, but, regardless of that knowledge, they each understood that the no sale conditions applied to *Radiator Building* and the other three paintings from Ms. O’Keeffe just as much as it did to the works from the Stieglitz estate.

As to the clues from the collection itself, Kevin Grogan testified that *Radiator Building* is central to the representation of the Stieglitz Collection as a whole. It is undisputed that Ms. O’Keeffe selected and assembled what would comprise the Stieglitz Collection at Fisk. The significance of inclusion of *Radiator Building*—a painting owned by Ms. O’Keeffe but designated by her as part of the Stieglitz Collection—is that it is the only work of art, to Mr. Grogan’s knowledge, that Ms. O’Keeffe ever produced which

specifically referenced her husband. Ms. O’Keeffe actually produced a number of skyscraper pictures at the time she produced the *Radiator Building* and so the painting in that respect is not unique. *Radiator Building*, however, contains a neon sign flashing “Stieglitz.” Mr. Grogan testified that the *Radiator Building* painting was a way of identifying the collection and that *Radiator Building* is the signature piece of the collection. Mr. Grogan characterized the Stieglitz Collection, including *Radiator Building*, as “a 101 object sampling of the entire collection of Alfred Stieglitz assembled over a period of 50 years.”

Based upon all of the foregoing, the Court concludes that the Museum has made a sufficient demonstration that the June 8, 1949 letter intended the no sale conditions to apply to the four O’Keeffe paintings, including *Radiator Building*, so as to defeat summary judgment.

Finally, based upon the argument and authorities at pages 18 through 27 of the Museum’s response to Fisk’s motion for summary judgment, the Court rejects Fisk’s argument that because Ms. O’Keeffe and Fisk did not expressly state words of reversion in their offer and acceptance of the conditions the conditions at issue in this case were prefatory and inoperable.

It is therefore ORDERED that Fisk’s motion for summary judgment is denied. The Museum has standing to proceed in this matter and its counterclaim remains pending.

It is further ORDERED that unless notified, on or before 4:00 p.m. Wednesday, October 4, 2006, by counsel for a party to maintain this memorandum and order under seal, the Court shall remove the seal of the memorandum and order and file it in public view.



ELLEN HOBBS LYLE
CHANCELLOR

cc: Stacey Garrett
Charles Bone
Anne Martin
C. Michael Norton
William Harbison
Andrée Blumstein
Stephen Hurd