To be Argued by
Richard A. Altman

Supreme Court of the State of New York
Appellate Division : First Department

New York County Clerk Index No. 600823/07

JOEL THOME,

Plaintiff-Appellant,

-against-

THE ALEXANDER & LOUISA CALDER FOUNDATION a/k/a THE CALDER FOUNDATION, HOWARD ROWER, ALEXANDER S.C. ROWER, MARY CALDER ROWER, SANDRA CALDER DAVIDSON and SHAUN DAVIDSON,

Defendants-Respondents.

PLAINTIFF-APPELLANT'S BRIEF

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QUESTIONS PRESENTED

1. Does a New York not-for-profit charitable foundation, created to compile a comprehensive catalog of the works of a deceased artist, and which invites owners of such works to submit materials regarding them, and which accepts such submissions, have a legally enforceable obligation to evaluate the materials and express a good-faith opinion as to the authenticity of such works within a reasonable time?

The lower court held that it did not, and that no such obligation ever arose.

2. Where no specific time is agreed to for such a foundation to authenticate such works, and the foundation refuses to do so, when does a cause of action accrue for breach of contract?

The lower court held that the statute runs from when the materials are submitted.

3. Is there any liability arising from the refusal of such a foundation to authenticate an artwork if their refusal causes an owner to lose a sale?

The lower court held that there was no such liability.

PLAINTIFF-APPELLANT'S BRIEF

Plaintiff-appellant Joel Thome's attorney, Richard A. Altman, submits this brief in support of this appeal from an order and judgment of the Supreme Court, New York County (Ramos, J.), which granted respondents-defendants' motion to dismiss on the grounds of failure to state a cause of action and the statute of limitations, and denied appellant's cross-motion for summary judgment.

The lower court erred in dismissing the action, and in holding that a not-for-profit corporation has no obligation under the facts of this case. In his cross-motion, appellant submitted overwhelming evidence to support his claim, none of which respondents opposed. Thus the lower court erred in refusing to evaluate that evidence and grant the cross-motion for summary judgment on certain of the claims.

STATEMENT OF THE CASE

1. The Work, its History and Re-creation

This is a dispute over the authenticity of two theatrical stage sets and related materials ('the Work") created by renowned artist Alexander Calder and owned by plaintiff-appellant Joel Thome, a prominent musician, composer and conductor of contemporary music. He is the founder of Orchestra of Our Time, a 501(c)(3) corporation, which has performed all over the world (71). He received a Grammy Award in 1993 for his work with rock icon Frank Zappa (72).

Mr. Thome seeks in this action a declaration that the Work is an authentic Calder, and damages directly caused him by respondents' willful and deliberate refusal to evaluate and determine the authenticity of the Work in good faith. Those damages included the loss of two firm commitments from collectors who wanted to buy the Work from him.

This appeal raises several issues of first impression, and is of great importance to "the New York City art market, where masterpieces command extraordinary prices at auction...our decision today is in part influenced by our recognition that New York enjoys a worldwide reputation as a preeminent cultural center." *Solomon R. Guggenheim Foundation v. Lubell*, 77 N.Y.2d 311, 314 and 320 (1991).

The issues are of pressing importance as well. *See DeGeer v. Authentication Committee for the Estate of Jean-Michel Basquiat*, Index No. 601224/08 (Sup.N.Y.Co.2008); *Sperone Westwater Inc. v. Archivio Alighiero Boetti,* 08 Civ. 03262 (S.D.N.Y.2008); *Simon-Whelan v. The Andy Warhol Foundation For The Visual Arts, Inc.,* 07 Civ.06423 (S.D.N.Y.2007), three pending cases in which the issues of authenticity of artworks and the obligations of foundations or other authenticating bodies are central.

See also Walder, Suit Proceeds Against Christie's Auction House Over Fake Basquiat, N.Y.L.J. Nov. 14, 2008 at 1; Taylor, *Lawsuits Challenge Basquiat, Boetti Authentication Committees*, http://www.nysun.com/arts/lawsuits-challenge-basquiat-boetti-authentication/75664/ ?print=4587718221 ("What's in a name? When the name is that of a famous artist, the answer can be millions of dollars. So it's small wonder that disputes over the authenticity of artworks can be heated, and as prices have risen, particularly for 20th-century art, more of those disputes have ended up in court.")(accessed December 1, 2008); Taylor, Is Authentication a Game of Monopoly?, N.Y. Sun, October 5, 2007, *available at* hhttp://andywarholartauthentication.blogspot.com (accessed December 1, 2008).

> The Andy Warhol Authentication Board is under attack from collectors and dealers who allege that the four-member panel is rejecting genuine works by the artist. Complaints range from disagreement as to what constitutes an authentic work of art, to accusations of a conspiracy to control the Warhol market.
> http://andywarholart-authentication.blogspot.com/2007/10/artnewspaper-oct-2003.html (accessed December 5, 2008);

The present case is believed to be the first appellate case on the subject, and the Court's decision will have a significant impact on these and other cases.

The Work consists of four parts: (1) a large stage set; (2) a smaller version suitable for smaller theatrical venues; (3) a maquette for the stage set; and (4) documents created around the time. The Work was created in 1975-6 under Calder's direct supervision, in connection with a theatrical performance in Manhattan of a 1918 work by French composer Erik Satie entitled *Socrate.* Photographs of the large stage set are at pages 119-20 of the record on appeal. A video of part of the performance may also be viewed at http://www.youtube.com/watch?v=yeMT68Rq8cs (accessed December 1, 2008).

The history of the Work and the process of its creation is recounted in detail in the verified complaint and Mr. Thome's affidavit (53-67, 71-81)[1]. The stage set was originally created in 1936 by Calder, working with composer Virgil Thomson, and was mounted in a production at the Wadsworth Atheneum in Hartford, Connecticut. Soon thereafter, however, the set was destroyed (55, 72).

In 1975, Mr. Thome was talking with Thomson about that original production, and they had the idea of re-creating the set. Thomson approached Calder, who lived in France at the time, and Calder was enthusiastic, saying, "it would be fun to revive that bit" (55). They then set about to re-create the set (56).

Calder came to New York in connection with a major exhibition of his work at the Whitney Museum, entitled "Calder's Universe", worked while here on the plans for the set with his dealer, curators at the Whitney, with Mr. Thome, and, most significantly, with members of his family, including his wife, his daughter and his

[1] Numbers in parentheses refer to pages in the record on appeal.

son-in-law, the latter two of whom are individual defendants in this action. He approved the final plans for the two sets and the maquette, and they were fabricated under his supervision. Mr. Thome paid most of the costs of fabrication (56).

Shortly before the performance, Calder died suddenly (56, 74). The performance was postponed for a year and then put on at the Beacon Theater in New York as a memorial to him, to considerable public acclaim and critical praise (see copies of reviews at 97-120). Since that time, Mr. Thome has continuously owned the Work, and paid for its storage and maintenance to the present day.

2. The respondents.

In 1988, the defendant Calder Foundation was formed in New York as a private foundation under the New York Not-for-Profit Corporation Law. Its principal charitable purpose, as stated in its 2005 tax return, is "cataloguing all the works produced by the artist Alexander Calder and making his works available for public inspection in order to facilitate art education and research." (126). According to the Foundation's website:

> Since 1987 the Calder Foundation has documented more than 17,000 works made by Alexander Calder for publication in a catalogue raisonné. *The catalogue raisonné seeks to be comprehensive in recording every work of art created by Calder*: from monumental sculptures, mobiles, and stabiles to paintings, drawings, and lesser known work, such as jewelry and household objects.

> The Foundation database records the title, date, size, media, provenance, and publication and exhibition details for each work of art. In addition, the works are documented by over 22,000 photographs. The Foundation is in correspondence with over 4,000 museums, dealers, collectors, auction houses, and scholars world-wide. Research on each piece continues with daily updates to the records, including changes in ownership and current exhibition and publication references.
>
> *Owners of works attributed to Alexander Calder are encouraged to submit applications for the catalogue raisonné and to update the Foundation on changes to their collections.* As the catalogue raisonné will be a completely illustrated reference, applications made without a photograph cannot be considered for inclusion. Photographs submitted become the property of the Foundation as a permanent part of the archival record, as well as for reproduction in the catalogue raisonné. Please note that the Foundation does not provide valuations of works. (emphases added)(76).

The individual respondents are Alexander S.C. Rower (a/k/a Sandy Rower), the Foundation's Chairman and Director and Alexander Calder's grandson), Mary Calder Rower (his daughter), Sandra Calder Davidson (another daughter) and Shaun Davidson (her husband)(68). They are the trustees of the Foundation. Respondent Howard Rower is deceased (48).

3. Thome approached the Foundation, which agreed to consider the Work for inclusion in the *catalogue raisonné*, but did not do so.

In 1997, Mr. Thome needed funds and desired to sell the Work. He approached the Foundation, requesting that it include the Work in the *catalogue raisonné* of Calder's works which was being prepared (57, 77), and submitted the materials necessary for evaluation. The inclusion of a work of art in a *catalogue raisonné* is essential to its marketability, because the art market considers exclusion as tantamount to a statement that the work is not authentic, and thus valueless. Thus these foundations have a monopoly position in the art market, since they can effectively and unilaterally determine the authenticity (or inauthenticity) of works by artists whom they represent, and thereby control the market for them. The resultant potential for self-dealing is plain, particularly when, as here, individual trustees own works by the artists (81).

"One of the tools used by art historians to trace ownership is an artist's *catalogue raisonné*. A *catalogue raisonné* is an annotated, illustrated book of a particular artist's works, usually prepared by art historians, scholars, and dealers, which constitutes 'a definitive listing and accounting of the works of an artist.'" *Orkin v. Taylor*, 487 F.3d 734, 736 (9th Cir.2007), *cert.den.*___U.S.___, 128 S.Ct. 491 (2007)[2], *quoting DeWeerth v. Baldinger*, 836 F.2d 103, 112 (2nd Cir.1987). "A *catalogue raisonné* is regarded as a definitive catalogue of the works of a particular artist; inclusion of a painting in a *catalogue raisonné* serves to authenticate the work, while non-inclusion suggests that the work is not genuine." *Kirby v. Wildenstein*, 784 F.Supp. 1112, 1113 (S.D.N.Y.1992).

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[2] Appellant's present counsel represented the Orkin petitioners in the U.S. Supreme Court.

Mr. Thome reasonably expected that because of his past relations with, and the close personal involvement of, Calder and his family in the project, such inclusion would be routine (76). He submitted all of the required documentation, and in September 1997 received an acknowledgment from the Foundation that his submission was complete (141-42). The acknowledgment stated:

> Thank you for the information which you submitted to our office...We are now in receipt of all requested material pertaining to the pieces in your collection and have everything necessary to consider these works for inclusion in the catalogue raisonné.
>
> We would be grateful to hear from you if your works should be sold, or if you should acquire new works in the future. Additionally if you come across anyone who owns a Calder, we would appreciate it if you could inform them of our project and urge them to contact us. We thank you for your generous contribution toward the success of this enormous project. (142).

Two months later, Mr. Thome had a telephone conversation with respondent Alexander Rower, in which the latter promised to authenticate the Work (77):

> In November of that year, Alexander Rower, the Director of the Foundation, discussed with me over the telephone how they would describe the Work, given the issues raised by its uniqueness in Calder's *oeuvre*. Mr. Rower determined that the main set, which is about thirty feet long, would be described as a "recreation," based upon the plans which I had prepared, relying in part on Calder's original 1936 plans. He also told me that the new set, which was two-thirds the size of the main set, would be described as a "new catalogue creation." *He promised to me that the pieces would be included in the Calder catalogue raisonné* in a manner to be determined (perhaps in a special

section for theatrical sets), to be published in the future (emphasis added).

In 1998, Mr. Thome suffered a stroke (77). Due to his need for funds, he sought to sell the Work, and in 2004 and 2005 received firm offers from two persons, named Jean Zimmermann and Lincoln Stoller (57-58). The parties agreed on all essential terms and conditions, the main one of which was the issuance of numbers assigned to works once they are included in the *catalogue raisonné*. But the respondents have refused to issue the numbers to this day, despite Mr. Rower's promise, repeated demands from Mr. Thome and his attorney, and the two would-be buyers. In 2004 and 2005, the two buyers backed out solely because the numbers were not issued. (57-58, 78-80).

Thus, there were at least four demands for performance before the present action was commenced: (1) Mr. Thome's initial telephone conversation in November 1997 (which was, moreover, a specific detailed promise by Mr. Rower to perform and a discussion about how to do so); (2) a letter he wrote to Mr. Rower in 2002 (143); (3) the demands he and the potential buyers made in connection with Mr. Thome's attempted sales of the Work; and (4) in January and February 2007, when Mr. Thome's attorney wrote to the Foundation's attorney, requesting that the Work be authenticated, failing which Thome would commence the present action(173-75). There was no substantive response.

PRIOR PROCEEDINGS

This action was commenced on March 14, 2007 (52) and a copy of the summons and verified complaint was mailed to respondents' law firm on that day, accompanied by a request to acknowledge service of process. Thereafter, the parties had settlement discussions, but after they proved fruitless, appellant's counsel requested a response to the complaint.

The respondents moved to dismiss the complaint on the grounds of the statute of limitations and the failure to state a cause of action (48-9). The individual defendants Mary Calder Rower, Sandra Calder Davidson and Shaun Davidson moved pursuant to CPLR 3211(a) subd. 11 to dismiss the complaint as to them on the ground of immunity from liability pursuant to N-PCL § 720-a.

Mr. Thome then cross-moved for summary judgment treatment of respondents' motion, pursuant to CPLR 3211(c), with respect to the first, second, third, fourth, seventh and eighth causes of action (70). On November 13, 2007, the lower court heard oral argument on the motions (23-47), and took the motions under submission.

Literally moments after the oral argument, a magazine article about the case came to appellant's counsel's attention for the first time. The article contained an admission by respondent Alexander S.C. Rower, essentially acknowledging the authenticity of the Work (184). Counsel immediately sent a copy of the article to the lower court, requesting that it be considered as part of the motion papers (181) Respondents' counsel objected to its inclusion (182). A few days later, the lower court rejected the submission and returned both letters.

While the motions were *sub judice* in the lower court, appellant served a notice to take the deposition of defendants Alexander S.C. Rower and Mary Calder Rower (the lower court had a rule in effect that service of a CPLR 3211 motion does not act as an automatic stay of discovery). He also served a notice for discovery and inspection of documents. Respondents objected, and the lower court issued an oral directive staying all discovery pending determination of the motions.

The lower court then issued a decision on April 17, 2008, which was entered on April 29 (11-24). In the decision, the lower court held that the Foundation had no obligation to authenticate works by Calder, that Thome had failed to state a cause of action and that in any event the statute of limitations had run as to all of his claims.

Following the entry of the decision, final judgment was entered against Thome and in favor of defendants on May 29, 2008, with an award of costs in the amount of $245 (3-6). The judgment was paid and a satisfaction entered (9).

Appellant served and filed a timely notice of appeal on May 4, 2008, following entry of the decision and order dismissing the action (1). On November 13, 2008, appellant moved in this Court to amend the record to include the magazine article rejected by the lower court; that motion is *sub judice* as of the date of filing of this brief.[3]

SUMMARY OF ARGUMENTS

The opening sentence in the decision under review states the central issue: "This action raises an issue of first impression, namely, whether a foundation dedicated to the preservation of an artist's work and legacy has a duty to the public to authenticate works alleged to be created by the artist." (12). Perversely, however, the court then held that such foundations do *not* have such a duty, notwithstanding (1) the requirements of the N-PCL, (2) specific language in the respondent

[3] The magazine article, the letter requesting that it be considered and the respondents' letter objecting are included in the record, and cited at several places in this brief. If this Court grants the motion, the record and brief will remain as filed. If the Court denies the motion, the article and letters will be physically removed from the record, and any references to it in this brief should in that event be deemed stricken. Waiting for the decision would have delayed filing this brief until January 2009.

Foundation's website and tax returns to the contrary, (3) actions indicating their acknowledgment of that duty and their intention to fulfill it, including a telephone conversation in which the Foundation's director promised to do so, and even (4) a public admission by that director that the Work is authentic.

The obvious questions which follow from the lower court's erroneous conclusion (but which it did not answer) are: (1) if such foundations have no such obligation, and can arbitrarily and capriciously ignore their own stated reasons for existing, what public purpose is served by permitting them to have tax-exempt status, with self-perpetuating (and self-dealing) boards of trustees?; (2) why should they then be permitted to exist in that form, rather than being treated as ordinary business corporations?; and (3) what should be the rights of owners of artworks when the foundation's deliberate refusals to act render their property valueless and unsaleable?

Such foundations occupy a monopoly position in the market for the works of the artists whose legacy they supposedly maintain. A statement of authenticity is absolutely essential to the marketability of such works; without it the work has no value and cannot be sold. And given the likelihood of self-dealing by its trustees (who frequently have art collections of their own), and the secretive nature of the art market in general (*see* Foy-Smith, Who buys paintings for $104m?, BBC News Online, May 6, 2004 http://news.bbc.co.uk/ 1/hi/ magazine/3689967.stm)(accessed

December 5, 2008), it should be unacceptable public policy that these foundations should have no obligation to act in good faith to make determinations of authenticity with reasonable promptness after accepting submissions. Yet that is what the lower court held, and it is that holding which this Court should reverse.

The lower court erred by dismissing a well-pleaded complaint, by evaluating the evidence submitted to it on the cross-motion against appellant (despite respondents' failure to submit any evidence whatsoever in support of their position), by mischaracterizing appellant's evidence and his position, and by erroneously applying the rules for accrual of the statute of limitations to appellant's claims. The lower court further erred by refusing to permit appellant to conduct any discovery, and by refusing to permit the inclusion of the magazine article.

The facts of this case make clear that a valid contract arose upon Mr. Thome's submission of the materials and their acceptance by the Foundation, that the Foundation breached that contract, and that he was damaged by that failure. This action is timely, it states causes of action, and respondents' failure to submit any evidence in opposition to appellant's summary judgment motion should have been deemed conclusive as to the facts. Appellant is entitled to summary judgment on all but the fifth and sixth claims, the fact-intensive nature of which will require discovery.

This Court should reverse the lower court's dismissal and direct entry of judgment in appellant's favor on those claims, with the remaining claims remanded for further proceedings, for discovery and for a trial on the issue of the damages to which he is entitled. At the very least, the complaint was sufficient to survive a motion to dismiss, and it should be reinstated in full, or the lower court should have granted appellant's request for leave to replead.

ARGUMENT

POINT I

THOME'S SUBMISSION IN RESPONSE TO THE FOUNDATION'S OPEN OFFER CREATED A UNILATERAL CONTRACT, REQUIRING THE FOUNDATION TO DETERMINE AUTHENTICITY.

The lower court said that the Foundation's solicitation of submissions by owners of Calder's artworks did not constitute an offer, and that the Foundation's acceptance of Mr. Thome's submission did not create an enforceable contract:

> all of the critical indicia of a binding and enforceable agreement are lacking from Thome's allegations, namely an offer and acceptance, mutual assent, an intent to be bound by material terms, and consideration. Moreover, acceptance on the part of the offeror must be unequivocal in order to effectively create a contract. Rather than constituting an acceptance by the Foundation, the only obligation expressed in the Foundation's postcard was to consider Thome's material, for the purpose of determining whether the material would be accepted. In other words, by submitting materials to the Foundation and

> requesting authentication, Thome merely placed an "order" with the Foundation.
> The mere acknowledgment that an order will be given attention will not, standing alone, constitute an acceptance, because it does not imply any promise to comply with the terms of the order. Consequently, the Foundation's postcard acknowledging receipt of the materials and a pledge to consider them did not constitute an acceptance.
> (16)(citations omitted).

The lower court further described as the Foundation's postcard response as "equivocal" and said that the conversation between Mr. Thome and Mr. Rower did not contain a "clear and unambiguous promise...to authenticate the Set or issue a Catalogue number" (17), and thus there is no cause of action based upon promissory estoppel.

This is a complete misstatement of the record. The conversation between Mr. Thome and Mr. Rower discussing how the Work was to be described was both a clear unequivocal acknowledgment of authenticity and a promise to perform: "He promised to me that the pieces would be included in the Calder *catalogue raisonné* in a manner to be determined (perhaps in a special section for theatrical sets), to be published in the future" (77).

If Mr. Rower had reason to doubt its authenticity, what would be the purpose of their conversation? It is obvious that the issue had already been decided, and that their discussion was simply over details of how this unique Work would be described, not whether it was authentic in the first place. And Mr. Rower did not dispute Mr. Thome's description of the conversation. It is unreasonable to characterize this conversation as anything but a promise to include the Work as an authentic Calder, and the respondents should have been estopped from arguing otherwise.[4]

Second, the Foundation's statements in its website and tax return constitute open offers to owners of putative Calders to submit applications with photographs for inclusion in the *catalogue raisonne*. The statement are offers to enter into unilateral contracts, which are automatically created by performance of the terms of the offer rather than by exchanges of promises. Submission of works and their acceptance by the Foundation constitute such performance, without the need for any further statements of assent or intent to be bound. *See generally Flemington National Bank & Trust Co. v. Domler Leasing Corp.*, 65 A.D.2d 29 at 36-37 (1st Dept.1978). Thus it was the Foundation, not Thome, which made the offer, and it was Thome, not the Foundation, who accepted the offer by performance in accordance with the offer.

The lower court cited only one case for the proposition that acknowledgment does not constitute acceptance, *Van Keuren v. Boomer & Boschert Press Co.*, 143

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[4] This is made conclusive by Mr. Rower's admission that "[w]e'll authenticate it for Orchestra of Our Time, but we won't for another party unless they can prove they're the rightful owner." (184)(Mr. Thome is the founder of the Orchestra, *supra* at 2). But issues of ownership are irrelevant to the Foundation's obligations, which run to a work, not its owner. A work of art is either real or fake, regardless of who owns it.

A.D. 785 (3rd Dept.1911), and that case does not support the conclusion here. The postcard in that case said only that "[y]our order of Aug. 29, for Press, etc., received through Mr. Wm. A. Lawrence, and will have our best attention." The Court said that this did not constitute an acceptance, both because of its vague language, and because the person receiving the order was only a salesman of doubtful authority. This is hardly the present case, in which the acknowledgment was unequivocal, came from an Assistant Editor (142), and, two months later, from the Foundation's Director himself. Mr. Thome did not "merely place[] an 'order' with the Foundation" as the lower court said (16); he accepted the Foundation's offer by full performance, and the Foundation's mutual assent (and agreement to be bound thereby) was shown both by the acknowledgment and by Mr. Thome's telephone conversation with Mr. Rower two months later.

Third, charitable foundations enjoy special privileges in the law. In addition to the primary privilege of not having to pay taxes on the income from their educational activities, promises to make contributions to them are enforceable without consideration. "Our courts have definitely ruled that such subscriptions are enforceable on the ground that they constitute an offer of a unilateral contract which, when accepted by the charity by incurring liability in reliance thereon, becomes a binding obligation." *I. & I. Holding Corp. v. Gainsburg*, 276 N.Y. 427, 433 (1938); *In re Versailles Foundation*, 202 A.D.2d 334 (1st Dept.1994).

This is an extraordinarily privileged exception to the ancient requirement that every contract must be supported by consideration, and it exists because charitable not-for-profit foundations have public roles and functions which go beyond engaging in pure commercial transactions. With such privileges must come equal responsibilities to act at all times in the public interest and avoid any actions which could appear self-serving.

In fact, we would go further and argue that Mr. Thome was actually doing a favor for the Foundation by submitting his materials for consideration. If its goal is truly "cataloguing *all the works* produced by the artist Alexander Calder" as its tax return claims, then *anyone* who submits a Calder for inclusion is advancing and assisting the Foundation's educational purpose. Its refusal then to evaluate in good faith works submitted is in direct conflict with that purpose, for if the work <u>is</u> authentic, then refusal to evaluate it leaves the *catalogue raisonné* incomplete, to the detriment of art scholarship and the Foundation's educational purpose.

The economic consequences of inclusion in the *catalogue raisonné* should be outside that purpose, and should ideally be of no consequence to the Foundation. The parties' interests are fundamentally different: Mr. Thome needed the Work to be included so he could sell it, but the Foundation needed it included because its purpose was to compile a complete list. That did not happen here; the Foundation had other conflicting interests. The complaint alleges that the respondents' refusal was motivated by their own economic benefit and that they stood to gain by controlling the market (63, 81). That allegation of self-dealing was sufficient to withstand a motion to dismiss, particularly where the lower court barred any discovery so that appellant could further support his allegations.

The lower court erroneously characterized appellant's submission to the Foundation as "an order." But he did not "order" anything; he responded to the Foundation's open offer by performance. His performance was accepted and acknowledged as sufficient, thereby creating a unilateral contract. The lower court erred in finding that no contract had been created, and that holding should be reversed.

POINT II

<u>THE COMPLAINT STATES EIGHT CAUSES OF ACTION.</u>

"In the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference." *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 31 (2005). The lower court failed to apply this elementary principle, and once it erroneously concluded that there was no enforceable contract between the parties, it compounded the error by dismissing everything else. But because there was a valid contract between the parties, and because that contract was breached, all of the other causes of action are viable.

1. Declaratory Judgment

The first cause of action is for a declaratory judgment that the Work is an authentic work of and by Alexander Calder (59). The lower court said that there was no justiciable controversy regarding the authenticity of the Work, and refused the requested declaration:

> Thome has failed to allege the existence of a live, justiciable controversy between himself and the Foundation or other defendants that would entitle him to a declaration, and ultimately, an injunction. Thome has failed to allege the existence of a duty, established either in contract, tort, or by statute, between himself and the Foundation, dedicated to the preservation of Calder's work and legacy, or the individual defendants as members of the Foundation's board, that would obligate the defendants to authenticate works alleged to be created by the artist, Calder. Thus, the issue of authenticity of the Set is not properly before the Court (22).

In the first place, the authenticity of the Work is irrefutable and there can be (and are) no issues of fact about it. The close personal involvement of Calder, his wife, his daughter, his son-in-law and other family members, as shown by the photographs and the extensive advertising and promotional materials from the time (92-120) are conclusive.[5]

Second, even if there were an issue of fact, it would be irrelevant on a motion to dismiss, where everything in the entire complaint is presumed to be true and a plaintiff is entitled to all inferences in his favor. So as a matter of pleading, the cause of action is sufficient to establish the existence of a justiciable controversy, CPLR 3001. Moreover, this is so "whether or not further relief is or could be claimed." *Id.* Thus the existence of other causes of action does not preclude the declaration appellant seeks.

Third, the lower court had complete authority to determine the authenticity of this and any other art work where the issue is properly presented. Courts have done so before, including in cases involving the Calder Foundation. *See, e.g.*, *The Greenberg Gallery, Inc. v. Bauman*, 817 F.Supp. 167 (D.D.C.1993), a suit to rescind the sale of a Calder because it was allegedly a fake: "I now find plaintiffs have failed to prove or persuade by a preponderance of the evidence that the mobile is not the Calder Rio Nero." 817 F.Supp. at 168; *In re Segretario*, 258 B.R. 541 (Bkrtcy.D. Conn.2001); *AE Liquidation Corp. v. Segre*, 2000 WL 204525 (S.D.N.Y. Feb. 18,

[5] They are all admissible evidence under the ancient document rule, inasmuch as they are more than 30 years old, *see Tillman v. Lincoln Warehouse Corp.*, 72 A.D.2d 40 (1st Dept.1979), and thus prove the truth of the facts therein.

2000); *Hahn v. Duveen*, 133 Misc. 871 (Sup.N.Y.Co. 1929)(dispute over authenticity of Leonardo painting); *Estate of Querbach v. A&B Appraisal Serv.*, No. L-089362-85 (N.J. Super.Ct. Bergen Co.1987), *reproduced in* Feldman, Weil & Biederman, *Art Law* 282 (1988 supp.)(appraiser liable for negligence in misidenti-fying a painting, court held that it was an authentic J.R. Cropsey).

The first cause of action alleges that appellant is the owner of the Work, that it is an authentic creation of Alexander Calder, that the Foundation refuses to authenticate it despite appellant's repeated demands, and that the Foundation is the only entity recognized by the art market which can do so (59). This is clearly a good cause of action. This is no abstract legal dispute, but one in which Mr. Thome has a clear personal interest, and the existence of which has twice cost him the opportunity to sell the Work. Moreover, the evidence submitted establishes that there can be no reasonable dispute as to the authenticity of the Work. So not only should the cause of action not be dismissed, but plaintiff is entitled to summary judgment on it, declaring that the Work is an authentic Calder and that he is entitled to the issuance of *catalogue raisonné* numbers.

2. Mandatory injunction

The second cause of action requests a mandatory injunction compelling the respondents to place the Work in the *catalogue raisonné* and to issue appropriate numbers reflecting its status as authentic. When asserting a claim for a declaratory judgment, a party shall "state whether further or consequential relief is or could be claimed and the nature and extent of any such relief which is claimed." CPLR 3017(b). In this cause of action, Mr. Thome seeks relief appropriate to the requested declaration of authenticity, which is that the respondents be ordered to take such steps as are necessary and appropriate to reflect that authenticity, and in the *ad damnum* clause, he also demands appropriate damages for their refusal to do so.

A plaintiff may demand an injunction as part of declaratory relief, *see For the People Theatres of N.Y., Inc. v. City of New York,* 6 N.Y.3d 63 (2005); *Wylan v. Pandozy*, 22 A.D.3d 385 (1st Dept.2005). Appellant demanded "a permanent mandatory injunction compelling defendants to issue *catalogue raisonné* numbers for the Work forthwith" (60). This is sufficient, and given that he was entitled to summary judgment on the issue of authenticity, he was entitled to summary judgment on the second cause of action as well and to the requested mandatory injunction.[6]

[6] An additional basis for such an injunction is in the nature of a writ of mandamus or an Article 78 proceeding. Corporations, as creatures of the State, are subject to such writs and proceedings, just as much as government entities. CPLR 7802(a); *Matter of Weidenfeld v. Keppler*, 84 App.Div. 235 (1st Dept 1903), *aff'd* 176 N.Y. 562. "A corporation can be compelled in an article 78 proceeding to fulfill not only obligations imposed upon them by State or municipal statutes but also those imposed by their internal rules." *Matter of Gray v. Canisius College of Buffalo*, 76 A.D.2d 30, 33 (4th Dept.1980) (citation and quotation marks omitted).

3. Interference with Prospective Advantage

The third cause of action asserts that respondents tortiously interfered with appellant's prospective advantage, in that two persons were ready, willing and able to purchase the Work, so long as he could provide *catalogue raisonné* numbers, and that because of respondents' willful refusal to provide the numbers, he lost both transactions.

The tort requires allegations that (1) defendants knew of a proposed contract between plaintiff and another; (2) defendants acted intentionally to interfere with that relation; (3) but for defendants' interference a contract would have been entered into; (4) defendants' conduct involved wrongful means, more culpable than would suffice for the tort of interference with an existing contract; and (5) damages. *NBT Bancorp, Inc. v. Fleet/Norstar Finance Group*, 87 N.Y.2d 614, 621 (1996).

The requisite allegations are pleaded and the claim should not have been dismissed. Appellant alleged that (1) he had "two ongoing business relationships with persons who were ready, willing and able to purchase the Work at an agreed price and committed to do so" (¶68 at 60); (2) the only condition to the sale was that respondents provide *catalogue raisonné* numbers (*id.* at ¶ 69); (3) they were fully aware of appellant's relationships with the potential purchasers (¶ 70), and in fact they approached the Foundation themselves or through agents; (4) the respondents intentionally refused to provide the numbers, for their personal benefit, using "dishonest, unfair or wrongful means to interfere with plaintiff's relationships with the potential purchasers" (¶¶ 71-2); (5) those means were outside of the scope of their employment with the Foundation (and thus wrongful)(¶ 73); (6) because of respondents' actions, the Work has been rendered unmarketable (¶ 74); and (7) damages (¶ 75).

Thus appellant has stated a claim, not only for tortious interference with prospective advantage, but for intentional interference with existing contractual relations. The test is less stringent when a defendant's actions are such as to render performance of an existing contract impossible. See *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 (intentional inducement to breach or render performance impossible). "Tortious interference, however, can take many forms." *NBT Bancorp, supra*, 87 N.Y.2d at 621 (1996).

The lower court dismissed the claim because "Thome's allegations that the Foundation's actions were 'willful, wanton and egregious' are conclusory and made without any factual support. Mere conclusory allegations of wrongful conduct are insufficient to state a valid claim for tortious interference with prospective economic relations" (19).

But at the pleading stage, and in the absence of any disclosure from the respondents which would have revealed their true reasons for refusing to authenticate the Work, appellant pleaded a sufficient claim. In the two cases cited by the lower court, neither was in the context of a motion to dismiss, but both were based upon the lack of sufficient evidence after an opportunity for disclosure. Moreover, there was already evidence sufficient to permit the claim to proceed. There are numerous emails demonstrating that Mr. Thome had binding commitments, that both buyers were committed to proceeding, that he lost both deals solely because of respondents' refusal to act, and that such refusal was apparently malicious and in bad faith.[7] The cause of action is sufficient and the lower court erred in dismissing it.

[7] *See* Lincoln Stoller's emails: "That guy [respondent Rower] is a pain in the neck to so many people, us included. It almost seems as if he really wants to be a pain." (149); "all our plans hinge on the issuance of a catalog number" (151); "we need to first make sure the Calder Foundation will provide the pieces with numbers in the catalog" (154); "If they have not been assigned numbers, then we've got a problem" (79, 166); "This agreement is contingent upon...Catalogue Raisonne numbers for the two Socrate mobile stage sets [being] obtained from the Calder Foundation" (79, 167); "The pieces' value in the general market is essentially zero without the numbers" (80, 170); "They [the Foundation] have a lot to lose if they were seen as manipulating the market" (171); "I would hope we could get numbers, but it's possible that Sandy [respondent Rower] will play a cat and mouse game. That would be unscrupulous, but who knows?" (166); "I have various suspicions as to why the CF [Calder Foundation] is not being helpful....And then there is the conspiratorial perspective in which the CF suspects that they might like to purchase the piece. In this case, even if they don't know what they're doing, they know that any piece that they might be interested in will cost them less without catalog numbers." (170).

4. Breach of contract

The fourth cause of action is for breach of contract based upon respondents' willful refusal to perform its obligations to evaluate Mr. Thome's materials, to determine whether or not the Work was authentic, and to inform him of its decision within a reasonable time.

"When a contract does not specify time of performance, the law implies a reasonable time. What constitutes a reasonable time for performance depends upon the facts and circumstances of the particular case." *Savasta v. 470 Newport Assocs.*, 82 NY2d 763, 765 (1993); *Boone Associates, L.P. v. Leibovitz*, 13 A.D.3d 267 (1st Dept.2004); *Escobar v. Gonzalez*, 277 A.D.2d 93 (1st Dept.2000). "Included within a court's determination of reasonableness are the nature and object of the contract, the previous conduct of the parties, the presence or absence of good faith, the experience of the parties and the possibility of prejudice or hardship to either one, as well as the specific number of days provided for performance." *Zev v. Merman*, 73 N.Y.2d 781, 783 (1988). Thus the lower court erred in dismissing the claim on a motion to dismiss; the question is one of fact.

When one party does not perform, the other can demand performance, and then if performance is still not forthcoming, can then deem the contract breached, and hold the non-performing party in default. *John F. Trainor Co. v. G. Amsinck & Co.*, 199

A.D. 693 (1st Dept.1922); *Taylor v. Goelet*, 142 App. Div. 467, 469 (1st Dept.1911), *aff'd* 208 N.Y. 253 (1913)("Of course, where the time of performance is not specified in the contract, the law presumes that the parties intended performance within a reasonable time...The law is settled in this State by a long line of authorities that, where the time of performance is indefinite, neither party can put the other in default without notice, giving a reasonable time specified to complete performance."). In other words, appellant could not deem the agreement breached without first demanding performance. He did so repeatedly.

Respondents' failure and refusal to perform its obligations under the contract was a breach of that contract. But the breach was not complete and was not actionable until Mr. Thome actually lost the deals, because it was only then that he accrued actual, measurable damages.

The lower court said that any breach allegedly occurred in 1998 ("the cause of action for breach of contract, based upon allegations of breach occurring in 1998, is time-barred")(17). But this is clearly erroneous: Mr. Thome nowhere alleged that the contract was breached in 1998, and there is no basis in the record for the lower court's assertion. Rather, his right to sue only accrued when he repeatedly demanded performance after a reasonable time, <u>and</u> only when there was non-performance after each demand, <u>and</u> only after he was damaged by losing the two sales.

Appellant demanded performance by (1) writing to respondent Rower in 2002 (77, 143); (2) the demands of Stoller's broker and appraiser in 2005 (79, 170); and (3) the demand by appellant's counsel on January 19, 2007 (181). There were also other "numerous demands" (80). Thus there was a proper claim for breach of contract, but the breach did not occur until either 2004 or 2005, when appellant incurred damages, or a reasonable time after each demand for performance.

Thus, since there was a contract between the parties, and since respondents refused to perform and since appellant was damaged, he has a cause of action for breach of contract.

5. Conflict of interest

The fifth cause of action is based on allegations that respondents have a conflict of interest with respect to the Foundation. The gravamen of this cause of action is that they are alleged personally to own works by Calder, that they essentially have a monopoly over the market for Calders, that they seek to manipulate the market by disparaging appellant's Work so that they can obtain it for themselves at a reduced price, that their power is being abused to his detriment, and that he has been damaged thereby.

Support for this cause of action is in the broad language of the Donnelly Act, Gen. Bus. L. § 340. Subds. 1and 5 read in pertinent part as follows:

> Every contract, agreement, arrangement or combination whereby
>
> A monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby
>
> Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby
>
> For the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy, illegal and void.
>
> ...
>
> 5. An action to recover damages caused by a violation of this section must be commenced within four years after the cause of action has accrued....[a]ny person who shall sustain damages by reason of any violation of this section, shall recover three-fold the actual damages sustained thereby, as well as costs not exceeding ten thousand dollars, and reasonable attorneys' fees.

This claim has a four-year statute of limitations, *id.* The lower court dismissed this claim solely on the basis that it was time-barred: "According to Thome, this conduct occurred in 1997. Because more than four years have passed since the allegedly wrongful conduct, the claim is time-barred." (18). But nowhere does appellant claim that the actionable conduct occurred in 1997. Rather, just as with the contract cause of action, it accrued when he suffered damages, and not sooner. The language of the statute would have barred an action being brought earlier than 2004 and 2005. Thus the claim was timely. Moreover, the lower court did not opine on the validity of this cause of action in any event. It should be reinstated.

6. Violation of Officers' and Trustees' Duties

The sixth cause of action is based upon the duties of officers and trustees of not-for profit corporations under the N-PCL. Those duties are well-described in *Manhattan Eye, Ear and Throat Hosp. v. Spitzer*, 186 Misc.2d 126, 151-52 (Sup.N.Y.Co.1999):

> A charitable Board is essentially a caretaker of the not-for-profit corporation and its assets. As caretaker, the Board ha[s] the fiduciary obligation to act on behalf of the corporation ... and advance its interests in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions. This formulation of the Board's duty of care is an expansion of the comparable section of the Business Corporation Law which does not contain the words care and skill, and firmly establishes the appropriate standard of care for directors of a not-for-profit corporation.
>
> It is axiomatic that the Board of Directors is charged with the duty to ensure that the mission of the charitable corporation is carried out. This duty has been referred to as the duty of obedience. It requires the director of a not-for-profit corporation to be faithful to the purposes and goals of the organization, since unlike business corporations, whose ultimate objective is to make money, nonprofit corporations are defined by their specific objectives: perpetuation of particular activities are central to the raison d'être of the organization. (citations and quotation marks omitted).

In this case, the individual respondents were not only in a fiduciary relation with the Foundation, but with the appellant as well. "A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation. Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions." *EBC I, Inc., supra,* 5 N.Y.3d at 31 (citation and quotation marks omitted).

This was no arm's length business transaction. Respondents are a charitable foundation and the individuals who control it. Their principal reason for existence is to compile a *catalogue raisonné* of an artist for educational purposes. Given that authenticity is absolutely essential to the marketability of a work of art, the Foundation should be deemed to have a fiduciary relation with those persons who submit works to them for authentication, since without it, the Foundation has the unilateral power to render works by Calder valueless. Such power is subject to being abused, and the respondents abused it.

They violated their duties and their fiduciary obligations to the Foundation, with consequent damage to appellant, in four different ways:

(1) They failed to evaluate the Work and to declare that it was an authentic Calder, despite their own personal knowledge of and involvement in the actual creation of the Work, thus violating their obligation to act in good faith to further the stated interests of the Foundation;

(2) They refused to evaluate the Work despite their full knowledge that Mr. Thome would lose two opportunities to sell the Work, and that he did in fact lose them. In so doing, it was a reasonable inference at the pleading stage that they acted in their own self-interest (and the complaint so alleges), with the expectation that he would be forced to sell the Work to them at a distress price. Appellant's sophisticated potential purchaser Lincoln Stoller certainly thought so, *see supra* n. 5 at 28 , and his suspicions stand unrefuted, even though respondent Rower submitted an affidavit to the lower court (68-69), and could have easily disputed Stoller's allegations.

(3) The individual respondents allegedly own works by Calder themselves (63) and thus have a conflict of interest, in that their own collections would become more valuable if appellant's Work were rendered unsaleable and kept off the market. They have also exploited their monopoly position in the art marketplace as the only organization which can authenticate works by Calder.

(4) By their grossly improper actions, they have exposed the Foundation, to whom they have fiduciary obligations, to the present lawsuit, and the consequent liability for significant damages.

The lower court dismissed this cause of action on the ground of the business judgment rule (20), and said that the allegations of bad faith were insufficient to overcome the rule. Further, said the court, there was no inference that the individual respondents owed appellant individually a fiduciary duty, as opposed to their duty to the Foundation. In any event, said the court, the statute of limitations had run. In support of its conclusion, the lower court cited *Continental Cas. Co. v. AON Risk Services Cos., Inc.*, 50 AD3d 315 (1st Dept.2008).

But that case said that there was no "evidence that AON NY exercised discretionary functions on plaintiffs' behalf or possessed superior expertise on which plaintiffs relied so as to give rise to a fiduciary duty." 50 AD2d at 316. By contrast, the Calder Foundation <u>does</u> exercise discretionary functions, and <u>does</u> possess superior expertise. It is also a monopoly, and the potential for abuse is clear. So the respondents <u>do</u> have fiduciary obligations, and, because of that discretion and expertise, they have them to the appellant. *EBC I, Inc., supra.*

The sixth cause of action should be upheld.

7. Civil conspiracy

The seventh cause of action is for civil conspiracy. While there is no independent tort of civil conspiracy in New York, the tort does exist in the context of an underlying intentional tort, so long as that tort is actionable. "Allegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort." *Alexander & Alexander of New York, Inc. v. Fritzen*, 68 N.Y.2d 968, 969 (1986). The complaint pleads a conspiracy, "a common scheme or plan to deprive plaintiff of his absolute right to sell the Work" (¶ 107 at 12).

"While there is no cognizable action for a civil conspiracy, a plaintiff may plead conspiracy in order to connect the actions of the individual defendants with an actionable underlying tort and establish that those acts flow from a common scheme or plan." *American Preferred Prescription, Inc. v. Health Management, Inc.*, 252 A.D.2d 414, 416 (1st Dept.1998).

"The elements of a conspiracy are: (1) a corrupt agreement between two or more parties; (2) an overt act in furtherance of the agreement, which constitutes an independent tort or wrongful act; (3) the defendant's intentional participation in the furtherance of the plan or purpose; and (4) resulting damages or injury." *Williams v. Sidley Austin Brown & Wood, L.L.P.*, 2006 WL 2739013 at *3 (Sup.N.Y.Co. September 22, 2006).

The lower court dismissed this claim because appellant "has not sufficiently alleged the existence of an underlying actionable tort." (21). But because all of the causes of action should have been sustained as individual torts, the claim for civil conspiracy should be reinstated

8. Product Disparagement

The eighth cause of action is for product disparagement. The gist of the claim is that respondents' refusal to authenticate the Work amounted to a positive statement that the Work is not a genuine Calder, that the refusal was malicious, that it amounts to a defamation of the Work, and that appellant suffered special damages in the form of two lost opportunities to sell the Work for specific sums.

The seminal case of disparagement of artwork is *Hahn v. Duveen*, 133 Misc. 871 (Sup.N.Y.Co.1929). Sir Joseph Duveen, an art dealer, had stated that a painting by Leonardo da Vinci was a copy. As a result of his statement, the owner's sale of it to a museum for $250,000 fell through, and the owner sued Duveen. The case was tried as a battle of experts, the jury could not reach a unanimous verdict, the trial judge ordered a retrial and the parties later settled, with Duveen paying $60,000 in damages plus court costs. See Lerner & Bresler, 1 *Art Law* 573 (3rd ed.2005).

In *Kirby v. Wildenstein*, 784 F.Supp. 1112 (S.D.N.Y.1992), the owner of a painting sued because of statements made as to its authenticity and condition in a *catalogue raisonné*. The Court granted summary judgment dismissing the action because of the failure to allege special damages, which must be specifically set forth in order to state a claim. The Court said, "[t]he phrase 'product disparagement' refers to words or conduct which tend to disparage or reflect negatively on the quality, condition or value of a product or property. In order to prevail on his claim of product disparagement, plaintiff must establish the following four elements: (1) the falsity of Wildenstein's statements; (2) publication to a third person; (3) malice; and (4) special damages." (citations omitted). 784 F.Supp. at 1115.

In *Drug Research Corp. v. Curtis Publishing Co.*, 7 N.Y.2d 435 (1960), the Court said, "[t]he rule is that, if a product has been attacked, the manufacturer may recover in a cause of action for libel, providing he proves malice and special damages as well as the falsity of the criticism...But special damage must be fully and accurately stated. If the special damage was a loss of customers... the persons who ceased to be customers, or who refused to purchase, must be named." 7 N.Y.2d at 440-41 (citations and quotation marks omitted).

The complaint in this action contains all of the necessary allegations, including special damages in the form of the purchase prices, and the identities of the purchasers who refused to buy the Work. Moreover, the emails and other documents in the record conclusively demonstrate that appellant had two binding written offers to sell the Work, contingent only upon the issuance of *catalogue raisonné* numbers, and that the Foundation refused to issue them, despite his and the buyers' efforts. Thus not only does appellant state a claim for product disparagement, but he is entitled to summary judgment on it.

The lower court dismissed this cause of action, solely on the ground that appellant supposedly failed to plead "communication to a third person regarding the Set" and that the basis of the claim was "that the Foundation has been silent in reference to the Set." (22). First, the third persons were the potential buyers in particular and the art market for Calders in general, which deems a failure to authenticate a work as tantamount to a positive statement that it is <u>not</u> authentic. Those persons certainly knew of the Foundation's refusal; they had sought to obtain authentication. Second, because of its role, the Foundation was under a duty to say whether or not the Work was authentic. "When a party is under a duty to speak, or when his failure to speak is inconsistent with honest dealings and misleads another, then his silence may be deemed to be acquiescence." *More v. New York Bowery Fire Ins. Co.*, 130 NY 537, 545 (1892).

The claim for product disparagement should be reinstated, and appellant is entitled to summary judgment on it.

POINT III

ALL OF THE CAUSES OF ACTION ARE TIMELY.

Respondents had argued, and the lower court held, that all of the causes of action were time-barred, because appellant had first requested that the Work be authenticated in 1997. But none of the causes of action accrued at that time, because appellant had no right to sue in 1997. His claims did not accrue until he actually incurred damages because of the loss of the opportunity to sell.

Respondents' duty to appellant, and the contract between them, arose when they accepted the materials. They breached that duty when they failed to accept, or reject, the Work as authentic within a reasonable time. But appellant's subsequent demands for performance gave rise to a new right to sue thereafter. The most recent demand for performance was in January 2007, and was accompanied by a threat to bring suit if performance were not forthcoming (174-75). Suit was commenced two months later, after it was clear that respondents would continue to refuse to perform.

But the appellant's injuries were also torts. And those claims did not accrue until he was actually damaged, by loss of the sales. Thus all the causes of action in the verified complaint are timely. Essentially, the lower court erred in conflating the contract and tort causes of action in the complaint, and deeming all of them to arise from the same facts. But this analysis ignores the crucial difference between the two.

That crucial difference is discussed at length in *Kronos, Inc. v. AVX Corp.*, *supra*, 81 N.Y.2d at 96:

> Moreover, it is important to distinguish the two breaches in this cause of action--one a tortious breach, the other a contractual breach--and to understand their differing legal significance. AVX's breach of duty in tort owing to plaintiff occurred when it allegedly made improper inducements to TAM. That tortious breach is separate and distinct from any contractual breach committed by TAM. For purposes of this litigation, the contractual breach is a result of the tortious breach and, in large measure, simply a link in the causal chain between defendant's wrongful act and plaintiff's injury. No need to make a right enforceable against defendant arises at that point, for *no right exists until there is loss*. (emphasis added).

In this case, the claim for breach of contract arose after a reasonable time for respondents' performance had passed, and after Mr. Thome's demands for performance were ignored. At that point (the time of which is a question of fact, and not amenable to summary disposition, *see Zev v. Merman*, *supra*), he had a claim for breach of contract, with a possible entitlement to nominal damages. *Kronos, Inc.*, *supra*, 81 N.Y.2d at 95. But the tort causes of action, that is, all but the first and fourth, did not ripen until the sales to Zimmermann and Stoller were actually lost, in 2004 and 2005. "In other words, a party's rights in contract arise from the parties' promises and exist independent of any breach. Nominal damages allow vindication of those rights. In tort, however, there is no enforceable right until there is loss. It is the incurring of damage that engenders a legally cognizable right." *Kronos, Inc.,* *supra*, 81 N.Y.2d at 96. In other words, "a cause of action does not accrue until an injury is sustained." *Vigilant Ins. Co. of America v. Housing Authority*, 87 N.Y.2d 36, 43 (1995).

Thus, the earliest date on which appellant's tort claims accrued was in 2004and 2005, and the earliest date on which his breach of contract claims arose was a reasonable time after the last demand for performance, which was in 2007. Thus, all of the causes of action in the complaint were timely when this action was commenced in 2007, and the statutes of limitation have not run as to any of them.

POINT IV

THE INDIVIDUAL RESPONDENTS ARE NOT ENTITLED TO THE QUALIFIED IMMUNITY OF N-PCL § 720-a.

Although the lower court's dismissal made the issue of qualified immunity academic, the reinstatement of any of the causes of action in the complaint could revive the issue, and it should be addressed on this appeal. The individual respondents-trustees Mary Calder Rower, Sandra Calder Davidson and Shaun Davidson moved in the lower court, pursuant to CPLR 3211(a) subd. 11, to dismiss the action as to them, pursuant to the qualified immunity afforded by N-PCL § 720-a. But they are not entitled to qualified immunity as a matter of law and this Court should so hold.

CPLR 3211(a) subd. 11 provides in pertinent part as follows:

> A party may move for judgment dismissing one or more causes of action asserted against him on the ground that...11. the party is immune from liability pursuant to [N-PCL § 720-a]...Presumptive evidence of the status of the corporation...under section 501 (c) (3) of the internal revenue code may consist of production of a letter from the United States internal revenue service reciting such determination on a preliminary or final basis or production of an official publication of the internal revenue service listing the corporation, association, organization or trust as an organization described in such section, and presumptive evidence of uncompensated status of the defendant may consist of an affidavit of the chief financial officer of the corporation....
> On a motion by a defendant based upon this paragraph the court shall determine whether such defendant is entitled to the benefit of [N-PCL § 720-a]...and, if it so finds, whether there is a reasonable probability that the specific conduct of such defendant alleged constitutes gross negligence or was intended to cause the resulting harm. If the court finds that the defendant is entitled to the benefits of that section and does not find reasonable probability of gross negligence or intentional harm, it shall dismiss the cause of action as to such defendant.

N-PCL § 720-a provides in pertinent part as follows:

> ...[N]o person serving without compensation as a director, officer or trustee of a corporation...described in section 501(c)(3) of the United States internal revenue code shall be liable to any person other than such corporation...based solely on his or her conduct in the execution of such office unless the conduct of such director, officer or trustee with respect to the person asserting liability constituted gross negligence or was intended to cause the resulting harm to the person asserting such liability.

See Pontarelli v. Shapero, 231 A.D.2d 407, 410 (1st Dept.1996)("unpaid directors are immune from suit...absent allegations of their gross negligence or intention to cause harm."); *Rabushka v. Marks*, 229 A.D.2d 899, 900 (3rd Dept.1996) ("On a CPLR 3211(a)(11) motion, Supreme Court is obligated to determine whether the defendant is entitled to the benefits conferred by N-PCL 720-a and, if it so finds, then it must ascertain whether there is a reasonable probability that the specific conduct of the defendant fell outside the protective shield afforded by N-PCL 720-a").

The respondents provided only one of the two specific pieces of presumptive evidence which the statute requires. They produced a letter from the Internal Revenue Service stating that the Foundation is a § 501(c)(3) corporation (178-79)(albeit only in reply papers, not in support of their original motion), but they did not produce an affidavit from the Foundation's chief financial officer that they serve without compensation. While the statute presumably does not preclude the use of other evidence, what respondents did produced was insufficient. *See Karen S. v. Streitferdt*, 172 A.D.2d 440, 441 (1st Dept.1991):

> The individual defendants' motion for dismissal pursuant to CPLR 3211(a)(11) was properly denied. The defendants did not present "presumptive evidence of uncompensated status" in that they did not present "an affidavit of the chief financial officer of the corporation, association, organization or trust." Further, "there is a reasonable probability that the specific conduct of such defendant[s] alleged constitutes gross negligence". If the appealing defendants did act as the plaintiffs allege, they may be found to have proceeded in reckless disregard of the consequence of their acts.

Here, the respondents supported that branch of their motion with an affidavit from Mr. Rower, who stated that he is "the duly authorized Chairman and Director of Calder Foundation" (68-69) He did not state, however, that he is the chief financial officer, and thus his affidavit does not comply with the specific requirement of the statute.

But apart from this technical issue, the verified complaint and Mr. Thome's affidavit allege sufficiently that these individual respondents acted intentionally to harm him by willfully refusing to authenticate the Work despite his demands, that their actions were intended to deprive plaintiff of his right to dispose of the Work, and that he lost two definite and binding opportunities to sell the Work, solely because of their refusal.

Given the extensive personal involvement of respondents in the original production of *Socrate* in 1976 and 1977, the Memorial Committee headed by Calder's widow, and their presence at the performance, their refusal to cause the Foundation to authenticate the Work amounts at the least to gross negligence, and at worst to willful and malicious misconduct. These allegations raised sufficient questions to bar automatic dismissal of the individual respondents as a matter of law.

CONCLUSION

Based on the foregoing, the Court should:

(1) reverse the lower court and direct the entry of summary judgment on the first, second, third, fourth, seventh and eighth causes of action;

(2) order respondents to serve an answer to the fifth and sixth causes of action in the verified complaint within ten days; and

(3) grant such other relief as may be just.

Dated: New York, New York
December 8, 2008

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STATEMENT PURSUANT TO CPLR 5531

1. The index number in the court below is 600823/07.

2. The full names of the parties are as stated in the caption. There have been no changes.

3. The action was commenced in the Supreme Court of the State of New York, County of New York.

4. The action was commenced on March 14, 2007. The summons and complaint were served on or around March 14, 2007.

5. The action seeks a declaratory judgment and an injunction regarding the authenticity of a work of art, and damages caused by defendants' refusal to determine that authenticity.

6. The appeal is from an order of Hon. Charles E. Ramos, entered April 29, 2008, and the final judgment entered pursuant thereto on May 29, 2008.

7. The appeal is on a full reproduced record.