

A (slightly summarized) translation of the sentence in Paul Andriesse vs. Hellen van Meene

This translation is not official, not made by a professional translator, and definitely not made by someone who knows a lot about English legal terms. It should also be noted that the translator is married to the defendant.

*Heiloo, March 15, 2004
Frank van Eykelen*

The judge has passed sentence in two parts: a preliminary one on September 17 2003 and a final one on March 10 2004.

The preliminary sentence of September 17 2003

Sentence of the kantonrechter (\approx district judge) in Amsterdam in the case of:

Paul Theodoor Andriesse
living in Amsterdam
plaintiff
attorney: mr. M.C. Kaaks

v e r s u s

Hellen Cornelia Geertruida Maria van Meene
living in Alkmaar
defendant
attorney: mr. E.C.B. Adriaanse

Procedural process

The following documents have been submitted:

- the summons (subpoena) of June 19 2002 containing the claim by the plaintiff with documentary evidence
- the answer of the defendant with documentary evidence
- the conclusion of counter-plea by plaintiff with documentary evidence including a change of plea
- the conclusion of rejoinder by defendant with documentary evidence
- a deed in which plaintiff reacts to the final documentary evidence
- an act of augmentation of the claim after the plea of April 28 2003
- the act of answer by the defendant

Undisputed facts

- 1.1 Plaintiff is art historian and photographer and owner of an art gallery in Amsterdam specialized in photographic art. Defendant has completed her education at the Rietveld Academy in 1996. She worked at the photo service counter of department store HEMA. On May 13 1998 defendant contacted the plaintiff, on advice from an ex-teacher of the Rietveld Academie. Numerous talks followed. Their collaboration started with a solo exhibition in plaintiff's gallery from October 17 1998 till November 21 1998.
- 1.2 Plaintiff sold works by defendant that were exhibited in his gallery. Later he also sold other works. After some time defendant could work fulltime as a photographer. Parties did not commit any agreement about their collaboration to writing.
- 1.3 Plaintiff received 50% provision of each work sold by him.
- 1.4 In a fax dated August 2001 17 the defendant writes to plaintiff that their collaboration ends immediately. In a handwritten PS on the fax it says: "As of September 1 2001 I quit."
- 1.5 Parties communicate by fax trying to wind-up their business. On November 29 2001 defendant's first lawyer writes: "Even though my client did not state a term of notice in her letter, you may assume that as of October 2001 the relationship has ended with a fair two month's notice. My client has interpreted the fact that you did not react to her letter of August 15 2001 as an approval."

Claim

- 2 Plaintiff claims that defendant has terminated their agreement wrongfully; that she owes him damages and that he is entitled to a compensation for lost provision. He demands EUR 105,300 for damages and EUR 50,000 for goodwill. Plaintiff states that the agreement can be qualified as an "agentuurovereenkomst" ("*agentuur*" means "agency" in the meaning of "commercial agency", "*overeenkomst*" means "agreement", so it translates as "agency agreement", FvE). This agreement was terminated in defiance of the legal regulations. Defendant is therefore entitled to pay damages and goodwill.

Defense

- 3 Defendant disputes the existence of an agency agreement. She disputes owing the plaintiff any money. She disputes the amounts claimed. And finally she appeals for compensation to the amount of \$ 3,550.

Judgment

- 4 Agency:
An agency is about intermediation with respect to the realization of agreements for determined or undetermined duration. The focus is not on services that aid in realizing the agreement, as in the case of "opdracht" (which translates as "charge" or "commission"). The focus is on performing "rechtshandelingen" ("legal transactions"). The main difference with "lastgeving" ("commission" or "mandate") or "bemiddeling" ("mediation") is the durability of the relation.
- 5 From start to end of their cooperation plaintiff has sold defendant's work with her knowledge and has charged mediation costs (50%) for this. She or others have not

sold any work not through him. Insofar the agreement can be characterized as an agency.

- 6 Defendant has argued that plaintiff has sold her work under the flag of two exposition-agreements. Furthermore he sold her work on the basis of a consignment-agreement with right of sale. This attempt to disqualify the agreement as an agency fails in regard of what has been contemplated under 5.
- 7 Defendant has claimed that she never asked the plaintiff to act as her "coach, manager, or agent". She denies any actual coaching ever took place. His efforts were not always in line with her wishes, and she denies the extent of his efforts. She denies that the market for her work is attributable only to the efforts of the plaintiff etcetera etcetera. This may all be, but it does not refute the fact that it has become sufficiently clear that from the end of 1998 till mid 2001 plaintiff has sold work by the defendant and that he has charged mediation costs for this. That leads to an agency agreement.
- 8 Nullity of agency:
Defendant has appealed to nullity of the agency agreement on the grounds of the fact the plaintiff has repeatedly refused to commit their agreements to paper. Plaintiff has argued rightly that the agreement of the parties is not threatened by nullity because it is not put to paper when asked to. The law does not provide for a "vormvoorschrift" ("vorm" is "form", "voorschrift" means "prescription" or "instruction", so this translates roughly as "form prescription") for the agency agreement. This defense therefore fails.
- 9 The agreement has been terminated irregularly. The defendant should have observed a 4 months notice but has not, and the defendant has not pleaded a pressing reason for the termination. Defendant is therefore has to pay damage.
- 10 The plaintiff has specified his damages. He has also asked for a reasonable compensation for lost provision from agreements with clients and relations to whom he has introduced the defendant. The plaintiff has not illuminated this last claim but is assumed that he aims at getting a compensation for the Japan-series.
- 11 The Japan-series is about 10 editions. Plaintiff recognizes the defendant's right within their relationship to co-determine how her work was distributed among galleries and/or others. To what extent plaintiff had the right to a distinct amount of editions has not been written down. The distribution of the Japan-series has resulted in a conflict between parties. The plaintiff was promised 3 editions as part of her proposed distribution of the 10 editions. Plaintiff did not agree with this distribution. It was not that he wanted more than the 3 editions assigned to him. He could not agree to assigning 3 editions to Matthew Marks Gallery in New York. Defendant has finally retracted her offer on September 17 2001 because she had not received a signed agreement from the plaintiff. However, in the light of the circumstances the defendant could not retract the 3 editions assigned to the plaintiff on the basis of a conflict about the distribution of the Japan-series that in itself did not touch upon assignment of these 3 editions to the plaintiff. But that does not mean that the plaintiff simply has a right to 50% of the sales amount of 3 editions of the Japan-series, because it is not likely that the defendant would have sold these editions through the plaintiff after termination of their relationship.
- 12 Plaintiff claims that he is entitled to 50% of three editions of the Japan-series and 10% of the remaining editions. That is somewhat surprising because it must be known

also to the plaintiff that these editions not have been sold out yet. It is not realistic to assume that the plaintiff would have been able to sell out his three editions during his legal notice of 4 months. That the other galleries would have sold out their assigned editions is also unlikely.

- 13 To enable a serious estimate of the damages from the irregular termination suffered by the plaintiff and to review eventual goodwill compensation, the defendant must submit data about the sales of the Japan-series up to January 1 2003.
- 14 Any further decision is reserved.

The final sentence of March 10 2004

Further procedural process

On September 17 2003 a preliminary sentence has been passed. To enable execution of that sentence the following documents have been exchanged:

- an act by the defendant with documentary evidence
- an act by the plaintiff with documentary evidence
- an act by the defendant with documentary evidence
- an act by the plaintiff

Grounds for the decision

- 1 No special significance is attributed to the claim specified in the preliminary sentence under 10. compared to the claim for damages specified after the plea. That claim is therefore rejected due to lack of significance.
- 2 The damages:
The long-term agreement between parties has been characterized as an agency agreement in the preliminary sentence. Various dissertations about primary gallery contracts, investments in the artist etcetera are rendered insignificant in that respect. If plaintiff had wanted to reach an agreement about that then he should have, being a professional in that area. Now that he hasn't there has to be looked at what the damages of the plaintiff are in the light of an agency agreement that's arranged only to a small extent. The following will be taken into account: the circumstance that the relationship between parties deteriorated from the beginning of 2001, that no clear solution to the distribution of the Japan-series could be reached, and that due to the lack of a clear agreement about it the defendant could have believed that she could end the relationship with plaintiff if not directly then at least at very short notice.
- 3 It has not become clear what the parties had agreed to (verbally) in the light of the agency agreement. Parties do agree that the plaintiff gave to the defendant 50% of what he received for works sold after subtracting the cost of the defendant. It has also been established that the plaintiff claimed 10% of sales of the defendant's work by foreign galleries. Furthermore it has become plausible that the defendant had the right to decide that galleries of her choice could sell her work. Finally the defendant could order a "sales stop".
- 4 Plaintiff demands (complete) compensation for his damages. His point of departure in that view is that he could sell 3 editions of the Japan-series, regardless of the irregular termination of the agreement by the defendant. The plaintiff also assumed that he had

the right to 10% of sales of the Japan-series by other galleries, regardless of the termination by the defendant. In his act after the preliminary sentence the plaintiff has not upheld the points of departure mentioned above, in the sense that he does not resist the reasoning under 12. and 13 of the preliminary sentence.

- 5 Other than the plaintiff claims no "evidence instruction" has been given to the defendant in preliminary sentence. That would have been wrong in the light of the fact that plaintiff now must prove his damages in accordance with article 7:441 lid 3 BW. The defendant has submitted the data requested in the preliminary sentence in an acceptable fashion. Partially to avoid disputes about numbers because of the time of sale and time of payment the data for 2001 and 2002 has been requested. As far as the claim for damages is concerned, the provision of 10% that the plaintiff charged foreign galleries is also taken into account concerning the data as provided by the defendant. The circumstance that his 10% was not charged to the defendant does not mean that this item cannot be considered as damage now that it has been established that the plaintiff used to charge foreign galleries 10%. The termination by the defendant has taken away his ability to acquire provision which can be characterized as damage.
- 6 It is unlikely that in 2001 the plaintiff would have completely sold out the 3 editions assigned to him. Based on what according to the defendant has actually been sold in 2001, the difference with what the plaintiff claims to have sold is quite too substantial. It is also taken into account that the plaintiff has never disputed the fact that the defendant could have ordered a "sales stop". Finally the plaintiff has not disputed that the notes produced by him that list interested clients have not resulted in sales to these clients. It is not unreasonable to assume that the plaintiff would have sold around 2 times more than what now has been sold according to the defendant. Where the sales by third parties are concerned there is not enough reason to deviate from the statement by the defendant. The above-mentioned will be regarded in the light of what has been considered under 2.
- 7 Based on what has been considered above damages to the amount of \$30,000 have been awarded (that is EUR 26,421 based on the exchange rate of December 2001 - EUR = \$0.88070)
- 8 The goodwill:
Starting-point is an average turnover of EUR 45,378 per year. That the plaintiff has not attributed to the fame of the defendant seems an underestimation of the (promotional) activities that the plaintiff has undertaken for the defendant in the light of their cooperation. Also taking into account what already has been considered a client compensation of EUR 12,000 seems fitting.
- 9 The compensation:
Plaintiff has passed over the fact that the claim for compensation has been made before the preliminary sentence and is mentioned in the preliminary sentence. The claim is adequately motivated while the plaintiff has not disputed the claim (with motivation). This means that the claim for compensation to the amount of \$ 3,550 has been awarded (that is EUR 3,748.80 based on the exchange rate of March 18 2003 - EUR = \$1.05600).
- 10 Based on what has been considered above the plaintiff's claim will be awarded as stated below.

11 Both parties have been put in the wrong in parts. The trial costs will therefore be compensated.

Decision

The district judge:

- I. declares that the defendant has terminated the agreement between parties irregularly and is therefore liable for damages;
- II. sentences the defendant to pay EUR 34,672.20;
- III. compensates the trial costs;
- IV. declares the sentence executable immediately;
- V. rejects all claims that are higher or different.

As pronounced by C. von Meyenfeldt, kantonrechter, Rechtbank Amsterdam on March 10 2004.