IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

MARY MISS,

Plaintiff,

vs.

EDMUNDSON ART FOUNDATION, INC.
d/b/a DES MOINES ART CENTER,

Defendant.

4:24-cv-00123-SHL-SBJ

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II. BACKGROUND.

The Art Center is a museum of modern and contemporary art located in the northeast corner of Greenwood Park in Des Moines, Iowa. (ECF 10-1, ¶¶ 2, 10.) In total, Greenwood Park consists of approximately eighty acres of land, including a pond to the south of the Art Center known as Greenwood Pond. (Id., ¶ 11.) By the late 1980s, the Greenwood Pond area had fallen into a state

The Artist Agreement states that title to the artwork shall pass to the ART CENTER upon completion of the project. (ECF 1-1, ¶ 8.) It further states, in relevant part:

- "Art Center agrees that it will not intentionally damage, alter, relocate, modify or change the Work without the prior written approval of the Artist." (Id., ¶ 8.2(i));
- "ART CENTER recognized that maintenance of the Project on a regular basis is essential to the integrity of the Project. ART CENTER shall reasonably assure that the Project is properly maintained and protected, taking into account any instructions provided by the Artist, and shall reasonably protect and maintain the Project against the ravages of time, vandalism and the elements." (Id., ¶ 9.2); and
- "ART CENTER shall have the right to determine, after consultation with a professional conservator, when and if repairs and restorations to the Project C-t(na-4b1114(a)341(e) P)55C-

Miss submitted preliminary design plans in late 1994, but the City declined to approve the

66, 99; ECF 19-7.) The Art Center responded by conducting a safety walk-through in early October 2023, during which Art Center staff concluded there were significant safety risks associated with the freestanding arches, cantilevered boardwalk, and warming hut (or pavilion) portions of the Site, all of which had damaged and/or rotting wood. (Tr. 67, 106–109.) According to Art Center Director of Facilities Michael Gard, the freestanding arches were in particularly bad shape. (Tr. 105, 107.) He said the arches were so structurally unsound that they could be moved "by several feet" simply by one person pushing against them. (Tr. 107.) The Art Center ended up taking the arches down in or around October 2023 without first obtaining Miss's permission. (Tr. 107–08; ECF 1, ¶¶ 19–20.) The warming hut and cantilevered boardwalk have not been removed, but they have been placed off limits to the general public through the use of fencing. (Tr. 100.) The fencing is not, however, a foolproof solution, as teenagers pull it down on weekends. (Tr. 76.)

Miss was not consulted on the decision to demolish the artwork, nor does she approve of the decision. (ECF 1, ¶¶ 23–24; Tr. 52.) According to the structural engineer report obtained by the Art Center, the cost to repair and restore the artwork in its entirety would exceed $2.6 million, which is equivalent to approximately one-third of the Art Center's annual operating budget. (ECF 10-1, ¶ 35; Tr. 72.) The Art Center considered alternative options such as using cheaper wood, but the cost still would be around $2 million. (Tr. 80.) Miss disputes the reliability of the Art Center's estimates but has not obtained an alternative estimate. (Tr. 59.)

III. LEGAL STANDARDS.

A. Preliminary Injunction Standards.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Tumey v. Mycroft AI, Inc.*, 27 F.4th 657, 664 (8th Cir. 2022) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). "[T]he burden of establishing the propriety of an injunction is on the movant." *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694, 699 (8th C 664 (ng c . "

granting the injunction will inflict on other parties litigant.'" *MPAY Inc. v. Erie Custom Comput. Applications, Inc.*, 970 F.3d 1010, 1020 (8th Cir. 2020) (quoting *Dataphase*, 640 F.2d at 113.) This "requires a court to distinguish between weak or illusory injuries and very real threats of injuries." *Rodriguez v. Molina*, 608 F. Supp. 3d 791, 798 (S.D. Iowa 2022)

periodical, data base, electronic information service, electronic publication, or similar publication . . . ." *Id*.

VARA does not define the term "[w]ork of recognized stature," but legislative history suggests courts should consider "the opinions of artists, art dealers, collectors of fine art, curators of art museums, conservators, and other persons involved with the creation, appreciation, history, or marketing of works of visual art" to determine whether the work has become sufficiently "recognized." *See* Garson, 11 CORNELL J.L. & PUB. POL'Y at 227; *see also Scott v. Dixon*, 309 F. Supp. 2d 395, 400 (E.D.N.Y. 2004) (a work has become "recognized" where "members of the artistic community and/or the general public" see it as such). Where a qualifying work is being threatened wittu4.4 (i)44rv027 B.6110.3 (a)10.4 (t)44.3 (e)10.3 (ne111 (y)]TJ0.023 T6i (d")1.3)44.3 (c)10

the right *not* to repair or restore the Site, and instead to remove it altogether. (ECF 18, pp. 10–11.) According to the Art Center, this interpretation is supported by the fact that the Site consists largely of wood and other ephemeral materials that necessarily will degrade over time. Surely, the Art Center argues, the parties must have intended for it to have the right to remove or deaccession the Site when the degradation reached a certain level.

For at least three reasons, the Court rejects this argument. First, Section 9.3(i) does not use words like "remove," "demolish," or "deaccession." Instead, once again, the Art Center is asking the Court to use the Agreement's *silence* on an issue to outweigh the express restriction in Section 8.2(i) on the Art Center's ability to "damage" or "alter" the Site without Miss's consent. Iowa law does not permit the Artist Agreement to be interpreted in this fashion; instead, the focus must be on the parties' "written words." *UE Loc. 893/IUP v. State*, 997 N.W.2d 1, 9 (Iowa 2023); *see also Retterath*, 938 N.W.2d at 687 ("The language the parties used is the most important evidence of their intentions, and therefore, we endeavor to give effect to all language of the contract.").

Second, in context, there is a better explanation than the one proposed by the Art Center for the Artist Agreement's failure to use words like "demolish" or "remove"; namely, that both sides expected the Site to be a *permanent* installation that would remain intact until, at minimum, Miss's death. The Art Center was, after all, paying hundreds of thousands of dollars to have a well-known artist create an installation that would turn a rundown area of Greenwood Park into a unique blend of natural landscape and art for public enjoy.033 Tc 2pb4Td[(th)-44.3 (e)-33.0.2 0 Td[(in)-pTc -33.7 (c

or for twenty years thereafter. This means, again, that Section 8.2(i) is the only provision addressing intentional damage, modification, or alteration to the work.

Third, it is far from clear on the existing record that the parties knew at the time the Artist Agreement was executed what type of wood or other building materials would be used for the Site or which features the Site would include. The Artist Agreement did not specify any materials, but rather contemplated a process in which Miss would prepare and submit design documents to the Art Center (and, eventually, City officials) for approval. (ECF 1-1, ¶¶ 1.1 *et seq.*) The Court therefore cannot conclude, as the Art Center argues, that the parties must have known the Site would degrade and intended to give the Art Center the unilateral right to decide when it needed to be taken down. Nor, in any event, would any such evidence allow the Court to ignore the plain language of Section 8.2(i).

Unable to find persuasive language in the Artist Agreement, the Art Center turns to Paragraph III.A of the 28E Agreement, which states: "The CITY may require the ART CENTER to repair or remove a sculpture if the ART CENTER has failed to either maintain the structural integrity of a sculpture or to correct any unsafe condition within a sculpture." (ECF 10-1, p. 13, ¶ III.A.) As the Art Center correctly points out, Miss agreed in the Artist Agreement that her relationship with the Art Center "is subject to the terms of the 28E agreement" and that "the terms of the 28E agreement [] shall take precedence over conflicting terms, if any, in this agreement." (ECF 1-1, ¶ 15.) The Art Center argues that Paragraph III.A of the 28E Agreement conflicts with, and therefore supersedes, Section 8.2(i) of the Artist Agreement and gives it the authority to remove the Site over Miss's objection.

The Court agrees in part and disagrees in part. The Court agrees that Paragraph III.A of the 28E Agreement would supersede Section 8.2(i) of the Artist Agreement *if* the City required the Art Center to repair or remove

Moines has the authority to declare something a public nuisance and/or deem it a safety hazard. *See* Des Moines Mun. Code, ch. 42, art. VI, §§ 347, 351, 355 (2024).[1] It presumably would be especially easy for the City to do so on publicly owned land like Greenwood Park. For whatever reason, however, the City has not exercised this authority in connection with the Site. Instead, the City's position appears to be that it delegated such authority to the Art Center. This is not the same as "requir[ing]" the Art Center to do something and therefore does not mean the Art Center can ignore its obligations to Miss as set forth in Section 8.2(i) of the Artist Agreement.

establish the Art Center's rights vis-à-vis *the City*; as in, the Art Center does not need *the City's* approval to restore, rehabilitate, or remove any portion of the artwork that is damaged or destroyed by any casualty. This is different than whether the Art Center needs *Miss's* approval to take the same actions. As it relates to *her* approval, the Art Center agreed in Section 8.2(i) of the Artist Agreement not to "intentionally damage, alter, relocate, modify or change the Work" without her prior written consent, and promised in Section 9.2 to "reasonably protect and maintain the Project against the ravages of time, vandalism and the elements." There is no apparent conflict between the commitments the Art Center made to Miss and the rights the Art Center possesses with respect to the City.

In context, there is good reason for the Art Center to have agreed to obtain Miss's permission, but not the City's, before removing damaged pieces of artwork. The Art Center entered into the 28E Agreement with the City in 1990 for the purpose of facilitating the "development of a site-related or environmental sculpture area for the enjoyment of the public in Greenwood Park." (Id., p. 9.) Because the project would be on City-owned land, the two sides needed clarity about their respective rights and responsibilities. The 28E Agreement helped provide such clarity, establishing that there would be "portions of each sculpture which each party shall maintain," with each side responsible for performing "necessary maintenance to assure that the designated portion of the sculptures for which it is responsible shall not become damaged, deteriorated or unsafe." (Id., p. 13, ¶ III.A.) The 28E Agreement further established that the Art Center would be liable, either directly or through indemnity, for any injuries arising out of the Site or activities related thereto. (Id., p. 16, ¶¶ VI.A, VI.B.) It makes sense in this context for the Art Center to have the unilateral right vis-à-vis the City to remove damaged pieces of the Site as set forth in Paragraph III.D.

By contrast, the Art Center and Miss did not enter the Artist Agreement until 1994, four years after the 28E Agreement was signed. By that time, and as explained above, the parties expected the artwork to remain intact for at least as long as Miss was alive. Accordingly, the Agreement focused largely on protecting Miss's moral rights as an artist; i.e., ensuring the Site would continuously

alteration to the Site (id., ¶ 8.2(i)), and being given similar veto power over repairs or restorations if the Art Center decided to make them (id., ¶ 9.3(i)). Against this backdrop, it is not inconsistent for the Art Center to need Miss's approval but not the City's before removing portions of the Site.

In sum, as it relates to the removal of the artwork without her written permission, Miss has

premise" that because harm occurred, protective covenant must have been

15.) Similarly, during her testimony, Miss agreed with the description of her work as "land art." (Tr. 53.) The closest she came to VARA's statutory language is when she testified as follows: "I feel like I'm sculpting the land, and I think it's -- you know, it was Tatlin building -- was he not a sculptor when he did his tower? I think what is considered a sculpture, the definition has been pretty expanded in the 20th century." (Tr. 54.)

The Court appreciates Miss's point and agrees that in some sense or another a builder, designer, or architect could be considered a "sculptor." All the same, when interpreting VARA, the Court's job is to determine what *Congress* meant by the word "sculpture" in 17 U.S.C. § 101, not whether there is some figurative or allegorical use of that word that might be broad enough to capture artwork that would not traditionally be understood as a "sculpture." To that end, the Court agrees with the Seventh Circuit's analysis in *Kelley v. Chicago Park District*: "To qualify for moral-rights protection under VARAu4.3 (i)4[ur:

Although Miss has only established a likelihood of success on the merits with respect to one portion of her breach of contract claim, this is enough to require analysis of the remaining *Dataphase* factors, starting with the threat of irreparable harm to the moving party. Here, the analysis is straightforward: Miss has established a sufficient threat of irreparable harm to warrant a preliminary injunction given the unique nature of the Site and the fact that the Art Center is proposing to remove and destroy it once and for all. *See Kte a4(6 t63 (4nl)4M91)10.4(13em*

the Art Center has not shown that the *Court* must decide the extent of the safety risks in a situation where nothing is stopping the City from exercising its authority to order removal of the Site if public safety so compels. By contrast, there is a public interest in ensuring that parties honor their contractual obligations, particularly when those obligations relate to public art. The public interest factor therefore does not weigh heavily in either direction.

E. The Nominal Bond of $100 Will Remain in Place.

The final issue is whether the Court should increase the nominal $100 bond. The Art Center argues that it should because Miss's position is perpetuating what the Art Center characterizes as