G2 Entertainment LLC v Tractenberg & Co. LLC
2012 NY Slip Op 33457(U)
August 27, 2012
Supreme Court, New York County
Docket Number: 650043/2012
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH SUPREME COURT JUSTICE Justice

PART 61

Index Number : 650043/2012
G2 ENTERTAINMENT, LLC
vs.
TRACTENBERG & CO, LLC
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum opinion.

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8/27/12

HON. ANIL C. SINGH
SUPREME COURT JUSTICE, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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G2 ENTERTAINMENT LLC,

Plaintiff,

-against-

TRACTENBERG & CO. LLC and LONDON GROUP, LLC,

Defendants.

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DECISION AND ORDER

Index No. 650043/12

HON. ANIL C. SINGH, J.:

Motions bearing sequence numbers 001 and 002 are consolidated for disposition.

Defendants Tractenberg & Co. LLC ("Tractenberg") and Diageo North America, Inc. ("Diageo") move to dismiss this action in its entirety pursuant to CPLR 3211(a)(7), contending that the complaint fails to state causes of action for breach of contract (Count I), breach of implied-in-fact contract (Count II), breach of the implied covenant of good faith and fair dealing (Court III), negligent misrepresentation (Court IV), negligence (Court V), fraud/intentional misrepresentation (Count VI), unjust enrichment (Count VII), quantum meruit (Count VIII), and promissory estoppel (Count IX).

Plaintiff cross-moves for an order: 1) dismissing without prejudice the claims against defendant Diageo; 2) denying the motion to dismiss of defendant Tractenberg; and 3) granting plaintiff leave to file a first amended complaint that: a) names London Group, LLC as a defendant; b) pleads certain additional facts so as to conform with the heightened pleading requirements of CPLR 3016(b); and c) removes the count for negligence.

At the outset, we will address plaintiff's cross-motion to amend the complaint.

Leave to amend a pleading should be granted freely where the proposed amendment is not palpably insufficient or patently devoid of merit, and will not prejudice or surprise the opposing party (Saleh v. 5th Ave. Kings Fruit & Vegetable Corp., 92 A.D.3d 749, 750 [2d Dept., 2012]). A determination whether to grant such leave is within the court's broad discretion, and the exercise of that discretion will not be disturbed lightly (Id.).

It is clear to the court that the proposed amendment to the complaint will not result in any prejudice or surprise whatsoever to the defendants. Accordingly, leave is granted to file the proposed First Amended Complaint.

The amended complaint alleges the following facts.

Plaintiff G2 Entertainment, LLC ("G2") is a celebrity and corporate

consulting company. Its business includes brand and celebrity licensing, merchandising, commercial endorsement and personal appearance consulting. G2 is owned and operated by Glenn Gulino.

Defendant Tractenberg is a public relations agency. At some point prior to April 2010, Tractenberg was retained by London Group, LLC or its successor, the owner of an alcoholic beverage brand called "Nuvo Sparkling Liqueur" ("Nuvo").

Tractenberg was interested in assisting its client to partner with a celebrity spokesperson to promote and advertise Nuvo. Tractenberg contracted with G2 in April 2010 to advise and consult Tractenberg with respect to celebrity endorsements for the Nuvo brand, interface with celebrities' agents and management, and negotiate on its behalf for the procurement of a celebrity for the brand. Tractenberg and G2 communicated exclusively by e-mail and telephone.

As compensation for the services rendered, G2 would receive an amount equal to 10% of the talent fee of any contract that was executed with celebrities with whom G2 dealt on Tractenberg's behalf.

Pursuant to the agreement and with Tractenberg's approval, G2 contacted actress Eva Longoria as a potential celebrity spokesperson.

On May 11, 2010, Tractenberg informed G2 that it was "going to take a break" on pursuing a celebrity spokesperson for Nuvo until July 2010, and, at that

point, Tractenberg would resume working with G2 on the Nuvo project. Tractenberg also informed G2 that it had decided not to continue negotiating with Ms. Longoria.

From May 2010 through November 16, 2010, Tractenberg remained silent to G2 as to its "secret dealings" with Ms. Longoria regarding the Nuvo brand.

On November 16, 2010, G2 discovered that, contrary to Tractenberg's statements in May 2010, Tractenberg had entered into a contract with Ms. Longoria for spokesperson and promotional services for the Nuvo brand.

Tractenberg never paid G2 its finders fee for arranging a celebrity endorsement contract between Ms. Longoria and London Group.

Plaintiff commenced the instant action by filing a summons and complaint on January 6, 2012, asserting nine causes of action. The First Amended Complaint asserts only seven causes of action because plaintiff has withdrawn its negligence claim and combined the claims for unjust enrichment and quantum meruit into a single cause of action.

The amended complaint alleges that Tractenberg utilized the work product, labor, expertise and advice of G2 but then deprived G2 of its rightfully-earned commissions; that London Group has been unjustly enriched because it benefitted from G2's services; and that all of the wrongful conduct engaged in by

Tractenberg is imputed to its principal, London Group.

Discussion

Defendant contends that plaintiff's contract claims are barred by the statute of frauds because there is no signed writing.

In Williamson v. Delsener, 59 A.D.3d 291 [1st Dept., 2009], the First Department held that e-mails exchanged between counsel, which contained their printed names at the end, constituted signed writings within the meaning of the statute of frauds.

In the instant matter, the amended complaint at paragraph 19 alleges:

> G2 had numerous electronic mail correspondence and at least three or four telephone calls per week with Trachtenberg [sic.] and exchanged electronic mails with Ms. Longoria's agent.

(First Amended Complaint, p. 4, para. 19).

"It is well settled that on a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts as alleged in the pleading to be true and according the plaintiff the benefit of every possible inference" (Avgush v. Town of Yorktown, 303 A.D.2d 340, 341 [2d Dept., 2003]). The only issue for the court to determine on a motion to dismiss is "whether the facts alleged fit within any cognizable legal theory" (Hynes v. Griebel, 300 A.D.2d 628 [2d Dept., 2002]).

Here, G2 contends that the account director for Tractenberg, Sarah Parker, dealt directly with the owner and operator of G2, Glenn Gulino. Plaintiff exhibits a chain of e-mails exchanged between Parker and Gulino (Opp., exhibits 1-6). The e-mails, which are signed by Parker and Gulino, lay out the essential terms of an agreement.

On April 15, 2010, G2 wrote to Tractenberg:

> What we normally do in this instance with the other Agencies we represent is serve as the agent for Tractenberg/Nuvo on any talent procurement. Our fee (10% of the talent fee only, NOT including travel, production costs, etc.) can be built right into the deal so it doesn't really cost you any more than you want to spend. For example, if we feel Talent X should be paid US$100,000, then it will be my job to get them for US$90,000 ... OR LESS to save you money and cover our fee! I know it seems counter-intuitive as the more the talent gets paid the more we get paid but my goal is to build our relationship so you continue to use us for your procurement needs.

(Opp., exhibit 1).

Eleven minutes later, Tractenberg responded:

> "Yes, that sounds fine. I think it's so much easier to just work with you and do things that way. Thanks!!"

Twenty-six minutes later, G2 responded:

> "Agreed and thank you! Glenn"

A recent decision by the First Department is instructive. In PMJ Capital Corp. v. PAF Capital, LLC, 2012 WL 3288722 [1st Dept., 2012], the plaintiff

commenced a breach of contract action in connection with its purchase of two mortgage loans from defendant, asserting causes of action for specific performance, damages and attorneys' fees. Defendant, by a pre-answer motion, moved to dismiss the complaint, arguing that the bid form submitted by plaintiff conclusively established that no binding contract was formed, and that the parties did not intend to be bound until a loan agreement had been signed and delivered by both parties. The Court held that, in light of e-mail communications between the parties, defendant's words and deeds raised an issue of fact as to its intent, preventing dismissal of the complaint at the early stage of the litigation.

Likewise, in Trueforge Global Machinery Corp. v. Viraj Group, 84 A.D.3d 938 [2d Dept., 2011], the plaintiff brought suit seeking a finder's fee for locating an acquisition opportunity. The Court held that e-mail correspondence satisfied the statute of frauds. The Court wrote:

> Contrary to the defendants' contention, they failed to establish their prima facie entitlement to judgment as a matter of law based on the statute of frauds, as certain e-mail correspondence was sufficient to set forth an objective standard for determining the compensation to be paid to the plaintiff as a finder's fee, since it was tied to an extrinsic event, i.e., it was expressed as a percentage of the price paid by the defendants for the located acquisition opportunity, thus rendering the terms definite and enforceable.

(Trueforge, 84 A.D.3d at 939 (internal citations omitted)).

For similar reasons, we find that the chain of e-mails in the instant matter is sufficient to constitute a written agreement satisfying the statute of frauds.

Defendant's next contention is that the plaintiff's claim for breach of the implied covenant of good faith and fair dealing is duplicative of plaintiff's claims for breach of contract.

A claim that defendant breached the implied covenant of good faith and fair dealing is properly dismissed as duplicative of a breach-of-contract claim where both claims arise from the same facts and seek the identical damages for each alleged breach (Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce, 70 A.D.3d 423, 426 [1st Dept., 2010]).

In the instant action, the claim for breach of the implied covenant of good faith and fair dealing clearly arises from the same facts and seeks identical damages as the breach of contract claim. Accordingly, the Court finds that it is, in fact, duplicative.

Next, defendant contends that plaintiff's claim for promissory estoppel is also duplicative of the breach of contract claim.

A claim for promissory estoppel cannot stand where, as here, there is a contract between the parties (Susman v. Commerzbank Capital Markets Corp., 95 A.D.3d 589, 590 [1st Dept., 2012]).

Defendant's next contention is that plaintiff's claim for fraud/intentional misrepresentation fails because it is duplicative of plaintiff's breach of contract claim and is not supported by any factual allegations.

Plaintiff's amended complaint alleges that Tractenberg's fraud is evidenced by the fact that it misrepresented to G2 that it was "passing on Eva" and that it was going to "take a break" on the project, but then surreptitiously contracted with Ms. Longoria and deprived G2 of its fee (First Amended Complaint, p. 7, para. 48).

"A fraud claim that is essentially a breach of contract claim should be dismissed" (60A N.Y.Jur.2d Fraud and Deceit section 209). "The addition of an allegation of scienter will not transform a breach of contract action into one to recover damages for fraud" (Id.).

In short, the Court finds that the claim for fraud/intentional misrepresentation is indistinguishable from the breach of contract claim.

Defendant's next contention is that plaintiff's claim for negligent misrepresentation should be dismissed because there is no "special duty" between the parties.

"A cause of action for negligent misrepresentation may be found not to exist where, although there is a contract between the parties, their dealings with each other are strictly at arm's length" (60A N.Y.Jur.2d Fraud and Deceit 141). "Where

the parties to an agreement deal at arm's length, the close relationship required to support a negligent misrepresentation claim is lacking" (Id.).

In the instant matter, it is clear to the Court that the transaction in issue was an arm's length transaction.

For the above reasons, it is hereby

ORDERED that the motion of defendant Diageo North America, Inc., to dismiss the complaint herein is granted, and the complaint is dismissed in its entirety as against defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal of Diageo North America, Inc., as a defendant, and the addition of London Group, LLC, as a defendant, and that all further papers filed with the court bear the amended caption; and it is further

ORDERED, that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records

to reflect the change in the caption herein; and it is further

ORDERED, that plaintiff's cross-motion for leave to amend the complaint is granted, and the First Amended Complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the motion of defendant Tractenberg & Co., LLC, to dismiss is granted, and the causes of action for breach of the implied covenants of good faith and fair dealing (Count III), negligent misrepresentation (Count IV), fraud/intentional misrepresentation (Count V), and promissory estoppel (Count VII) of the First Amended Complaint are dismissed; and it is further

ORDERED that defendants are directed to serve an answer to the First Amended Complaint or otherwise respond thereto within 20 days after service of a copy of this order with notice of entry.

The foregoing constitutes the decision and order of the court.

Date: 8/27/12
New York, New York

Anil C. Singh

HON. ANIL C. SINGH
SUPREME COURT JUSTICE