AEG Live, LLC v LF USA, Inc.
2016 NY Slip Op 30957(U)
May 23, 2016
Supreme Court, Neew York County
Docket Number: 650767/2013
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
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AEG LIVE, LLC,

Plaintiff,

-against-

LF USA, INC d/b/a THE FRYE COMPANY,

Defendant.

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Index No.: 650767/2013

Mtn Seq. Nos. 001 & 002

DECISION AND ORDER

JEFFREY K. OING, J.:

Mtn Seq. No. 001

Defendant LF USA, Inc. ("Frye") moves, pursuant to CPLR 3212, for an order granting it summary judgment dismissing plaintiff AEG Live, LLC's ("AEG") complaint.

Mtn Seq. No. 002

AEG moves, pursuant to CPLR 3212, for an order granting it summary judgment on its complaint.

These motions are consolidated for disposition.

Background

AEG serves as the promoter for the Williamsburg Concert Series (the "Concerts"), a series of live music concerts held during the summer at 50 Kent Avenue, Brooklyn, New York, and is responsible for securing sponsorships for the Concerts (Compl., ¶¶ 10, 13). The Open Space Alliance ("OSA") oversees the venue

in which the Festival takes place (Klein EBT at p. 27, Novikoff Aff., Ex. C).

Frye manufactures and sells garments, fashion accessories, and sports goods for women, men, children and the home (Compl., ¶ 5). On or about November 12, 2012, Sarah Cohen Beugoms ("Cohen"), an associate marketing coordinator with Frye, requested sponsorship information for the 2013 Concerts from OSA (Novikoff Aff., Ex. E). In response, a member of OSA, Sean Hoess, spoke with Cohen and subsequently sent her a series of slides providing information about the festival (the "Sponsorship Deck") (Cohen EBT at p. 27-29, Novikoff Aff., Ex. D). After this initial exchange, Cohen and Andrew Klein, Senior Vice President of Global Partnerships for AEG, had numerous discussions regarding Frye's potential sponsorship of the Concerts (Compl., ¶ 18). On January 9, 2013, Cohen asked Klein, via email, to "send over a contract for the concert series" (Compl., ¶ 20; Richards Aff., Ex. J). In response, Klein telephoned Cohen and asked whether she had final approval to make the deal (Klein EBT at 66:10-67:25, Richards Aff., Ex. C). When Cohen informed Klein that she had not yet received internal approval, Klein told her that he would not send a contract until Cohen had received such approval, as he did not want to "waste time for the lawyers" (Klein EBT at 66:10-67:25, Richards Aff., Ex. C).

On January 16, 2013, Cohen requested a copy of the Sponsorship Deck updated for 2013 (Novikoff Aff. in Opp., Ex. F). Later that day, Klein sent Cohen the updated Sponsorship Deck by email (Compl., ¶ 23). The 2013 Sponsorship Deck listed two different levels of sponsorship -- a Presenting Sponsorship for $250,000 and a Category Exclusive Sponsorship for $150,000 (Sponsorship Deck, Novikoff Aff., Ex. G). It also outlined the benefits that would accrue to the Presenting Sponsor, including receiving 40 VIP tickets per day and four "all access tickets" as well as a to-be-determined number of passes for staff working the event (Sponsorship Deck, Novikoff Aff., Ex. G). Among other promotional benefits, the sponsor would be included in press releases for the Concerts, have its logo included in advertising for the Concerts, and be able to "use concert series marks and logos in approved promotions and PR to support concert series sponsorship" (Sponsorship Deck, Novikoff Aff., Ex. G). Notably, the Sponsorship Deck stated that promotional opportunities for the Sponsor would be customized as needed (Sponsorship Deck, Novikoff Aff., Ex. G). A number of other benefits were left vaguely defined, including the "right to create an interactive consumer experience on-site (Sponsorship Deck, Novikoff Aff., Ex. G).

On January 18, 2013, Cohen sent Klein an email stating "based on our conversation yesterday, I would like to offer $200,000 for FRYE to be the Presenting Sponsor for the Williamsburg Park 2013 Concert Season. Please advise next steps" (Richards Aff., Ex. K [emphasis added]). Klein responded "Sarah, CONFIRMED. Let's do this. I will call you later to talk about next steps. We are looking forward to working with you and your team" (Richards Aff., Ex. K [emphasis added]).

On January 29, 2013, Klein sent a draft Sponsorship Agreement to Cohen (Sponsorship Agreement, Richards Aff., Ex. M). The Sponsorship Agreement stated that it contained the entire agreement between the parties and merged "any prior representations, warranties, or understandings they may have had regarding the subject matter of this Agreement" (Sponsorship Agreement at ¶ 14, Richards Aff. Ex. N). The Sponsorship Agreement also provided that it was to commence upon its execution by the parties (Sponsorship Agreement at ¶ 1, Richards Aff. Ex. N). A list of "Sponsor Rights and Benefits" -- which largely reflected the benefits listed in the 2013 Sponsorship Deck -- was attached as an exhibit to the Sponsorship Agreement (Sponsorship Agreement, Richards Aff., Ex. N).

On January 30, 2013, the parties held a meeting in which they discussed further details concerning defendant's sponsorship,

including: creating a "logo lock" for the event which integrated the Frye and AEG logos; Frye's on-site event presence; the delivery of complimentary tickets; and providing Frye's products to artists performing at the Concerts (Compl., ¶ 29).

On February 13 and 14, 2013, Cohen's superiors determined that Frye would not sponsor the Concerts (Cohen EBT at p. 171, Richards Aff. Ex. E; Richards Aff., Ex. U). Thereafter, AEG commenced this action against Frye on May 9, 2013 asserting claims against Frye for breach of contract and promissory estoppel.

Discussion

I. Breach of Contract

The elements of breach of contract are: (1) a valid and enforceable contract between the parties; (2) the plaintiff's performance of the contract; (3) breach by the defendant; and (4) resulting damages (Noise in Attic Prods., Inc. v London Records, 10 AD3d 303, 307 [1st Dept 2004]).

Plaintiff AEG claims that the January 18, 2013 email exchange between Cohen and Klein created a contract between the parties. AEG relies heavily on the proposition that "[a]n exchange of emails may constitute an enforceable agreement if the writings include all of the agreement's essential terms, including the fee, or other cost, involved" (Kasowitz, Benson,

Torres & Friedman, LLP v. Duane Reade, 98 AD3d 403, 404 [1st Dept 2012], aff'd, 20 NY3d 1032 [2013]), and argues that because Frye had already received the 2013 Sponsorship Deck -- which plaintiff maintains contained all the essential terms of the agreement -- before the January 18, 2013 email exchange, these emails created a contract between the parties. Defendant argues that these emails established only an agreement to agree which was not binding on Frye.

To determine whether these emails created an enforceable contract or were merely an agreement to agree, two factors are considered: "whether the agreement contemplated the negotiation of later agreements and [whether] the consummation of those agreements was a precondition to a party's performance" (Amcan Holdings, Inc. v Can. Imperial Bank of Commerce, 70 AD3d 423, 427 [1st Dept 2010] quoting IDT Corp. v. Tyco Group, S.A.R.L., 13 NY3d 209, 213 n. 3 [2009]). Consideration of these factors demonstrates that no contract was formed here.

As to the first factor, the record is clear -- both parties contemplated the negotiation of a later agreement and did not intend for the 2013 Sponsorship Deck and January 18, 2013 email to serve as the contract between the parties. Despite plaintiff's conclusory claims, the Sponsorship Deck did not include all of the material terms of the prospective agreement,

as it did not address, inter alia, the nature of Frye's on-site presence at the Concerts or dates for payment and performance, and therefore could not create a binding agreement (Compare Argent Acquisitions, LLC v First Church of Religious Science, 118 AD3d 441, 444 [1st Dept 2014] [written agreement omitting material terms that would reasonably be expected to be included in contract for subsequent negotiations -- obligation to make a down payment and date down payment was to be made -- was not binding] with Kasowitz, Benson, Torres & Friedman, LLP v Reade, 98 AD3d 403, 404 [1st Dept 2012] aff'd, 20 NY3d 1082 [2013] [email setting forth attorney fee arrangement in great detail which was agreed to by client was binding contract]).

Further, the conduct of the parties demonstrates that they understood that a subsequent formal written agreement was necessary to memorialize their agreement. First, by her request for a contract on January 9, 2013 -- prior to the January 18, 2013 email exchange -- Cohen sent a forthright, reasonable signal to AEG that Frye meant to be bound only by a formal written agreement (Jordan Panel Sys., Corp. v Turner Const. Co., 45 AD3d 165, 169 [1st Dept 2007]). Moreover, in the January 18, 2013 email exchange, both parties referenced "next steps," suggesting that each recognized these emails did not create a final contract between the parties. Finally, after the contract was sent to

Frye, the parties held further discussions regarding its terms, suggesting that there was never a meeting of the minds on all essential terms between the parties (Spier v Southgate Owners Corp., 39 AD3d 277, 278 [1st Dept 2007]).

As to the second factor, Klein explicitly informed Cohen that there would be no performance by AEG until the contract was executed (Richards Aff., Ex. T). This is supported by the draft of the written agreement sent from AEG to Frye, which provided that it would be effective once executed and contained a merger clause. Both of these provisions are "persuasive evidence that the parties did not intend to be bound prior to the execution of a written agreement" (Ciaramella v Reader's Digest Ass'n, Inc., 131 F3d 320, 324 [2d Cir 1997] [citations omitted]). In short, although AEG has "presented evidence that the negotiating parties had agreed as to price ... the totality of the circumstances clearly showed that there was never a meeting of the minds on all essential terms" (Galesi v Galesi, 37 AD3d 249 [1st Dept 2007]). As no contract was created between the parties, there was no contract for Frye to breach.

Accordingly, plaintiff's motion for summary judgment is denied. Defendant's motion for summary judgment dismissing this claim is granted, and it is dismissed.

II. Promissory Estoppel

The elements of promissory estoppel are: (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury sustained in reliance on the promise (Sabre Intl. Sec., Ltd. v. Vulcan Capital Mgt., Inc., 95 AD3d 434, 439 [1st Dept 2012]); Skillgames, LLC v Brody, 1 AD 3d 247, 250-251 [1st Dep't 2003]; Oppman v. IRMC Holdings, Inc., 14 Misc 3d 1219(A), 2007 WL 151355, at *15 [Sup Ct NY County 2007]).

Plaintiff claims that Frye relayed a clear and unambiguous promise to purchase the title sponsorship for $200,000 and that, in reliance on that promise, AEG did not seek another title sponsor, and as a result, when Frye failed to make this payment, it was forced to sell the sponsorship to H&M for $100,000.

Here, the parties' failure to reach a definite agreement is fatal to plaintiff's claim for promissory estoppel (See e.g., Benham v eCommission Sols., LLC, 118 AD3d 605, 606-07 [1st Dept 2014] [plaintiff's promissory estoppel claim failed where parties had a mere "agreement to agree" that plaintiff should receive some sort of equity stake in defendant, with the terms of that stake subject to future negotiations and approval]; New York City Health and Hosps. Corp. v St. Barnabas Hosp., 10 AD3d 489, 491 [1st Dept 2004]).

Accordingly, plaintiff's motion for summary judgment is denied. Defendant's motion for summary judgment dismissing this claim is granted, and it is dismissed.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on its complaint is denied; and it is further

ORDERED that defendant's motion for summary judgment dismissing the complaint is granted, and it is hereby dismissed; and it is further

ORDERED that the Clerk is respectfully directed to enter judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 5/23/16

HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING
J.S.C.