GMAC Real Estate, LLC v. Joseph Carl Securities, Inc. et al Doc. 1 Att. 5

09CV3007
JUDGE GOTTSCHALL
MAGISTRATE JUDGE SCHENKIER
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BEFORE THE
AMERICAN ARBITRATION ASSOCIATION
JOEL L. CHUPACK, ARBITRATOR

GMAC REAL ESTATE, LLC, Claimant, and JOSEPH CARL SECURITIES, INC.; JOSEPH CARL REAL ESTATE d/b/a DIAMOND GMAC REAL ESTATE; MICHAEL BERRERAS; and RACHELLE STROLE f/k/a RACHELLE SMITH, Respondents.	)	No. 51 115 Y 01329 07

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been duly sworn and pursuant to the Demand for Arbitration dated September 24, 2007, having heard oral testimony and having reviewed the proofs and allegations submitted by GMAC REAL ESTATE, LLC ("GMACRE") and JOSEPH CARL SECURITIES, INC. and JOSEPH CARL REAL ESTATE d/b/a DIAMOND GMAC REAL ESTATE (collectively, "Diamond"); MICHAEL BERRERAS ("Berreras"), and RACHELLE STROLE f/k/a RACHELLE SMITH ("Strole") (all Respondents are collectively referred to herein as "Respondents"), hereby find as follows:

THE CLAIMS

GMACRE's Amended Demand for Arbitration consists of four counts. Count I is for breach of the Franchise Agreements against all Respondents. Count II is for breach of the Franchise Development Costs Notes against all Respondents. Count III is for breach of contract of the personal guaranties of the Notes against all Respondents. Count IV is for an accounting against all Respondents. As part of the claims, GMACRE is seeking an award of attorneys' fees and costs.

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THE DOCUMENTS

Diamond, Berreras and Casey Strunk ("Strunk") entered into a Real Estate Franchise Agreement dated as of June 1, 2004 (the "2004 Franchise Agreement") in which GMACRE was the franchisor, Diamond was the franchisee, and Strunk and Berreras were the principals, for a Scottsdale, Arizona office. Paragraph 23 of that agreement provides for arbitration of disputes through the American Arbitration Association. There was a 4th amendment to the 2004 Franchise Agreement, dated March 1, 2006, in which Strole endorsed the agreement as a principal.

The parties entered into a second Real Estate Franchise Agreement dated as of April 1, 2006 (the "2006 Franchise Agreement") for a Tuscon, Arizona office. Paragraph 23 of that agreement also provides for arbitration of disputes through the American Arbitration Association. The 2004 Franchise Agreement and the 2006 Franchise Agreement are referred to herein collectively, as the "Franchise Agreements."

Under paragraph 19(B)(2) of each of the Franchise Agreements, the "Owners" are personally liable for the financial obligations of the "Strategic-Partner", but limited to those obligations incurred prior to the date of termination and losses attributable to the one-year period after the date of termination. "Owners" are defined as Strategic-Partners and its principals or ownership interest holders. "Strategic-Partner" is identified as Joseph Carl Real Estate, LLC. Joseph Carl Securities, Inc. owned the membership interest in Joseph Carl Real Estate, LLC. Under the Franchise Agreements, Berreras and Strole signed the endorsement as principals/ownership interest holders.

In conjunction with the execution of 2004 Franchise Agreement, Diamond signed a Franchise Development Costs Note for up to $300,000. This note was guaranteed by Berreras and Strunk. Also, in January, 2005, Diamond signed another Franchise Development Costs Note for up to

$300,000 for the Surprise, Arizona office. This note was also guaranteed by Berreras and Strunk

On September 20, 2006, GMACRE served Respondents with a notice of default of the 2004 Franchise Agreement. The default was not cured. On January 23, 2007, GMACRE sent Respondents a notice of termination of the Franchise Agreements (the agreements had a cross-default provision). On February 2, 2007, the parties entered into a letter agreement reinstating the Franchise Agreements (the "Reinstatement Agreement").

THE REINSTATEMENT AGREEMENT

The Reinstatement Agreement reinstated, but modified , the Franchise Agreements. One of these modifications was that GMACRE released Strole for all obligations through the date of the Reinstatement Agreement, except for her obligations under the agreement. Essentially her obligation under the agreement was to have formed and a new company that would become a GMACRE franchisee.

In the Reinstatement Agreement, among other items, GMACRE acknowledged that Strole was assigned the managing interest in Diamond, Berreras and Strunk confirmed their obligations under the Franchise Development Costs Notes, and provided that, unless sooner terminated, the Franchise Agreements would terminate in 60 days.

Both the live witnesses and the testified deponents testified that the Reinstatement Agreement was drafted in a hurry. The annual GMACRE convention in Florida was to take place in a few days. Without an agreement Diamond's agents would not be admitted to the convention.

The primary drafter of the Reinstatement Agreement was David B. Goldstein, Diamond's counsel. Paragraph 9 of the Reinstatement Agreement, contains general release language in which Strole is being released for all obligations through the date of the Reinstatement Agreement, except

for "any obligations this letter imposes on her."

These obligations appear in paragraph 10 and consist of Strole's obligation to form a new company, obtain a residential real estate license, enter into an agreement with a duly licensed person to serve as the designated broker and for the new company to enter into a franchise agreement with GMACRE (items b, c, d and e). If Strole defaulted in any of these obligations, then the current liabilities would be accelerated and the "appropriate parties" would immediately become liable for future damages.

The current liabilities refer to the balance of the unpaid franchise fees and the balance due under Franchise Development Costs Notes. The future damages refer to liability under the Franchise Agreements for the one-year period commencing from the termination of the agreements.

GMACRE advances an interpretation of the Reinstatement Agreement that if a triggering event occurs, then the release of Strole is nullified. This interpretation is not supported by either the language of the agreement or the weight of the evidence.

The release language contained in Paragraph 9 is unambiguous. Only Strole's obligations under paragraph 10 were not released. This is consistent with the language in paragraph 4 in which Casey and Strunk, not Strole, confirmed their debt for current liabilities and future damages. This is also consistent with the reference to "appropriate parties" in paragraph 10.

Even if the language is deemed to be ambiguous, the parol evidence clarified any ambiguity. The deposition testimony of David B. Goldstein was clear and credible on the meaning of the release language and the objectives of the Reinstatement Agreement. He testified that Berreras and Strunk confirmed their liability for past and future damages, that Strole was unwilling to assume any liability for pre-existing debts and that the triggering events in paragraph 10 would only result in

liability to Berreras, Strunk and Diamond; and that the "appropriate parties" stated in paragraph 10 refer to Berreras and Strunk and not Strole

I found his testimony clear and relatively unbiased (he did not represent either Berreras or Strole) on the meaning of the release language. On the other hand, the deposition testimony of Richard D. Ballot, corporate counsel for GMACRE, appeared to be circuitous and self-serving.

The Reinstatement Agreement was entered into primarily to allow Diamond agents, already on their way to the convention, to attend and avoid the embarrassment of being turned away at the door. It was structured in a rush to accomplish this purpose. In consideration for this, Strole was acknowledged as the principal of Diamond and agreed to attempt to form a new company that would ultimately become a GMACRE franchisee. GMACRE failed to establish a sufficient correlation between the occurrence of a triggering event, some of which relied on GMACRE's cooperation, and the undoing of the general release for all prior obligations.

Based on these findings, even if one or more of the triggering events occurred, I do not find that Strole is liable for either current liabilities (through February 2, 2007) or for damages for loss of anticipated revenue for the one-year period following termination. However, the Reinstatement Agreement, by implication, obligates her future franchise fees until the agreement is terminated.

THE TRIGGERING EVENTS

Much of the testimony, both live and in depositions, focused on whether a triggering event under paragraph 10 occurred. However, whether or not a triggering event occurred is really a non-issue as to Berreras and Diamond. Once the Reinstatement Agreement was terminated (whether by the act of GMACRE or upon the expiration of the 60-day period), their liability under the Franchise Agreements and the Franchise Development Costs Notes resumed.

During my deliberation, I analyzed the parties' positions on this issue and while my holding as to the liability of the parties is as set forth above, this analysis serves as an alternative ground for a holding. Whether a triggering event occurred and the legal effect of its occurrence are difficult issues to resolve because while b, c, d and e of paragraph 10 technically did not occur, from a substantive perspective, the conditions may have been satisfied.

First, I note that the failure to enter into a new franchise agreement with GMACRE, satisfactory to both parties (item e), was not entirely within the control of Strole. Both Strole and GMACRE were obligated to use their best efforts to enter into a franchise agreement for the three locations. (¶8) GMACRE had the right to approve Rachelle or her nominee. (¶7) Strole presented testimony that GMACRE was not very cooperative in including her in the negotiations with Rankin.

Second, Respondent's position is that, in essence, items b through e were satisfied by GMACRE's acceptance of Sonoran as a franchisee. The evidence showed that Strole made contact with Pamela Rankin and introduced her to GMACRE; that she provided some assistance with transitioning of Sonoran to a GMACRE franchise; that Diamond and Sonoran held a coordinated kick-off event on the same day, although at different locations; that Sonoran conducted business from the prior Diamond locales; and that many, if not most of Diamond agents, were picked up by Sonoran.

GMACRE asserts that it lost the benefit of its bargain. However, the weight of the evidence doe not support this assertion. Sonoran had ran a very successful operation and was well-managed. Diamond was grossly mismanaged. Although, Strole did not form a new company that became a new franchisee, GMACRE did obtain Sonoran as a franchisee.

By Sonoran becoming a GMACRE franchisee, the same goal was accomplished as if Strole

had formed a new company that became a GMACRE franchisee. GMACRE maintained a presence and an uninterrupted one in essential Arizona markets. Based on the above, I find that GMACRE failed to meet its burden is establishing that it suffered any damage as a result of Strole's alleged failure to form a new company to become a franchisee.

DAMAGES

As stated earlier, whether or not a triggering event occurred, Berreras remains liable under Count I for breach of the Franchise Agreements for unpaid franchise fees in the amount of $98,990.73, transactional and advertising fees for the period of October through December, 2006, in the amount of $62,979.59, and royalty, advertising and office referral fees (for the 12-month period beginning 6/1/06), in the amount of $252,797.54. Berreras also remains liable under either Count II or III for breach of the Franchise Development Costs Notes or his guaranty, in the amount of $288,362.80. The total of these damages are $703,130.

Diamond is liable under Count I for the same amount that Berreras is liable for, that being the aggregate amount of $703,130. The liability of Berreras and Diamond for this amount are joint and several. In addition, Diamond is liable under paragraph 19(b)(1)(a) of the Franchise Agreements for future financial losses in the amount of $1,841,990.

Strole is not liable for any of the above-referenced items for which Berreras and Diamond are liable for and, therefore, the claims under Counts II and III are dismissed as to her. Strole is liable under Count I for franchise fees due from and after the reinstatement date of February 5, 2007, but limited to the dues for February and March, 2007 ($23,370 per month) in the aggregate amount of $46,740. Pursuant to paragraph 3 of the Reinstatement Agreement, the franchise agreements were to automatically terminate 60 days from February 5, 2007. The fact that GMACRE did not send out

a notice of termination until after that 60-day period will not serve to extend Strole's liability.

ATTORNEYS' FEES AND COSTS

GMACRE is requesting an award of attorneys' fees and costs pursuant to paragraph 19(c) of the Franchise Agreements. The amount requested to be awarded is $105,740.22. This request was supported solely by the affidavit of the Billing Department manager. A request for fees must be supported by the affidavit of the partner responsible for the litigation. In addition, the affidavit lacks in providing any details necessary to assess the reasonableness of the fees charged or the tasks performed. Therefore, I have no basis to determine whether the fees requested are reasonable and the request for attorneys' fees is denied. Notwithstanding the above, I find that there was sufficient detail in the billings to support an award of costs in the amount of $1,376.55. I also find that GMACRE is entitled to recovery of the arbitration fees and expenses it has incurred herein.

Accordingly, I AWARD as follows:

A. MICHAEL BERRERAS, JOSEPH CARL SECURITIES, INC., and JOSEPH CARL REAL ESTATE d/b/a DIAMOND GMAC REAL ESTATE are jointly and severally liable to GMAC REAL ESTATE, LLC in the amount of Seven Hundred Three Thousand One Hundred Thirty Dollars ($703,130).

B. JOSEPH CARL SECURITIES, INC. and JOSEPH CARL REAL ESTATE d/b/a DIAMOND GMAC REAL ESTATE is liable to GMAC REAL ESTATE, LLC in the amount of One Million Eight Hundred Forty-One Thousand Nine Hundred Ninety Dollars ($1,841,990).

C. RACHELLE STROLE f/k/a RACHELLE SMITH is liable to GMAC REAL ESTATE, LLC in the amount of Forty-Six Thousand Seven Hundred Forty Dollars ($46,740).

D. MICHAEL BERRERAS, JOSEPH CARL SECURITIES, INC., JOSEPH CARL REAL ESTATE d/b/a DIAMOND GMAC REAL ESTATE, and RACHELLE STROLE f/k/a RACHELLE SMITH are jointly and severally liable to GMAC REAL ESTATE, LLC in the amount of One Thousand Three Hundred Seventy-Six and 55/100 Dollars ($1,376.55) for costs incurred.

E. The claim for an accounting under Count IV is denied.

F. The administrative fees and expenses of the American Arbitration Association totaling $11,250.00 and the compensation and expenses of the Arbitrator totaling $7,743.75 shall be borne by Respondents, jointly and severally. Therefore, Respondents, jointly and severally, shall reimburse GMAC REAL ESTATE, LLC the sum of $18,993.75, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by GMAC REAL ESTATE, LLC..

The above sums are immediately due and payable.

This Award is in full settlement of all claims submitted to this Arbitration. All claims not expressly granted herein are, hereby denied.

DATED: May 8, 2009

Entered:

Joel L. Chupack, Arbitrator