

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Karmaloop, Inc.,	:	
Plaintiff	:	Civil Action 2:13-cv-0270
v.	:	Judge Frost
ODW Logistics, Inc.,	:	Magistrate Judge Abel
Defendant	:	

Discovery Dispute Conference Order

On February 4, 2014, counsel for the parties participated in a telephone discovery dispute conference with the Magistrate Judge. The dispute is about whether discovery on Karmaloop's commercial extortion claim under Chapter 93A of the Massachusetts Code should include damages for ODW's alleged breaches of contract during the course of the six years it provided warehouse services for Karmaloop.

ODW maintains that Judge Frost's July 10, 2013 Opinion and Order (doc. 43) and January 27, 2014 Opinion and Order (doc. 53) permit discovery on Karmaloop's commercial extortion claim only of damages, if any, that occurred after the Transition Services Agreement ("TSA") and a release were executed. Karmaloop acknowledges that the orders eliminated its claim under Ch. 93A for rescission of the TSA, but argues it may recover damages for ODW's breaches of the Warehouse Distribution Services Agreement ("warehouse agreement") during the entire 6 years ODW provided warehousing services.

Should the court permit the damages discovery Karmaloop seeks, ODW asserts that discovery about virtually every aspect of its performance under the contract would be

time-consuming and expensive. Its counsel estimate, based on their earlier review of 20,000 pages of documents, that it would cost about \$530,000 to review the documents Karmaloop seeks for relevance, privilege, and redaction. ODW requests that if the court determines Karmaloop is entitled to this discovery, that the Chapter 93A claim be bifurcated with liability being tried then, if liability is making the request more than a year into the case and because it would further delay a conclusion of this litigation. Expense should not be a factor because each party to a lawsuit bears the cost of reviewing the documents they produce.

Resolution of this dispute turns on a reading of the two orders. The July 10, 2013 Opinion and Order held that Karmaloop's claim for declaratory judgment that the TSA was not binding because it entered it under economic duress must be dismissed because Karmaloop had alternative remedies available when it signed the TSA. (Doc. 43, pp. 5-8, PageID 433-36.) The January 27, 2014 Opinion and Order stated:

. . . the Court rejects Karmaloop's newfound reliance on a theory of commercial extortion under the Massachusetts unfair and deceptive practices act, M.G.L. c. 93A, and the debatable remedy of rescission as supporting Karmaloop's attempt at obtaining declaratory judgment. Simply stated, Karmaloop is raising now an argument it should have raised before and cannot resurrect a failed claim or defeat a controlling adverse rationale based on hindsight strategic maneuvering. To conclude otherwise would be to invalidate this Court's prior decision regarding whether the TSA is binding. Karmaloop should have raised its newfound argument previously. Instead, Karmaloop relied only on two narrow grounds, and Karmaloop is stuck with its litigation choices. Those choices lead to the conclusion that because Karmaloop failed to comply with Section IV(c) of the TSA by providing ODW with the Confirmation Inventory within the requisite time period, Karmaloop is barred from asserting inventory-related claims under the TSA. ODW is therefore entitled to a declaratory judgment in this regard.

(Doc. 53, pp. 5-6, PageID 564-65.) The court further held:

Karmaloop's second counterclaim for conversion and third counterclaim in Case No. 2:12-cv-996, asserting a violation of M.G.L. c. 93A, remain pending.

(*Id.*, p. 11, PageID 409.)

ODW argues that the first quoted language leaves the TSA intact, including the release of all claims arising before its execution. The court held that

the Release involved in this case controlled all prior claims between the parties and all future claims, with two exceptions: a breach of contract claim when the Confirmation Inventory exception applied (which it does not due to Karmaloop's untimeliness) and intentional tort claims (based on public policy qualifying the scope of the release).

(*Id.*, p. 10, PageID 408.) The court went on to hold that Karmaloop's conversion claim survived because a release of a future intentional tort is void as against public policy. (*Id.*, pp. 9-10, PageID 407-08.) ODW argues that Karmaloop's Ch. 93A claim does not fall within either exception.

Karmaloop argues that the July 10, 2013 Opinion and Order held that "[i]f ODW was shown to have made threats to better its bargaining position, then this could constitute a violation of M.G.L. c. 93A." Karmaloop further argues that Massachusetts law provides that a "plaintiff is entitled to recover for all losses which were the foreseeable consequences of the defendant's unfair or deceptive act or practice" *DiMarzo v. American Mut. Insurance Co.*, 389 Mass. 85, 101 (Mass. S.Ct. 1983)(Citation omitted). Since it was foreseeable to ODW that extorting a release might prevent Karmaloop from directly pursuing its contract and fraudulent inducement claims against ODW based on conduct that pre-dated the release, Karmaloop's damages are the value of any released claims. Consequently, the damages flowing from the breaches of contract and fraudulent inducement during the course of the

6 years ODW provided warehouse services were foreseeable consequences of ODW's commercial extortion, Karmaloop may recover those damages.

ODW maintains that Karmaloop cannot recover damages for claims arising prior to execution of the enforceable TSA and the release regardless of Karmaloop's theory. While Karmaloop is entitled to prosecute its claim under M.G.L. Chapter 93A as the court has not yet dismissed it, ODW maintains that the only remedy that Karmaloop can theoretically pursue are damages, if any, arising after the execution of the TSA and the release. In other words, according to ODW, Karmaloop's alleged remedy cannot possibly include damages arising from claims that existed prior to the execution of the TSA and the release since the enforceable release operated to release all such claims – just as any release is aimed at doing. In ODW's view, permitting discovery on, and prosecution of, claims that are subject to an enforceable release would be nonsensical and contrary to the purpose of having an enforceable release – to bring finality to any disputes and differences that existed prior to the execution of the TSA and the Release. Moreover, damages, if any, arising after the date of the release would be nominal.

Karmaloop responds that the fact that it may not be able to pursue the released claims directly is irrelevant because “[t]he relief available under c. 93A is ‘sui generis ... and is not subject to the traditional limitation of preexisting causes of action.’” *Kattar v. Demoulas*, 433 Mass. 1, 12 (2000) (quoting *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 693 (1972)). See also *Greenfield Country Estates Tenants Ass’n, Inc. v. Deep*, 423 Mass. 81, 88 (1996) (Chapter 93A “created new substantive and procedural rights previously not available at common law.”). Karmaloop further points out that, in *Kattar*, the plaintiff could not pursue

a claim for wrongful foreclosure but was allowed to pursue (and was awarded damages for) a claim under Chapter 93A because foreclosing was unfair. Karmaloo further contends that ODW's position that Karmaloo only can pursue Chapter 93A damages that accrued after the TSA and release not only is unsupported by any law, but also makes no sense, as (i) the only damage that resulted from ODW's "threats to better its bargaining position" was that Karmaloo waived its prior claims for money damages; and (ii) if ODW's position was correct, no plaintiff ever could avoid or seek damages for fraudulent inducement.

ODW responds that *Kattar* and any similar authority is inapposite as ODW does not dispute that Chapter 93A creates a cause of action or that Karmaloo is permitted to try to prove a violation of that statute. However, ODW maintains that, unlike the plaintiff in *Kattar* or any other case cited by Karmaloo, Karmaloo is attempting to recover damages by proving underlying claims that the court has already found are conclusively released as a matter of law. Karmaloo is welcome to try to prove damages, if any, other than the value of the claims unequivocally released by the release.

In light of the foregoing, and as an alternative, ODW requests that, if the Court determines Karmaloo is entitled to pursue damages equal to the value of the released claims, then the Chapter 93A claim be bifurcated, with liability being tried first. If liability is established, only then would discovery on these alleged damages proceed. This would obviate the need to resolve the discovery dispute at the present time and would postpone and possibly avoid the need to engage in any of the expensive and burdensome discovery sought by Karmaloo until Karmaloo demonstrates success on that claim.

Karmaloop argues that the court should not bifurcate liability and damages because ODW has never filed a motion to bifurcate even though (i) ODW has been on notice of the scope of discovery for over 6 months; (ii) it now is the eve of the close of discovery; (iii) ODW has not cited any legal authority indicating that bifurcation might be appropriate; (iv) allowing bifurcation will cause a significant delay in this matter; and (v) ODW has not provided any analysis to support its claim of hardship that makes this case any different than any other case where damages could be a significant issue.

Decision. Both a conversion and a Chapter 93A claim are going forward. Karmaloop has the right to conduct full discovery on these claims. That discovery covers all alleged breaches of the warehouse agreement that occurred before execution of the TSA and the release as well as all of the alleged fraudulent inducement claims. Under Karmaloop's theory of the Chapter 93A claim, it is entitled "to recover for all losses which were the foreseeable consequences of the defendant's unfair or deceptive act or practice." *DiMarzo*, above. Those arguably include ODW's breaches of the warehouse agreement. Although ODW argues that Karmaloop's damages are at best nominal, that argument depends on a reading of the case law and the TSA that the court has not made. Judge Frost's order is clear that the Chapter 93A claim remains, and his decision imposes no restriction on the damages recoverable under that claim. Consequently, Karmaloop is entitled to take the discovery it has served, as modified by the parties' agreements as to search terms and any other agreed limitations on the scope of the written discovery requests.

ODW's argument that the discovery will be burdensome is not persuasive. First, it has offered no affidavits or other evidence demonstrating that responding to the discovery

would be unreasonably burdensome. The cost projection for the relevance and privilege review seems high and is not well-documented. No sample searches with relevancy/ privilege review to determine the likely benefits of a full search and the costs of that search and attorney review have been conducted. And, in any event, when the discovery requests are directed to documents relevant to disputed material factual issues, it is normal for the producing party to bear those costs.

Finally, bifurcation does not appear to be warranted. One jury should hear and determine all the claims of the parties. It is not practical to have a jury reach a verdict on liability on the Chapter 93A claim, then—should the jury find liability—adjourn the trial for several months while the parties conduct damages discovery.

Under the provisions of 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P., and Eastern Division Order No. 91-3, pt. F, 5, either party may, within fourteen (14) days after this Order is filed, file and serve on the opposing party a motion for reconsideration by the District Judge. The motion must specifically designate the Order, or part thereof, in question and the basis for any objection thereto. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

s/Mark R. Abel
United States Magistrate Judge