

Waldorf Servicing., LLC v Waldorf
2011 NY Slip Op 33064(U)
November 21, 2011
Sup Ct, Suffolk County
Docket Number: 7940-04
Judge: Elizabeth Hazlitt Emerson
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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY **COPY**

PRESENT: Hon. Elizabeth Hazlitt Emerson

WALDORF SERVICING, LLC, WALDORF SPECIAL
RISK, LLC, CHRISTOPHER V. WALDORF, JR.,
STEPHEN M. WALDORF and PAMELA JEANNE
WALDORF,

Plaintiffs,

RIVKIN RADLER LLP
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Uniondale, New York 11556

-against-

WILLIAM G. WALDORF,

Defendant.

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DECISION AND ORDER AFTER HEARING

This matter arises in connection with a Stipulation and Order dated November 28, 2007 (the "Stipulation"), among Pamela Jeanne Waldorf ("Pamela"), William G. Waldorf ("William") and Stephen M. Waldorf ("Stephen"), three siblings each of whom currently owns a one-third interest in Waldorf Servicing, LLC; Waldorf Risk Solutions, LLC; and Waldorf Special Risks, LLC (collectively the "Waldorf Entities"). After many years of litigation between and among Pamela, William, Stephen and, at times, their brother Christopher Waldorf ("Christopher"), the parties agreed to resolve their disputes by entering into the Stipulation. Generally, the terms of the Stipulation governed the manner in which the Waldorf Entities were to be operated after the purchase of Christopher's interest.¹ In particular, the Stipulation provided that each of Pamela, William and Stephen would remain employees of the Waldorf Entities and set out the terms pursuant to which the compensation of shareholders would be calculated.

¹ This Stipulation also set forth the terms on which Christopher Waldorf's interest in the Waldorf Entities would be purchased by and divided among Pamela, William and Stephen.

On April 13, 2010, Pamela presented this court with an Order to Show Cause in which she requested the following relief:

1. directing William Waldorf and Stephen Waldorf to (i) comply with the So-Ordered Settlement; and (ii) to immediately pay Pamela Waldorf the sum of \$833,333;
2. permanently enjoining and directing William Waldorf and Stephen Waldorf to comply with the So-Ordered Settlement;
3. adjudging William Waldorf and Stephen Waldorf to be in contempt of Court for their failure and refusal to abide by the So-Ordered Settlement;
4. allowing Pamela Waldorf to conduct discovery and scheduling a hearing before the courts to ascertain damages sustained by Pamela as a result of the alleged violations of the So-Ordered Settlement; and
5. to award attorney's fees in connection with a finding of contempt.

In support of her requests, Pamela alleged that William and Stephen had violated, *inter alia*, Section 8 of the Stipulation, which provides in relevant part as follows:

Bonuses to be paid to Pamela, William and Stephen predicated upon implementation of a work-related point system, the details of which shall be mutually agreed upon, each such bonus subject to a \$1.5 million annual cap. Profits are to be distributed according to each members' interest (1/3 Pamela, 1/3 William, and 1/3 Stephen).

Pamela argues that the above-quoted language of Section 8 of the Stipulation must be read to prevent the payment of bonuses to any of the siblings unless and until a work-related point system has been agreed to by each of Pamela, William and Stephen. Put another way, she asserts that, by entering into the Stipulation, the parties agreed that the consent of all parties to a "work related bonus system" was "a condition precedent to any bonus being paid to any of the owners of the Waldorf Entities." Pamela argues that she never agreed to a work-related bonus system. Notwithstanding this fact, she argues that William and Stephen paid themselves bonuses after execution and delivery of the Stipulation in clear violation of the terms of the Stipulation. Further, she argues that the payment of bonuses to Stephen and William pursuant to a work-related bonus system was tantamount to self help and an express attempt to squeeze her out of the business and undermine her of co-equal ownership rights. Accordingly, she seeks compensation from William and Stephen that, in essence, will equalize payments to the siblings. Further, she seeks an award of attorneys' and accountant's fees incurred in connection with this application.

In response, William and Stephen acknowledge that all three parties did not agree to a work-related bonus system. Further, they acknowledge that they did, in fact, pay themselves bonuses, which were calculated in accordance with the work-related bonus system that was in place before the execution of the Stipulation. William and Stephen note that the bonuses received by each of them during the years in question did not exceed the \$1,500,000 cap set forth in Section 8 of the Stipulation. Notwithstanding these facts, William and Stephen argue that the bonus payments made to them did not constitute a violation of the Stipulation. They assert that the Stipulation did not represent an agreement by the parties to preclude bonus payments unless and until an agreement was reached with respect to the point system. Rather, William and Stephen argue that Section 8 required the parties to negotiate in good faith with Pamela with the goal of implementing a work-related point system to be used to calculate bonus payments to each of the siblings. They argue that, after execution of the Stipulation, they made numerous attempts to negotiate an agreement with Pamela, as well as discuss other matters related to the Waldorf Entities, but that she refused to participate in good-faith negotiations. In addition, they point out that Pamela was entitled to participate in the old work-related bonus system on the same terms as each of them and thereby receive bonus payments. They assert that, despite being requested to do so, Pamela refused to complete sufficient work to qualify for such bonus payments. Finally, they argue that the language of Section 8 permitted the parties to adopt a work-related point system by a simple majority and did not require unanimous consent.

After submission of the Order to Show Cause, the parties were permitted to conduct appropriate discovery. Thereafter, following several attempts to reach a resolution, a hearing was scheduled. Such hearing commenced on October 4, 2010, and continued on December 8, 2010; January 5, 2011; January 6, 2011; April 13, 2011; April 14, 2011; April 15, 2011; May 16, 2011; June 3, 2011; and June 6, 2011.

Preliminarily, the court notes that, although many issues were addressed in the record, Pamela's Order to Show Cause raises specific requests for relief. Chief among these requests are Pamela's request for a finding of contempt and, upon such a finding, a direction from the court to William and Stephen to obey the terms of the Stipulation. Further, her request for damages or an equalization of compensation, as well as attorneys' and accountant's fees, flows from and is dependent upon a finding of contempt supported by the alleged violations. In examining the record, the court notes that the parties do not disagree as to many of the important facts offered for the court's consideration. For example, the parties agree that William and Stephen received bonus payments and that Pamela did not. The parties agree that Section 8 required them to negotiate with a view to adopting a work-related point system. The parties also agree that all three siblings did not agree to the implementation of a point system, although each side disputes whether the other negotiated in good faith. Finally, the record contains a large amount of undisputed information as to the various functions performed by and contributions made by each of the parties. In essence, the dispute between the parties is not with respect to the facts underlying the application, but the interpretation or plain meaning and, by extension, the intent of the Stipulation with respect to the payment of bonuses.

Turning first to the issue of contempt, under New York law to prevail on a motion to punish for civil contempt, the movant must establish by clear and convincing evidence (1) that a

lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) that the order was disobeyed and that the party disobeying the order had knowledge of its terms, and (3) that the movant was prejudiced by the offending conduct (**Town of Riverhead v T.S. Haulers, Inc.**, 68 AD3d 1103). It has been held that the mandate alleged to be violated should be clearly expressed; and, when applied to the act complained of, it should appear with reasonable certainty that it has been violated (**Pereira v Pereira**, 35 NY2d 301; **Yalkowsky v Yalkowsky**, 93 AD2d 834. In other words, to be clear and unequivocal, a writing “must clearly specify all the acts which the defendant is restrained from doing” (**Howard S. Tierney, Inc. v James**, 269 App Div 348). Where a significant question is left unanswered, the mandate is not clear and unequivocal (**Rienzi v Rienzi**, 23 AD3d 447). Further, when analyzing the clarity of a provision or term of a contract, New York courts have recently held that, if it can be said that the parties have conflicting but equally reasonable interpretations of a term, such term may be ambiguous (*see Prince of Peace Enterprises, Inc. v Top Quality Food Market LLC*. 760 F Supp 2d 384, 398 [court finding settlement unenforceable as parties had conflicting understanding of the meaning of a term], *rearg denied* US Dist Ct, SDNY, Feb. 16, 2006, Holwell, J [2011 WL 650799]). Put another way, when parties understand relevant language differently and both understandings are reasonable, the term may well be found to be ambiguous and, as such, cannot be found to be clear and unequivocal. Finally, it should be noted that the party seeking a finding of contempt bears the burden of demonstrating the elements required for such a finding by clear and convincing evidence. This is a higher, more demanding standard than the preponderance standard (**Solomon v State of N.Y.** 146 AD2d 439). Clear and convincing evidence is evidence that satisfies the factfinder that it is highly probable that what is claimed actually happened. It is evidence that is neither equivocal nor open to opposing presumption (**In the Matter of Gail R.**, 67AD3d 808). Thus, the party making the application for civil contempt has the overall burden of proof to establish, by clear and convincing evidence, that a court order has been violated (*Id.*)

Pamela’s arguments in support of her request for contempt rest squarely with the quoted language from Section 8 of the Stipulation. As previously summarized, Pamela contends that the phrase “mutually agreed upon” required unanimity or an agreement by all three siblings to adopt a specific point system prior to the payment of any bonus. She asserts that this language must be read by the Court to preclude or prevent the payment of bonuses to any sibling unless and until a point system has been agreed to by all shareholders. Further, she argues that the overall intent of the Stipulation, i.e. co-equal rights of ownership, supports her claim of an absolute bar to bonus payments. In opposition, William and Stephen contend that the point system used to calculate bonuses was in place prior to the Stipulation being so-ordered and that, rather than implement a new system without Pamela’s consent, they preserved the previous system until a new agreement could be entered into. They agree that Section 8 of the Stipulation required them to negotiate with Pamela with a view toward adopting a new system, and they assert that they did so. William and Stephen dispute that Section 8 prevents any bonus payments. In addition, they argue that the term “mutual” required a simple majority, not the express agreement of all three siblings. Finally, they ask the Court to conclude that Pamela’s behavior should be viewed as a failure to engage in good-faith negotiations and, as such, precludes a finding of equitable relief in her favor.

The Court finds that Pamela has failed to establish, through clear and convincing evidence, that the Stipulation constitutes a clear and unequivocal mandate preventing the payment

of bonuses under the circumstances alleged. Rather, the court finds that the language of Section 8 is ambiguous as to the intent of the parties when they adopted it. Although not expressed in this manner, the question is whether the Stipulation precluded the payment of any bonuses. With respect to this question, the court finds that each side had a different understanding of the scope and effect of the language used and that each side's understanding was equally reasonable. For example, Section 8 does not contain words that expressly prohibit the payment of bonus, such as a clause containing the following language: "No bonuses shall be paid *unless and until* mutual agreement is reached with respect to a work-related bonus system." Section 8 does, however, contain an express limitation on the size of potential bonuses, i.e. a cap of \$1.5 million, which demonstrates that certain limitations were agreed to. The court finds that the absence of any language expressly prohibiting the payment of bonuses and the inclusion of the \$1.5 million cap suggests that the parties did not agree to prohibit the payment of all bonuses. On the other hand, the court notes that the language of Section 8 contains the phrases "predicated upon" and "mutual agreement." These phrases support the argument that no bonuses were to be paid unless and until an agreement was reached. Such completely different and conflicting possibilities demonstrate that the language is ambiguous and, as such, cannot support a finding of contempt. Moreover, Pamela's assertion that the overall intent of the Stipulation was to equalize the positions of the three siblings does not provide evidence of a clear and unequivocal mandate and, as such, cannot support a finding of contempt. Further, a finding of contempt requires the court to determine, not only that a clear mandate was disobeyed, but that the disobeying party had knowledge of its terms. William and Stephen presented compelling evidence that they reasonably believed that the Stipulation did not preclude the payment of all bonuses unless and until an agreement was reached.

Pamela also contends that William and Stephen violated the clear and unequivocal mandate to negotiate with her regarding the implementation of a new point system. She argues that the actions of William and Stephen were, in fact, an attempt to squeeze her out of the business and deny her co-equal ownership rights, violating the Stipulation's implied covenant of good faith and fair dealing. William and Stephen counter that they attempted to engage Pamela in active discussions regarding the point system through multiple means of communication, including telephone, email, and personal contact. Furthermore, they invoke the doctrine of unclean hands, arguing that it was Pamela who refused to participate in good-faith negotiations.

Under New York law, the implied covenant of good faith and fair dealing embraces a promise that neither party to a contract shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract (**Rooney v Slomowitz**, 11 AD3d 864; **511 W. 232nd Owners Corp. v Jennifer Realty Co.**, 98 NY2d 144). Whether or not the acts of a party to the Stipulation were in bad faith will depend upon the facts presented to the court (**Pernet v Peabody Engineering Corp.**, 20 AD2d 781). Where a clear and unequivocal court order mandates that parties negotiate a future agreement, a party that fails to negotiate in good faith may be held in contempt (**New York State Labor Relations Bd. v George B. Wheeler, Inc.**, 177 Misc. 945, *affd as mod*, 265 App Div 970, *affd* 291 NY 562). Section 8 clearly obligated the parties to negotiate a point system, and none of the parties asserts otherwise. Accordingly, the court must examine the record to determine whether such an obligation has been met. Although it is clear that communications repeatedly broke down between the parties and that all three siblings did not agree on a work-related bonus plan, the court cannot say that William and Stephen violated

their obligation to negotiate in good faith. In fact, the evidence demonstrates that all three siblings behaved in a similar manner, at times responding appropriately to requests to engage in discussions and at other times refusing to communicate. The mere fact that no agreement was reached is not, in and of itself, evidence that the parties did not negotiate in good faith. Rather, the evidence presented by Pamela regarding William and Stephen's failures is no more compelling than the evidence presented by William and Stephen regarding Pamela's failures. Accordingly, the court finds that Pamela has again failed to meet her burden of proof, and the request for a finding of contempt on this ground is also denied.

As to the remaining requests for relief, they also depend upon a finding that Section 8 is clear and unambiguous and constitutes an express mandate by the court. Given the court's reasoning as set forth above, the remaining requests for relief are denied.

HON. ELIZABETH HAZLITT EMERSON

DATED: November 21, 2011

J. S.C.