NMN Fabrics, Inc. v Sommers Plastic Prod. Co., Inc.
2014 NY Slip Op 32944(U)
November 17, 2014
Supreme Court, New York County
Docket Number: 654445/2013
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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NMN FABRICS, INC.,

Plaintiff,

DECISION AND ORDER

-against-

Index No.654445/2013

SOMMERS PLASTIC PRODUCTS COMPANY, INC.,

Defendant.

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HON. ANIL C. SINGH, J.:

In this action for alleged breach of contract, plaintiff NMN Fabrics, Inc. ("NMN") moves for summary judgment, pursuant to CPLR 3212, in favor of the plaintiff's complaint against defendant Sommers Plastic Products Company, Inc. ("Sommers") for improper termination of their contractual agreement and improper withholding of amounts owed. Defendant opposes.

Background

Defendant Sommers is in the business of selling and distributing textiles for wholesale home furnishing, furniture, and design trades. Plaintiff NMN is in the business of providing sales services for distributers of fabrics and textiles.

In 2001, the parties entered into a written agreement ("Agreement")[1], whereby plaintiff provides services to defendant for the North American sales territories (see Notice of Motion (motion sequence number 001), Exhibit A). During the term of the agreement, plaintiff was to represent and promote the defendant's products and interests and in return, receive commissions of eight percent of sales on all orders placed by large contract and residential textile jobbers, furniture and home furnishing accessory manufacturers. Pursuant to the Agreement, Michael Paul was handling the representation of defendant Sommers on behalf of plaintiff NMN.

On December 12, 2013, Michael Paul, NMN President Neil Nahoum, and the defendant held a morning meeting where Michael Paul announced his decision to work for Nassimi, one of defendant's competitors. Upon the news, defendant announced at the meeting that the Agreement was terminated and again in an email later that afternoon. Neil Nahoum replied stating his willingness to sever ties with Michael Paul to maintain NMN's relationship with defendant; however, defendant proceeded to terminate.

According to the plaintiff, defendant improperly terminated the plaintiff's services. The termination procedure under the Agreement stated:

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[1] While New Jersey law is governing in the Agreement, both plaintiff and defendant have agreed by letters dated October 29, 2014 and October 27, 2014 respectively to knowingly and voluntarily waive the New Jersey Choice of Law and to apply New York law.

6. Termination.

(a) NMN Fabrics, Inc. contract hereunder may be terminated by either party in the event of the other party's failure to perform in accordance with any of the material terms and conditions of this Agreement. In the event that either party desires to terminate this agreement in accordance with this provision, it shall give the other party at least sixty (60) days notice of such desire and the specific basis of the claim that the other party has failed to perform in accordance with this agreement. During this sixty (60) day period, the parties will meet and make a good faith effort to resolve the issues.

(Id.).

The plaintiff contends that the defendant provided neither the required 60-days notice of termination nor the opportunity for plaintiff to resolve the issues. Moreover, plaintiff also argues that defendant refuses to pay plaintiff the commissions owed in accordance with the Agreement.

In opposition, defendant Sommers claims that it was the plaintiff who breached the "no-competition" clause of the Agreement when Michael Paul made the decision to join Nassimi. Defendant argues that Michael Paul was a partner of NMN with Neil Nahoum and further submits affidavit of Sommers Vice President Fred Schecter and emails to show that he held himself out to be a partner. However, plaintiff argues that Michael Paul is an independent contractor and so his decision to leave does not constitute a breach.

Discussion

The movant for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter

of law (see Dallas-Stephenson v. Waisman, 39 AD3d 303, 306 [1st Dept 2007], citing Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (see Asabor v. Archdioceses of NY, 102 AD3d 524, 527 [1st Dept 2013]).

Since summary judgment is a drastic measure, the court may grant the motion only if no triable issues exist (see Grossman v. Amalgamated Hous. Corp., 298 AD2d 224, 226 [1st Dept 2002]). If there is any doubt to the existence of a triable issue of fact, the motion should be denied (see id., citing Rotuba Extruders v. Ceppos, 46 NY2d 223, 231 [1978]).

Although it is undisputed that defendant did not comply with the 60-days notice requirement in the Agreement, there is a factual issue here as to whether plaintiff's alleged violation of the no competition provision rendered notice and opportunity to cure futile (see 1537 Assoc. v. Temlex Indus., Inc., 128 AD2d 384, 386 [1st Dept 1987]).

Generally, the non-defaulting party must afford the defaulting party any contractually secured opportunity to cure prior to terminating a contract (see Sea Tow Servs. Int'l v. Pontin, 607 F Supp 2d 378, 388-389 [EDNY 2009]). However, in limited circumstances, New York law permits a party to terminate a contract immediately, without affording the breaching party notice and opportunity to cure (Id.; see also Special Situations Fund III, L.P. v Versus

Tech., 227 AD2d 321 [1st Dept 1996] ("[a] party will be relieved or discharged from the performance of futile acts or conditions precedent. . . upon the failure or refusal by a party to honor its obligations under their contract")).

According the non moving party every favorable inference, there is still a factual question as to whether Michael Paul's decision to work for defendant's competitor is an incurable breach. Moreover, such determination requires further discovery of Michael Paul's relationship to NMN and Neil Nahoum.

As to the commissions that the plaintiff contends is owed, defendants do not dispute that plaintiff is entitled to sums of $9,090.17 and $14, 253.95 for October 2013 and November 2013 respectively. However there is a factual dispute about whether the parties agreed to the reduction in plaintiff's commissions from 2009 to 2013. Therefore, the plaintiff did not establish the prima facie burden of summary judgment because there is doubt as to commissions owed to plaintiff. Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on breach of contract claims is denied in its entirety; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on February 18, 2014, at 9:30 AM.

Date: November 17, 2014
New York, New York

Anil C. Singh

HON. ANIL C. SINGH
SUPREME COURT JUSTICE