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CONSOLIDATED INDEX No. 14037-12

SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

HEARING DATE 11/3/14
NEXT CONFERENCE: 2/26/15
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CASUAL WATER EAST, LLC and CASUAL WATER BRIDGE HAMPTON, LLC, Plaintiffs, -against- CASUAL WATER, LTD., GREGORY P. KIRWAN and MICHAEL HARTMAN, Defendants.	PHILLIPS LYTLE, LLP Attys. For Plaintiffs 620 Eighth Ave. New York, NY 10018 LEWIS, JOHS, AVALONE, ETAL Atty. For Defendants One CA Plaza - Ste. 225 Islandia, NY 11749

DECISION AND ORDER AFTER HEARING

There exists a long and difficult history between these parties. Their relationship, arising from two Agreements, has deteriorated as each party interprets ambiguous provisions of the Agreements to their own advantage. Plaintiffs, Casual Water East LLC (East) and Casual Water Bridgehampton, LLC (Bridgehampton), instituted this action to enforce the Agreements against defendant Casual Water, LTD (LTD), and the two individual owners.

Many efforts have been made to resolve the differences between the parties, all without success. Discovery has been slowed, as the parties direct their attention to litigation. Previously, by order dated January 23, 2014, defendants' motion to amend and for a preliminary injunction was granted and the Court issued the following directive:

> ...LTD is entitled to the payment of the Support Fees subject to certain conditions subsequent as set forth in the agreements. The corporate plaintiff's admitted failure to pay the Support Fees, as it had in the past, rendered the status quo between these parties 'not a

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> condition of rest but of action' and it inflicted irreparable harm upon the defendant LTD so as to warrant the imposition of mandatory injunctive relief, provisionally, until a final resolution of the claims interposed in this action is at hand.

It has been the goal of this Court to put the parties and the Agreement back together, as best as possible, during the pendency of the litigation. One of the constant difficulties in trying to resolve this conflict has been the lack of definition and ambiguous nature of the term, "referral," in the Agreements. Previously, much of the time of the Court has been focused on whether a referral is simply the providing by LTD of the name and address or telephone number of a bona fide customer seeking pool or spa service or whether East actually secures a signed contract for the service of constructed pool or spa as a customer. Today, that issue remains unresolved, as insufficient discovery has occurred to afford the Court an adequate basis to make a final determination.

By so-ordered stipulation dated August 21, 2014, the parties, in an effort to arrive at the appropriate Support Fee pursuant to the Agreement, agreed to produce profit and loss statements for the first and second quarters of 2014 on or before September 8, 2014. Additionally, the parties agreed that if they could not reach an agreement as to the Support Fee due and payable to LTD and pay the same by September 30, 2014, the Court would schedule a hearing to determine the issue. The parties had negotiated a payment for 2013 to avoid a hearing on the issue that year. The parties could not agree on a payment for 2014 so, by order dated October 9, 2014, the Court directed a hearing on the Support Fee issue. That hearing was held on November 3, 2014.

Prior to the hearing, the parties agreed that there was no dispute that East's Support Fee is based on ten percent of Net Revenue. Therefore, the focus of the hearing was to determine whether the Support Fee due from Bridgehampton should be calculated based on ten percent or six percent of Net Revenue under the subject Agreements. Bridgehampton has agreed to only pay the Support Fee based on six percent, pending a decision by the court on the proper percentage. It is Bridgehampton's position that LTD has not referred the requisite number of customers under the parties' Agreements and has failed to met the New Account Threshold necessary to mandate the ten percent Support Fee.

At the hearing, LTD offered the February 6, 2008 Agreement as Pl. Ex. 1, wherein it transferred 90 accounts and customers, delineated as "Acquired Subscribers," to Bridgehampton. In return, Bridgehampton had to pay a quarterly fee equal to ten percent of the net revenue, "for the ongoing support of Seller and further customer referral by Seller (the 'Support Fee')" (*see* par. 4[a]). LTD agreed "to refer all new Subscribers in zip code 11932 to [Bridgehampton]. [LTD] will not support or refer Subscribers to any other servicing organization in zip code 11932" (*see* par. 7). Paragraph 10 of the Agreement states, in relevant part, as follows:

> The Parties agree that [LTD] shall be required to refer to [Bridgehampton], a minimum of Three (3) new Subscribers in each and every calendar year in order for the Support Fee to continue (the "New Account Threshold"). In the event [LTD] fails to achieve the New Account threshold in any given calendar year, the Support Fee shall automatically drop to nine percent (9%). If [LTD] achieves the New Account Threshold in the following year, the Support Fee shall increase to ten percent (10%) in that year. In the event [LTD] fails to achieve the New Account Threshold for two consecutive years, the Support Fee shall drop to six percent (6%) and never again higher, but possibly further reduced as indicated in the following sentence.

The Agreement has an Addendum attached to it whereby five signers to the Addendum "decided to formalize an Executive Committee to interpret the contract where necessary."

LTD also submitted the May 21, 2008 Agreement as Pl. Ex. 2, wherein it transferred 60 accounts and customers, in 23 zip codes other that 11932. In this Agreement, paragraph 10 is nearly identical to the one set forth above, except that the referral is increased to " a minimum of Five (5) new Subscribers in each and every calendar year in order for the Support Fee to continue (the "New Account Threshold"). This Agreement contains not only the identical Addendum, but a second Addendum that clarifies the date of the quarterly payments and the interest to be charged for late payment.

Taking the two Agreements together, the parties offer that a minimum of eight referrals must be made. Since it is conceded that the New Account Threshold was not met in 2012, but has been met for each year thereafter, the parties are focused on the referrals for the year 2011. If the New Account Threshold was not met that year, then, Bridgehampton argues that the Support Fee must drop to six percent and can not rise any higher, no matter how many referrals are made in 2013 and 2014.

The Court heard from two individuals, Jennifer Eaton, the office manager of LTD and Matthew Garry, Bridgehampton's principal. The Court found both witnesses to be credible and cannot say that one was more credible than the other. One thing became very clear to the Court at the conclusion of the testimony, that is, that prior to the difficulties that lead to this litigation, the parties acted in a very informal manner. They shared office space and expenses and more importantly, a single phone number for the two businesses. Based upon the nature of the relationship, there was no real paper trail of referrals or eventual customers. No reports were made back to LTD if a referral ever became a customer and Bridgehampton did not object to the process of referrals in the beginning years.

Jennifer Eaton testified that as the office manager for 13 years, referrals would come from new construction job, renovation jobs, and from unsolicited referrals off the street, including phone calls into the shared office. She offered a list of twelve referrals to Bridgehampton for the year 2011, in a document she created (*see* Def. Ex. A). She also testified that this was not the whole universe of referrals since "We have numerous people who call in and need service, and we don't necessarily document them. We would just pass the name and phone number along" (*see* transcript, p. 14). During 2011 she, or other LTD employees, would pass the information to Bridgehampton.

By the conclusion of the hearing, it was conceded that two names on the list of twelve, Paulson and Lindsay, must be excluded and that six are not challenged as referrals (Cebula, Feldmann, Kastenbaum, Baptiste, Lee [Economy], and Brady). That leaves four in question.

Based upon the submitted e-mail (*see* Def. Ex. E) and the testimony from Ms. Eaton, the Court must conclude that Ursula was a referral (*see* transcript, p 107).

Ms. Eaton testified that Selver was a 2011 referral because that is when he took possession of the property (*see* transcript, p 18). The Court notes that, unlike Lindsay, Bridgehampton did not offer extensive invoices for Selver to prove service work in 2010. Moreover, Mr. Garry admitted that the QuickBooks system would overwrite the name once the customer was confirmed (*see* transcript, p 88), so it is possible that the winterization work was for the builder or a charge-back to LTD . On this limited discovery record, the Court agrees that Silver should count as a 2011 referral.[1]

Having reached the necessary referrals for 2011, the Court need not address the remaining referrals but does note that Tiseo, without additional documentation, appears to be a referral for the subsequent year. On the limited record before the Court, Cerdas may be an additional referral for 2011.

The Court notes that Mr. Garry did agree that in the summer months there would be more than 15 - 30 phone calls for new service and that he believed that, as a very rough estimate, 20% of those would become customers of Bridgehampton. He testified that he did not keep track and did not notify LTD when one of the prospective customers signed as a customer. However, in light of that testimony, an argument can be made that in the summer months three to six new customer are acquired each month by the phone referrals. Even if one or two of those were forwarded from LTD employees to Bridgehampton, the 2011 referral limit would have been satisfied.

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[1] No documentary proof was offered that if Selver was listed as a 2011 referral, it would decrease the 2010 total. In any event, if it did, then, under the Agreements, the Support Fee for 2010 would drop to nine percent (9%) but then go back to ten percent (10%) for 2011; drop back down to nine percent (9%) for 2012; but then go back up to ten percent (10%) for 2013 and 2014.

The Court arrives at its decision today upon consideration of the Agreements, in particular paragraph 4(e) which states: "No consent or approval of any person is or will be required in connection with the execution, delivery or performance of this agreement."

Moreover, the Court notes that as of October 2012, Bridgehampton had over 200 customers, far more than the number of "Acquired Subscribers" under the Agreements.

Finally, the e-mail from Mr. Garry to LTD (*see* Def. Ex. F) acknowledges that "the royalty is based on referrals and not just new construction."

It is therefore,

ORDERED that LTD did satisfy the needed referrals for 2012 and the Support Fee should be set at ten percent (10%) for that year. Adjustments to the payments for the first and second quarters of 2014 shall be made within fifteen (15) days of the date of this decision and order; and it is further

ORDERED that the next court conference shall be held on **February 26, 2015** at 9:30 a.m. in Part 45 at the courthouse located at 1 Court Street - Annex, Riverhead, New York.

This constitutes the decision and order of the Court.

DATED: 12/2/14

THOMAS F. WHELAN, J.S.C.