Taboola, Inc. v Sandra Rose, LLC
2020 NY Slip Op 31866(U)
June 10, 2020
Supreme Court, New York County
Docket Number: 655877/2018
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42
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TABOOLA, INC.

Plaintiff, DECISION AND ORDER

Index No. 655877/2018

- v -

SANDRA ROSE, LLC, MOT SEQ 002

Defendant.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this breach of contract, action, the plaintiff, Taboola, Inc., moves pursuant to CPLR 3212 for summary judgment on its sole cause of action for breach of contract against the defendant, Sandra Rose, LLC. The plaintiff also moves (i) to dismiss the defendant's counterclaims for breach of contract and misrepresentation, (ii) to dismiss the defendant's nine affirmative defenses, and (iii) for attorneys' fees. The defendant opposes the motion. The motion is granted to the extent discussed herein.

II. BACKGROUND

The plaintiff provides targeted digital advertising services to internet publishers, allowing for the publishers to include one of the plaintiff's 'content discovery platforms' on

their website and providing the publisher with a percentage of the plaintiff's revenue generated from internet traffic flowing therefrom. On July 17, 2018, the plaintiff and the defendant entered into a publisher agreement whereby the defendant would be able to include one of the plaintiff's 'content discovery platforms' on its website.

Paragraph VI of the publisher agreement states that "Taboola and Publisher enter into this Agreement based upon the terms, covenants, and conditions set forth in the Terms and Conditions, which Taboola reserves the right to update periodically, available at [Website]."

Paragraph V of the publisher agreement and paragraph 2(a) of the terms and conditions require the defendant, for the 24 months from the implementation of the content discovery platform on defendant's websites, to display the content discovery platform on all pages of the websites and maintain them in the same location and alongside the same page elements.

Paragraph 4 of the terms and conditions requires the defendant to make the plaintiff its "exclusive services provider during the term" and "not engage any third party, including, without limitation, any of Taboola's competitors or their affiliates, including without limitation ... ZergNet ... to make recommendations, play video advertisements, or provide a content

recommendation service that is similar to [the plaintiff's discovery platform] on any properties owned or operated by publisher, including, without limitation, the Properties."

Paragraph 4 of the terms and conditions further entitles the plaintiff to liquidated damages if the defendant breaches the exclusivity provision, providing in relevant part that:

> "Publisher further agrees that in the event of a breach of the foregoing exclusivity clause, Publisher shall pay to Taboola, as liquidated damages and not a penalty, an amount equal to: (i) Taboola's monthly Adjusted Gross Revenue realized from Publisher for the Properties to which the breach applied for the immediately preceding three months (or less if the breach occurred earlier than three months into the Term) times (ii) the number of months remaining in the then-current Term, it being agreed that actual damages in each such circumstance will be uncertain and difficult to measure, and that the amount provided is a reasonable measure."

Paragraph 11 of the terms and conditions also states: "[i]f either Party hereto breaches any of the terms of this Agreement, the non-breaching Party shall be entitled to recover from the breaching Party any reasonable legal fees, costs, and expenses incurred to enforce this Agreement against the breaching Party."

The plaintiff's content discovery platform was first implemented on the defendant's website on July 19, 2018, with the term set to expire on July 18, 2020. However, on September 16, 2018, the defendant removed the plaintiff's content discovery platform from its website and replaced it with competitor ZergNet's recommendation service. On October 5, 2018

the plaintiff sent the defendant written notice advising that the defendant was in breach of the publisher agreement for improperly removing the content discovery platform from the properties and replacing it with the recommendation service of a third-party. The notice directed the defendant to cure its breaches by restoring the plaintiff's content discovery platform and removing ZergNet's service.

The defendant refused to reinstall the plaintiff's content discovery platform or remove ZergNet's recommendation service. Instead, on October 24, 2018, the defendant's attorney emailed the plaintiff and claimed that the plaintiff had breached the publisher agreement, and thus the agreement had terminated.

On November 2, 2018, the plaintiff responded to the defendant disputing its claims, rejecting the purported termination of the agreement, and reiterating its demands for the defendant to cure its breaches. The defendant did not cure the alleged breaches under the agreement, and the plaintiff subsequently commenced the instant action on November 27, 2018. On January 7, 2019, the defendant answered the complaint asserting affirmative defenses of failure to state a cause of action, performance, impracticability, misrepresentation, breach of contract, mistake, performance excused, breach of the duty of good faith and fair dealing, and unjust enrichment. The answer

also asserts two counterclaims for breach of contract and misrepresentation.

III. DISCUSSION

A. Summary Judgment Standard

It is well settled that the movant on a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form and the pleadings and other proof such as affidavits, depositions, and written admissions. See Zuckerman v City of New York, 49 NY2d 557 (1980); CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

B. Breach of Contract

The plaintiff establishes its *prima facie* entitlement to judgment as a matter of law on its sole cause of action for

breach of contract. In support of its motion for summary judgment, the plaintiff submits, *inter alia*, the publisher agreement between the plaintiff and the defendant, the terms and conditions that were incorporated into the publisher agreement by reference, excerpts from the deposition transcript of Sandra Rose Hendricks, the owner of the defendant, detailing her decision to remove the plaintiff's platform and reinstall competitor ZergNet's discovery platform, and the plaintiff's August 2018 revenue summary with respect to the defendant.

These submissions demonstrate 1) the existence of a contract, 2) the plaintiff's performance under the contract; 3) the defendant's breach of that contract, and 4) resulting damages. See Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010). Specifically, the plaintiff's submissions demonstrate that 1) the plaintiff and the defendant entered into the publisher agreement, 2) the plaintiff performed under the publisher agreement by providing its discovery platform to the defendant and the revenue generated by the platform, 3) the defendant breached the publisher agreement by removing the discovery platform from its website prior to the 24 month term required under paragraph V of the agreement and reinstalling and using ZergNet's discovery platform in violation of the paragraph 4 of the terms and conditions, and 4) damages inasmuch as the plaintiff has not been able to collect the percentage of the

defendant's advertising revenue that it would be entitled to under the agreement.

Based upon the defendant's breach of the agreement, the plaintiff establishes its entitlement to liquidated damages in the amount $258,672.51. These damages are calculated pursuant to the publisher agreement by multiplying the average monthly gross revenue from the defendant's websites for the month immediately preceding the breach, shown by the plaintiff's August 2018 revenue summary to be $11,547.88, by the number of months remaining in the term, 22.4.

In opposition, the defendant raises three arguments, (i) that it should not be held liable for breaching any provision of the terms and conditions, as they were not attached to the publisher agreement, and thus the defendant did not read them prior to entering into the agreement, (ii) that its conduct did not constitute a breach of the publisher agreement, and (iii) that it was entitled to terminate the publisher agreement based upon the plaintiff's alleged breach. These contentions are without merit.

Contrary to the defendant's first argument, it is well settled that outside documents may be incorporated into the terms of a contract by reference. See Kachurin v Barr, 272 AD 391 (1st Dept. 1947), aff'd 297 NY 889 (1948); see also

Eshaghpour v Zepsa Indus., Inc., 174 AD3d 440 (1st Dept. 2019). Moreover, a party who signs a contract is presumed to know its terms and is bound by them, regardless of whether the party read the contract. See Level Export Corp. v Wolz, Aiken & Co., 305 NY 82 (1953); Sterling Nat'l Bank & Trust Co. v I.S.A. Merchandising Corp., 91 AD2d 571 (1st Dept. 1982). This rule applies equally to materials incorporated into the contract by reference. See Shah v Monpat Const., Inc., 65 AD3d 541 (2nd Dept. 2009). The courts regularly apply this rule to hold a defendant bound by terms and conditions that are incorporated by reference into a contract and available on a plaintiff's website, even if the defendant failed to review them. See, e.g., Madison Indus. Inc. v Garden Ridge Co., 2011 N.Y. Slip Op. 31866(U), (Sup Ct, NY County 2011) (incorporation by reference of terms and conditions by providing website address with terms and conditions sufficient); Bijou International Corporation v Kohl's Corp., 2008 N.Y. Slip Op. 33439(U) (Sup Ct, NY Country 2008).

As to the defendant's second argument, the defendant submits no evidence or authority supporting its contention that its removal of the plaintiff's discovery platform and its use of a competitor's discovery platform did not breach the publisher agreement, particularly in light of the terms of both the publisher agreement and the terms and conditions. As such, the second argument fails to raise a triable issue of fact.

Inasmuch as the defendant's third argument contends that the defendant was entitled to terminate the publisher agreement based upon the plaintiff's alleged breach of the agreement, such an argument is without support. The defendant claims that the plaintiff failed to provide a content discovery platform that worked as expected with the defendant's website. However, as the plaintiff correctly notes, the plaintiff was only required to provide the underlying code for the content discovery platform, provide content to be displayed on the platform, and pay the defendant its share of the revenue derived from the platform.

Nothing in the agreement required the plaintiff to ensure that the code it provided worked with the defendant's website. On the contrary, paragraph 6(b) of the terms and conditions states that the plaintiff's services are provided "as is," and disclaims any separate representations concerning the quality or performance of the content discovery platform. Notably, the defendant's principal admitted during her deposition that the plaintiff's alleged conduct did not breach any specific term of the publisher agreement, but rather did not meet expectations relating to advertising revenue.

As such, the defendant fails to raise a triable issue of fact, and summary judgment on the plaintiff's sole cause of action for breach of contract is granted.

C. Affirmative Defenses

As the court has granted the plaintiff’s motion for summary judgment, the branch of the plaintiff’s motion seeking to dismiss the defendant’s nine affirmative defenses is denied as academic.

D. Defendant’s Counterclaims

The plaintiff’s submissions also establish entitlement to summary judgment dismissing the plaintiffs two counterclaims for breach of contract and misrepresentation. A breach of contract claim must allege the specific contract provision that was allegedly breached. See Gordon & Breach Science Publrs., Inc. v New York Sys. Exch., Inc., 267 AD2d 52 (1st Dept. 1999). Here, although the defendant alleges that the plaintiff breached the publisher agreement by failing to provide code that worked properly on the defendant’s website and costing the defendant revenue, there are no provisions in either the publisher agreement or the terms of conditions that require the plaintiff to perform the actions in question.

As discussed herein, under the publisher agreement and the terms and conditions, the plaintiff was only required to provide the underlying code for the discovery platform, provide content to be displayed on the platform, and pay the its share of the revenue derived from the platform. Nothing in either document

requires the plaintiff to ensure that the platform works with the other elements of the defendant's website. On the contrary, paragraph 6(b) of the terms and conditions states that the plaintiff's services, including the platform, are provided "as is," and disclaims any separate representations concerning the quality or performance. Likewise, nothing in the publisher agreement or terms and conditions guarantees a particular outcome or increased revenue for the defendant. As such, the defendant cannot establish any breach of contract by the plaintiff, and therefore the first counterclaim is dismissed.

The defendant's second counterclaim for 'misrepresentation' fails to specify whether it is for negligent or fraudulent misrepresentation. However, in either case, the counterclaim fails. To prevail on a cause of action for negligent misrepresentation, a party must establish: 1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; 2) that the defendant provided incorrect information to the plaintiff; and 3) reasonable reliance on the information by the plaintiff. See J.A.O. Acquisition Corp. v Stavitsky, 8 NY3d 144 (2007). There is no "special relationship" where the parties only have an ordinary, arm's-length business or contractual relationship. Deven Lithographers v Eastman Kodak Co., 199 AD2d 9, 10 (1st Dept. 1993); Stank Winston Creatures, Inc. v Toys "R"

Us, Inc., 4 Misc. 3d 1019(A) (Sup Ct, NY County 2004). As the record demonstrates that the plaintiff and the defendant only had an ordinary, arm's-length, contractual relationship, and the defendant fails to raise a triable issue of fact in response, any claim for negligent misrepresentation must fail.

Moreover, to prevail on a fraudulent misrepresentation claim, a party must establish that: 1) the defendant made a material false representation of fact; 2) the defendant intended to defraud the plaintiff thereby; 3) the plaintiff reasonably relied on the representation; and 4) the plaintiff suffered damage as a result. See J.A.O. Acquisition Corp. v Stavitsky, supra; Swersky v Dreyer & Traub, 219 AD2d 321 (1st Dept. 1996). However, statements of prediction or expectation about future events cannot give rise to negligent misrepresentation or fraud claims. ESBE Holdings, Inc. v Vanquish Acquisition Partners, LLC, 50 AD3d 397 (1st Dept. 2008); Dragon Inv. Co. II LLC v Shanahan, 49 AD3d 403 (1st Dept. 2008).

Here, the defendant alleges that prior to entering into the publisher agreement, the plaintiff made representations regarding how the content discovery platform would operate on the defendant's website and the revenue that the defendant could expect to generate. However, such statements relate to the plaintiff's predictions and expectations and do not give rise to

either a negligent or fraudulent misrepresentation claim. Id. Moreover, regardless of whether the defendant's misrepresentation claim is based in fraud or negligence, such a claim is precluded by the language of the publisher agreement. As explained herein, paragraph 6(b) of the terms and conditions expressly disclaim any representations or warranties other than those set forth in the publisher agreement and terms and conditions. Therefore, the plaintiff's motion for summary judgment dismissing the defendant's second counterclaim is also granted.

E. Attorneys' Fees

The plaintiff also seeks attorneys' fees pursuant to the publisher agreement. Generally, in a cause of action seeking attorneys' fees, such fees are merely incidents of litigation and are not recoverable absent a specific contractual provision or statutory authority. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1st Dept 1976). Inasmuch as Paragraph 11 of the terms and conditions provides that: "[i]f either Party hereto breaches any of the terms of this Agreement, the non-breaching Party shall be entitled to recover from the breaching Party any reasonable legal fees, costs, and expenses incurred to enforce this Agreement against the breaching Party," an award of

attorneys' fees is proper, with the amount of attorneys' fees due to be determined at a hearing.

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the plaintiff's motion for summary judgment is granted to the extent that the portions of the motion seeking summary judgment on the first cause of action and dismissing the defendant's counterclaims are granted, and the remainder is denied; and it is further,

ORDERED that the Clerk is to enter judgment in favor of the plaintiff and against the defendant in the amount of $258,672.51 plus statutory interest as of September 16, 2018; and it is further,

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: the issue of the amount due to the plaintiff for an award of contractual attorneys' fees; and it is further,

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in

accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further,

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further,

ORDERED that the plaintiff shall serve a proposed accounting of the costs and attorneys' fees he incurred within 24 days from the date of this order and the defendant shall serve objections to the proposed accounting within 20 days from service of plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further,

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further,

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further,

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts, and, upon disposition of that motion, the plaintiff may enter an amended judgment adding the award of attorneys' fees and costs to the amount recovered, if any; and it is further,

ORDERED that the plaintiff shall serve a copy of this order upon the defendant within 15 days of the entry of this order.

This constitutes the Decision, Order, and Judgment of the court.

Dated: June 10, 2020 ENTER: