

Coda-Gargoyles, LLC v Quantum Optics, Inc.

2001 NY Slip Op 30047(U)

January 11, 2001

Supreme Court, New York County

Docket Number: 0601638/2005

Judge: Bernard J. Fried

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(99)

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

BERNARD J. FRIED

J.S.C.

PRESENT: _____

PART 60

Index Number : 601638/2005

CODA-GARGOYLES, LLC

vs

QUANTUM OPTICS, INC.

C

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

<u>PAPERS NUMBERED</u>	

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

FILED
NOV 02 2005
NEW YORK
COUNTY CLERKS OFFICE

Dated: 11/1/05

Bernard J. Fried
J.S.C.

BERNARD J. FRIED

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: LAS PART 60

-----X
Coda-Gargoyles, LLC,

Plaintiff,

-against-

Quantum Optics, Inc.,
FGX International, Inc.
and AAi Fostergrant, Inc.,

Defendants.
-----X

FILED
Index No. 601638/05
NOV 02 2005
NEW YORK
COUNTY CLERK'S OFFICE

Fried, J.:

This action seeks damages for the alleged breach by defendant Quantum Optics, Inc. ("Quantum") of an agreement for the purchase of assets from plaintiff ("Agreement"). Quantum is the successor in interest to the Agreement. Defendants AAi FosterGrant, Inc. ("AAi") and FGX International, Inc. are companies related to Quantum. Plaintiff also seeks an accounting.

Under the Agreement, plaintiff agreed to sell to defendant certain property, including intellectual property relating to several popular brands of sunglasses ("Gargoyle Products") and the accounts receivables of prior purchasers of the brands sold under the Agreement. (Perkins Affirmation, Exhibit B). The Agreement required defendants to pay to plaintiffs a non-refundable cash advance of \$750,000, plus 90% of collections of the accounts receivables, and an "Additional Purchase Price". The additional purchase price consisted of 10% of gross annual sales of Gargoyle Products for three years from the closing of the Agreement. The additional purchase price is set-off by the cash advance, such that plaintiff receives no additional purchase price unless defendants sell more than \$750,000 of

Gargoyles products.

The parties accepted additional obligations relating to the collection of accounts receivables and the additional purchase price: Defendants are required to send notice to all accounts receivable debtors specified in the Agreement. Defendants must also maintain adequate books and records of the sales of Gargoyle Products and submit to plaintiff quarterly summaries and certified annual statements of such sales. Under section 4.6, the parties agreed that if any dispute arose as to the “amount and calculation” of the certified annual statements, plaintiff must submit a Notice of Disagreement to defendants within 30 days and, if the dispute could not be resolved, submit to an audit process.

In the **First Cause of Action**, plaintiff claims breach of contract on several grounds. First, they argue that defendants breached by not providing notice to all accounts receivable debtors as required. Second, defendants allegedly breached by failing to maintain accurate books and records of sales. Third, defendants allegedly breached by failing to submit, on a quarterly basis, summaries including good faith estimates of the quantity, description, and net sales of products governed by the purchase Agreement. Fourth, defendants failed to make a good faith effort to market products. Finally, defendants failed to submit a certified statement of annual net sales.

Plaintiff alleges, in its **Second Cause of Action**, that defendants breached the implied covenant of good faith and fair dealing by allegedly failing to properly perform their reporting and accounting obligations, failing to develop a business or marketing plan for the sale of products, and failing to implement an effective marketing plan for the sale of products.

As a **Third Cause of Action**, plaintiff seeks an accounting of all of defendants' sales of Gargoyles products, all of defendants' sales of non-Gargoyles products, and accounts receivable collected by defendants. They seek to determine whether any sales of Gargoyles products were mis-allocated by defendants.

Defendants move to dismiss the complaint, pursuant to CPLR §§ 3211(a)(1) and (a)(7), based on documentary evidence and failure to state a cause of action. In the alternative, defendants argue for a stay of the action, pursuant to CPLR § 2201, pending the conclusion of an audit procedure as provided in the Agreement. In support of their motion, defendants submitted documentary evidence and a memorandum of law.

Plaintiff opposes the motion to dismiss, arguing that the documentary evidence is not sufficient to justify dismissal, the complaint states valid causes of action, and the action should not be stayed. Plaintiff submitted an affidavit and various documents in opposition to the motion.

A. Documentary Evidence

Defendants argue that all causes of action should be dismissed because documentary evidence shows that there is no valid claim for breach of contract or breach of the covenant of good faith and fair dealing. Defendants also claim that the cause of action for an accounting is precluded by section 4.6 of the Agreement, because the Agreement required plaintiff to send a timely Notice of Disagreement in response to any disputed annual statements, that plaintiffs failed to do so, and, therefore, waived their right to complain about the annual sales revenue. They contend that plaintiff's true complaint, essentially, is that

defendants failed to sell enough Gargoyles products to require payment of an additional purchase price, limiting plaintiff's earnings under the Agreement to the \$750,000 cash advance.

Plaintiff replies that it did not waive its right to complain about the annual statement because defendants never issued a proper annual statement as required by the Agreement and they failed to submit all required quarterly summaries. They also argue that defendants breached the Agreement by failing to send notice to all former account debtors and failing to make a good faith effort to market Gargoyle products.

A motion to dismiss may be granted on documentary evidence so long as the documents alone "definitively dispose of plaintiff's claim." (E.g., Bronxville Knolls, Inc. v. Webster Town Center Partnership, 221 A.D.2d 248 [1st Dep't 1995]). The movant may not rely on affidavits or depositions to support a motion to dismiss pursuant to CPLR § 3211(a)(1). (See Id.; Juliano v McEntee, 150 AD2d 524, 525 [2nd Dep't 1989]; Demas v. 325 West End Ave. Corp., 127 A.D.2d 476, 477 [1st Dep't 1987]).

In this case, the documents relied upon by the defendants do not, by themselves, "definitively dispose" of plaintiff's claims. The Agreement between the parties required defendants to provide annual and quarterly statements containing specified data and to notify certain former debtors of the plaintiff. To show satisfaction of these contractual obligations, defendants submitted a copy of the Agreement, one annual statement, two quarterly summaries, and a form letter addressed to "Valued Gargoyles Customer." However, these documents do not definitively prove the sufficiency of the annual statement and quarterly summaries, that defendants provided to plaintiffs all quarterly summaries required under the

Agreement, or that defendants sent notice to all appropriate accounts receivable debtors.

Thus, the motion to dismiss on documentary evidence is denied.

B. Failure to State a Cause of Action

Defendants seek dismissal of all of plaintiff's causes of action, contending that no breach of the Agreement occurred and the claim for breach of the implied covenant of good faith and fair dealing is duplicative of the breach of contract claim. With regard to the breach of contract claim, defendants argue that plaintiff waived its right to complain of the annual statements by failing to provide proper notice of dispute regarding the calculations in the statement and submitting to the audit provision of the Agreement.

When deciding a motion to dismiss pursuant to CPLR 3211(a)(7), the facts as alleged in the complaint and opposition papers must be accepted as true. A court must accord the plaintiff "the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory." (E.g., Sokoloff v. Harriman Estates Development Corp., 96 N.Y.2d 409, 414 [2001]; Leon v. Martinez, 84 N.Y.2d 83, 87-88 [1994]). "The motion must be denied, if from the pleadings' four corners, 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" (Richbell Information Services, Inc. v. Jupiter Partners, L.P., 309 A.D. 2d 288, 289 [1st Dep't 2003])(quoting 511 West 232nd Owners Corp. v. Jennifer Realty Corp., 98 N.Y.2d 144, 151-152 [2002]).

To state a valid cause of action for breach of contract, a plaintiff must allege the terms and existence of a contract between the parties, performance by plaintiff, breach by

defendant, and damages incurred by plaintiff. (See Pernet v. Peabody Engineering Corp., 20 A.D.2d 781, 781-82 [1st Dep't 1964]). With regard to the terms of the contract, the pleader should "plead its legal effect, as he [or she] understands it and purposes to maintain it. . . ." (United States Printing & Lithograph Co. v. Powers, 183 A.D. 513 [1st Dep't 1918]; Murphy v. New York Yellow Cab Co. Sales Agency, 207 A.D. 820, 821 [2nd Dep't 1923]; Rosenthal-Block China Corp. v. Johann Haviland China Corp., 12 A.D.2d 915, 915 [1st Dep't 1961]).

The complaint sufficiently alleges the terms and existence of a contract with defendants and its proper performance. Coda-Gargoyles alleges that under the Agreement, which became effective on December 24, 2003, it was required to sell to defendant assets including intellectual property and accounts receivables. (Coda-Gargoyles Complaint, at ¶ 9). Plaintiffs claims to have properly executed the sale of the specified intellectual property and fulfilled all its obligations.

Plaintiff also alleges that the Agreement required defendants to pay a portion of accounts receivables and a purchase price comprising an "\$750,000 cash advance . . . to be set-off against" an additional purchase price of "10% of [d]efendants' sales of Gargoyles Products from the closing date." (Coda-Gargoyles Compl., at ¶ 10). Following the sale, defendants were required to provide notice to accounts receivable customers. At the conclusion of each quarter, defendants were to provide quarterly statements showing their "good faith estimates of the quantity, description and net sales of Gargoyles Products, listed by each Gargoyles Product." (Coda-Gargoyles Compl., at ¶ 27). At the end of each fiscal year, defendants were to provide annual statements "in sufficient detail to show the quantity,

description and net sales of the Gargoyles Products for which payment was received during the preceding fiscal year.” (Coda-Gargoyles Compl., at ¶ 17). Plaintiff alleges that the Agreement required annual statements “to be certified by [d]efendants’ chief financial officer. . . .”

Finally, plaintiff alleges defendants breached their obligations under the contract and that the breach caused plaintiff damage. The complaint alleges, among other things, that defendants failed “to notify all accounts receivable customers, maintain accurate books and records of sales of Gargoyle Products, submit . . . quarterly summaries, . . . and submit certified annual net sales. . . .” (Coda-Gargoyles Compl., at ¶ 27). Plaintiff also argues that defendants breached the contract by failing to make good faith efforts to market Gargoyle Products. The complaint alleges damages in the form of a low level of sales of Gargoyles products, causing no Additional Purchase Price to be paid to plaintiff.

Defendants contend that plaintiff waived any right to complain of the annual statement because plaintiff failed to fulfill a condition precedent. They argue that, under the Agreement, plaintiff was required to file within 30 days a Notice of Disagreement if it disagreed with the “amount or calculation of the Additional Purchase Price set forth in an annual statement” and plaintiff failed to timely file the Notice with respect to the defendants’ 2004 annual statement of sales of Gargoyles Products. However, plaintiffs’ complaint with respect to the 2004 annual statement is that it is not as detailed as required by the Agreement. They do argue that defendants’ failure to aggressively market Gargoyles Products caused damages; but, plaintiff does not allege any breach of contract based on the “amount or calculation” of figures stated in the annual statement. They allege that neither the annual

statement or the quarterly summaries provided the information required by the Agreement. Also, plaintiff claims defendants failed to furnish all required quarterly summaries. Furthermore, the obligation to file a Notice of Disagreement applies to disputes as to the “amount and calculation” of annual statements but not to disputes regarding quarterly summaries.

The complaint states a valid cause of action for breach of contract with respect to both the annual statements and quarterly summaries.

Defendants also argue that the cause of action based on breach of the implied duty of good faith and fair dealing should be dismissed because it is duplicative of plaintiff’s cause of action for breach of contract. I agree.

A covenant of good faith and fair dealing exists impliedly in every contract. (Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 90-91 [1917]; Jaffe v. Paramount Communications, Inc., 222 A.D.2d 17, 22-23 [1st Dep’t 1996]). Breach of the implied covenant constitutes a breach of the contract. (See generally Jaffe v. Paramount Communications, Inc., *supra*, 222 A.D.2d at 22-23). Thus, a cause of action for breach of the implied covenant of good faith and fair dealing should be dismissed when the claims made under that cause of action are duplicative of claims made under a cause of action for breach of contract. (See Englehard Corp. v. Research Corp., 268 A.D.2d 358, 358-59 [1st Dep’t 2000]; Apfel v. Prudential-Bache Securities, Inc., 182 A.D.2d 439 [1st Dep’t 1992]; A. Brod, Inc. v. Worldwide Dreams, LLC, 2004 WL 1563352, at 1-2).

Plaintiff’s claims under its cause of action for breach of the implied covenant of good

faith and fair dealing duplicate its claims for breach of contract. In its first cause of action, plaintiff alleges that defendants breached the contract “by failing to *inter alia* . . . maintain accurate books and records of sales of Gargoyles products; . . . submit . . . quarterly summaries; make a good faith effort to market Gargoyles products; and, . . . submit a certified statement of the annual net sales. . . .” Plaintiff does not elaborate as to what comprises a good faith effort to market Gargoyles Products but does allege, in paragraph 19 of the complaint, that defendants “never provided . . . any sales, marketing or business plans relating to their sale of Gargoyles Products. The second cause of action alleges that defendants breached the implied covenant of good faith and fair dealing by “failing to perform . . . its reporting and accounting obligations; . . . by failing to develop a business or marketing plan . . . and failing to implement an effective marketing plan. . . .” The claims, in this second cause of action, based on failure to perform reporting and accounting obligations are duplicative of its claims under the first cause of action based on defendants’ failure to submit quarterly summaries and certified statements of annual net sales. Defendants’ reporting and accounting obligations consist, primarily, of submitting sufficiently detailed quarterly summaries and annual statements. Similarly, the claims in the second cause of action, based on defendants’ failure to develop and implement business or marketing plans, are equivalent to the claim in the first cause of action for failure “to make a good faith effort to market Gargoyles Products.” Thus, the second cause of action is duplicative of the first and must be dismissed.

Defendants argue that the third cause of action should be dismissed because plaintiff

allegedly waived its right to complain by failing to file a timely Notice of Disagreement with regard to the annual statement. They contend that, rather than bring an action for an accounting, plaintiff must submit to the audit procedure as provided for in the Agreement.

However, as discussed above, this argument fails because a Notice of Disagreement is required only when there is a dispute as to the “amount or calculation” of the annual statement. Plaintiff does not attack the “amount and calculation” of the annual statement but contends that defendants breached by, among other things, failing to provide sufficient detail in the annual statement. The Agreement requires an audit only where there is a dispute with the “amount and calculation” of an annual statement. Thus, plaintiff is not required to submit to an audit and has not waived its right to bring a cause of action for an accounting.

C. Stay of the Proceedings

Alternatively, defendants move to stay this action while an audit is performed according to section 4.6, contending that plaintiffs are obligated to submit to the audit procedure in order to resolve any dispute regarding “the [s]tatements and the underlying books and records. . . .”

As discussed above, the audit procedures provided for under the Agreement only apply to disputes over the “amount and calculation” of annual statements which is not disputed by plaintiff. The complaint does not trigger the audit provisions under the Agreement. Although the parties could on their own volition submit to an audit, there is no basis for this action to not proceed. Therefore, the motion to stay this action is denied.

Accordingly, it is

ORDERED that the motion to dismiss the first cause of action is denied, and it is further

ORDERED that the motion to dismiss the second cause of action is granted, and it is further

ORDERED that the motion to dismiss the third cause of action is denied, and it is further

ORDERED that the motion to stay the proceedings is denied.

Date: 11/1/05

ENTER:


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