

Bon Jour Group LLC v Wathne Ltd.

2005 NY Slip Op 30150(U)

July 14, 2005

Supreme Court, New York County

Docket Number:

Judge: Richard B. Lowe

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

PRESENT: RICHARD B. LOWE III PART 56
0603432/2004

BON JOUR GROUP LLC.
VS
WATHNE LTD.

C

SEQ 1
DISMISS ACTION

INDEX NO. _____
MOTION DATE 3/30/05
MOTION SEQ. NO. 001
MOTION CAL. NO. 3

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ... <i>Memo</i>	<u>1, 2</u>
Answering Affidavits - Exhibits <i>Noted Cross Motion + Bug</i>	<u>3, 4</u>
Replying Affidavits <i>Bon Jour Reply + Aff.</i>	<u>5, 6</u>

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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

FILED
JUL 20 2005
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 7/14/05

[Signature]

RICHARD B. LOWE III

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56**

-----X
BON JOUR GROUP, LLC,

Plaintiff,

**Index No.,
603432/04
DECISION & ORDER**

-against-

WATHNE, LTD.,

Defendant.

-----X
WATHNE, LTD.,

Third Party
Plaintiff,

-againt-

CHARLES DAYAN and CARMINE PORCELLI,

Third Party
Defendants.

-----X
RICHARD B. LOWE III, J.S.C.

Motion sequence numbers 001 and 002 are consolidated for disposition. In this commercial dispute with defendant Wathne, Ltd., (“Wathne”), stemming from two Sublicense Agreements (collectively the “Agreements”), the plaintiff Bon Jour, LLC (“Bon Jour”) moves for an order, pursuant to CPLR § 3211 [a] [7], dismissing the counterclaims and striking the requests for punitive damages and attorneys’ fees as well as dismissing the Third Party Complaint against Charles Dayan (“Dayan”). Third Party Defendant Carmine Porcelli (“Porcelli”) moves for an order, pursuant to CPLR§ 3211 [a] [7], dismissing the Third Party Complaint against him. In addition, Bon Jour moves for an order, pursuant to CPLR§ 3211 [b], dismissing the affirmative defense of fraud.

Wathne cross moves for an order: (1) pursuant to CPLR§ 3124, directing Bon Jour to produce documents; and (2) pursuant to CPLR § 3103, directing Bon Jour to pay for the expense of a computer expert and to provide the expert access to computers.¹

¹Defendant’s Notice of Motion does not cite the particular CPLR provision for the appointment of a computer expert. However, CPLR§ 3103[a] provides such relief [“The court may

BACKGROUND

Bon Jour and Wathne executed the two Agreements on or about August 23, 2002. These Agreements are the only signed agreements between the parties. Moreover, the Agreements provide for no amendments and modifications except in writing signed by the parties. They also provide no waiver of a right or obligation should a party fail to enforce or delay the enforcement of any right or obligation under the Agreements. Lastly, the Agreements unequivocally expresses the parties' entire understanding and supercede any other inducements, understandings, representations whether oral or writing between the parties. At the time of their signing Dayan was plaintiff's Chief Executive Officer and Porcelli was its Managing Director. Wathne's President, Laura Gunther ("Gunther") signed the Agreements on its behalf. In late 2003, Porcelli was terminated by Bon Jour and this action was commenced in or about November 2004.

Under the Agreements, Bon Jour subleased use of the Bon Jour trademark to Wathne in consideration for payment of a certain percentage of royalties for a period of years, but no less than the stated amounts in the Agreements. Wathne also agreed to pay Bon Jour a percentage of image advertisement. A dispute arose between the parties and Bon Jour commenced this action against Wathne alleging breach of contract and unjust enrichment. Bon Jour maintains it complied with the terms of the Agreements and relied on Wathne's promise to perform, but that the latter defaulted when it failed to use commercial efforts to commence substantial production and sale of licensed items (handbags and belts using the Bon Jour name). Bon Jour complains that on or about March 15, 2004 and April 20, 2004, it demanded in writing that Wathne make payments in accordance with the Agreements and Wathne refused. Plaintiff seeks money damages, consisting of the cost it incurred in advertising the Bon Jour trademark (\$3,527,400), as well as the minimal

... make a protective order ... regulating the use of any discovery device. Such order shall be designed to prevent unreasonable annoyance, *expense*, ... or other prejudice to any person")].

payments called for under the Agreements (\$3,342,911).

Wathne answers denying the material allegations the complaint. Moreover, Wathne interposes several affirmative defenses and counterclaims against Bon Jour as well as the Third Party Complaint against Dayan and Porcelli. Wathne complains that before the execution of the Agreements Bon Jour, by way of both Dayan and/or Porcelli, made both public and private representations other than unequivocally represented in the Agreements, that is, Bon Jour was going to launch a women's fashion clothing line and that based on these representations Wathne executed the Agreements. Moreover, Wathne complains that it was clear to the parties that a womens' fashion clothing line was contemplated in order for Wathne to perform its obligations under the Agreement and that it would not have executed the Agreements, but for the representations – although there is no language in the Agreements referring to such representations.

Wathne further complains that after the execution of the Agreements and following discussions with Dayan and/or Porcelli, the parties agreed to rescind the Agreements in or about May 2003, based on Bon Jour's failure to launch a women's fashion clothing line. Furthermore, that Bon Jour and Wathne memorialized the modification of the Agreements in an unsigned letter dated June 20, 2003. Wathne also complains that although there was no signed agreement with Bon Jour either rescinding or modifying the Agreements, as required under the Agreements, Bon Jour's conduct from May 2003 to May 2004 and until Bon Jour demanded payment was unequivocally referable to the alleged oral understanding that the Agreements were either rescinded or modified regardless of the Agreements' no waiver provisions.

As affirmative defenses, Wathne alleges - among other defenses - Porcelli on behalf of Bon Jour had actual and apparent authority to negotiate and did negotiate with Gunther an oral understanding to rescind the Agreements. Wathne followed with a unilateral memorialization of that understanding in the unsigned letter, dated June 20, 2003. Moreover, although the letter was

not countersigned by Bon Jour, a requirement under the Agreements, the parties acted in a manner that was unequivocally referable and consistent with the terms of the unsigned letter. Thus, although the Agreements' no waiver provision provides otherwise, Wathne argues in view of Bon Jour's post-May 2003 conduct, it is equitably estopped from enforcing the Agreements. Wathne also interposes the defense that sometime before Bon Jour demanded payment Dayan directed staff to destroy all electronic communication and other computer records with third sublicensees in an attempt to refute Wathne's contention that Bon Jour represented its intention to launch a ladies fashion line. Furthermore, Wathne interposes the affirmative defense that "Bon Jour's claims are barred by the fraud of" Dayan.

Wathne's counterclaims and Third Party Complaint are also premised on the above allegations. Wathne complains that prior to the Agreements, Bon Jour represented to Wathne its intention to launch a ladies' fashion line and in connection with that venture sought to enter into the Agreements with Wathne. In its dealings with Wathne, Bon Jour communicated primarily with Gunther, who in turn communicated with Porcelli. Wathne maintains that Bon Jour gave it numerous assurances that it would launch such a fashion line either in private talks or in public media events and or press releases. For example, Wathne alleges that Porcelli informed Gunther that Bon Jour had entered into a sublicense agreement with the Levy Group ("Levy Group") to develop and market an apparel line to support Wathne's handbag line contemplated under the Agreements. Wathne complains that these private and public assurances from Bon Jour caused Wathne to enter into the Agreements, but that at the time that these assurances were made they were false and intended to deceive Wathne. As an example, Wathne alleges that Dayan and Porcelli knew, but did not disclose to Wathne, that the Levy Group sublicense agreement had an opt out provision that allowed the licensee to opt out of its agreement if the level of initial sales were not satisfactory. It argues Dayan and Porcelli did not disclose that fact to Wathne because they knew

the Agreements would not have been executed. In the end, there was never a ladies' fashion line and department stores did not place any orders with Wathne.

Wathne claims that subsequent to the above, Gunther confronted Porcelli and learned for the first time that there would be no ladies' fashion line and that Porcelli agreed to modify the Agreements as memorialized by Wathne in the June 20, 2003 - letter that Wathne alleges framed the parties' subsequent conduct for approximately a year although the letter was never countersigned by Bon Jour. Wathne alleges that once Porcelli was terminated in late 2003, Dayan embarked on a scheme to hold Bon Jour to the terms of the Agreements that had since been rescinded and/or modified by the parties. Wathne claims Dayan ordered the destruction of electronic and computer records in an attempt to thwart any defense against him and Bon Jour as to the enforcement of the Agreements. Wathne seeks to recover any and all records that relate to the alleged fraud, four counterclaims and Third Party Complaint. Wathne interposes causes of action for: (1) breach of contract ; (2) fraudulent misrepresentations; (3) negligent misrepresentations; and (4) material non-disclosure, and seeks compensatory and punitive damages as well as attorneys' fees.

DISCUSSION

Bon Jour moves to dismiss the answer to the extent it interposes the affirmative defense of fraud, the four counterclaims, the requests for punitive damages and attorneys' fees, and the Third Party Complaint against Dayan on the ground that Wathne fails to state a cause of action (CPLR 3211 [a] [7]) and a meritorious defense (CPLR 3211 [b]). Porcelli cross moves for the same relief.

Generally, the facts as pleaded in the answer are presumed to be true and accorded every favorable inference (*Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366; *Rabouin v Metropolitan Life Ins. Co.*, 307 AD2d 843, 844 [on a motion to dismiss made pursuant to rule authorizing motions to dismiss, the pleading is to be afforded a liberal construction, and the court should accept as true

the facts as alleged in the complaint, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory)).

However, here the Agreements contain unequivocal provisions that set forth the parties' representations and understandings that supercede any other understandings, representations and inducements at the time of the execution of the Agreements. Moreover, the Agreements provide for written and signed amendments and modifications in any circumstance and no waiver of the parties' rights and duties under the Agreements. Yet, the counterclaims and in the Third Party Complaint contradict all of the relevant terms of the very Agreements that Wathne agreed to be bound.

Wathne ignores the terms of the unambiguous Agreements and it is clear to the Court that the very provisions address the rights of the parties and arguably prevail over the allegations in the counterclaims and the Third Party Complaint. Wathne's factual allegations are flatly contradicted by the documentary evidence (the Agreements) and therefore are not presumed to be true or even accorded a favorable inference (*Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [in those circumstances where, on a motion to dismiss, the factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference, and the criteria becomes whether the proponent of the pleading has a cause of action, not whether he has stated one]; *Taussig v Clipper Group, L.P.*, 13 AD3d 166 [where factual allegations or legal conclusions in complaint are flatly contradicted by documentary evidence, they are not presumed to be true, or even accorded favorable inference, on a motion to dismiss]).

Wathne's allegations that Bon Jour breached the terms of a "binding Modification Agreement in May 2003" is premised on the unilateral unsigned letter of June 20, 2003 (Answer,

¶ 56), and is of no real moment. The allegations are premised on discussions with Dayan and/or Porcelli that post-date the execution of the Agreements and upon which it is alleged the parties agreed to rescind the Agreements that Wathne unilaterally memorialized in an unsigned letter dated June 20, 2003. Wathne complains that the parties' conduct thereafter is unequivocally referable to an oral understanding they had that either rescinded or modified the agreements, regardless of the Agreements' no waiver provisions.

In view of the unequivocal language in the Agreements to which Wathne is bound, coupled with the contract obligation that any amendment or modification of the Agreements must be signed by the parties, such negates Wathne's breach of contract claim. Under the clear language of the Agreements there is no presumption of truth of the allegations, but only whether Wathne has stated a cause of action of breach of contract (*Ark Bryant Park Corp. v Bryant Park Restoration Corp, supra*). The substance of the parties' Agreements forecloses reliance on the claim that an unsigned letter amended and modified those agreements upon which Wathne now seeks to plead a breach of the unsigned letter agreement.

Wathne's allegations that it relied on both public and private representations of Bon Jour's future apparel line for women before the execution of the Agreements are of no moment. The alleged misrepresentations are neither fraudulent nor negligent and at best amounts to no more than nonactionable expressions of future expectation (*Bower v Atlis Sys.*, 182 AD2d 951, 953 *lv denied* 80 NY2d 758; cf., *Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403, 407). Furthermore, each of the Agreements include a provision that no oral or other agreements, understandings, representations or inducements exist, which negates Wathnes' claims (see, *Citibank v Plapinger*, 66 NY2d 90, 95 [fraud in the inducement of a guarantee by corporate officers of corporation's indebtedness was not a defense to action on guarantee when guarantee recited that it was absolute and unconditional irrespective of any lack of validity or enforceability of guarantee, or any other

circumstance which might otherwise constitute a defense available to guarantor in respect of guarantee, those recitals being inconsistent with guarantors' claim of reliance upon oral representation that lending banks were committed to extend to corporation an additional line of credit]). Therefore, Wathne cannot interpose causes of action for fraudulent and negligent misrepresentations.

Wathne's cause of action for material non-disclosure is also legally deficient. Aside from the fact that there can be no separate cause of action for non-disclosure (*Young v Keith*, 112 AD2d 625, 626 [but "nondisclosure may constitute a false representation where a party has a duty to communicate the undisclosed information to the other contracting party"]), Wathne's claimed nondisclosure relates to Bon Jour's alleged failure to disclose the Levy Group's opt out provision in a separate agreement. The allegation presumes a duty of disclosure by Bon Jour. "In the absence of a confidential relationship or fiduciary relationship between two parties to a contract, no duty to disclose exists" (*George Cohen Agency, Inc. v Donald S. Perlman Agency, Inc.*, 114 AD2d 930, 931). There is no allegation that Bon Jour had such a relationship with Wathne and the Agreements demonstrate, if anything, an arms-length business relationship (see *Northeast Gen. Corp. v Wellington Adv., Inc.*, 82 NY2d 158, 162). Here, too, Wathne fails to state a cause of action of negligent misrepresentation².

Pursuant to CPLR § 3211[b], Bon Jour has the burden of establishing that the affirmative defense of fraud is without merit as a matter of law (*Pellegrino v Millard Fillmore Hosp.*, 140 A.D.2d 954, 955). In view of the above and the absence of any other specificity of an alleged fraud (CPLR § 3016 [b]), it follows that the affirmative defense fails. Wathne's claim that Bon Jour did not intend to carry out the terms of the Agreements at the time they were made, is insufficient

² Wathne concedes, if anything, that the fourth counterclaim is premised on an alleged negligent misrepresentation.

to support a claim for fraud (*Gupta Realty Corp. v Gross*, 251 AD2d 544 [vendor's fraud claim was not sufficiently distinct from its breach of contract claim against purchasers to be actionable; alleged misrepresentations were not collateral or extraneous to underlying contract, given that they were expressly incorporated into mortgage modification agreement]; *Sforza v Health Ins. Plan of Greater N.Y.*, 210 AD2d 214). Moreover, Wathne's pleading contains no allegations of a separate legal duty independent of the Agreements. Wathne's attorney's legal memorandum consists of facts not alleged in the pleading and is of no probative value (see, *Bendik v Dybowski*, 227 AD2d 228). Again, the Agreements include provisions that negate Wathne's misrepresentation and inducement claims.

Lastly, Wathne's request for attorneys' fees and punitive damages are stricken. The requests for attorneys' fees are premised on an alleged letter agreement that contains no such provision. Moreover, the only provision for attorneys' fees is contained in the Agreements, which Wathne maintains was either rescinded or modified. There can be no recovery of attorney' fees from a losing party except where authorized by statute, agreement or court rule (*Chapel v Mitchell*, 84 NY2d 345). Furthermore, in view of the dismissal of the fraud and misrepresentation claims the requests for punitive damages fails (*Borkowski v Borkowski*, 39 NY2d 982 [punitive damages are recoverable in fraud actions as they are in other tort actions, depending upon defendant's degree of moral culpability]).

Accordingly, Bon Jour's motion to dismiss the affirmative defense of fraud, the counterclaims and the Third Party Complaint against Dayan and to strike the requests for punitive damages and attorneys' fees is granted. In view of the above, Porcelli's motion for the same relief is granted and the Third Party Complaint is dismissed against Porcelli.

That branch of Wathne's cross motion to compel production of documents and for the appointment of a computer expert at the expense of Bon Jour and for access to computers, is

denied at this time. In support of this branch of its motion, Wathne's attorney affirms that Bon Jour has produced 57 emails covering the period of February 20, 2002 to October 15, 2003, whereas Wathnes' production of emails totaled sixty-times that amount. Moreover, Gunther submits her affidavit (Gunther 02/23/05 Aff.) and affirms that in a conversation with Porcelli, he informed her that his review of office files in preparation for his deposition revealed that files had been destroyed (*id.*, ¶ 5). Bon Jour submits the affirmation of its attorney, who affirms that 333 documents have thus far been produced (Simmons 03/24/05 Affirm.).

The parties are directed to Rules of the Justices of the Commercial Division, Supreme Court, New York County, as to the stay of discovery. Rule 12 provides that the making of a motion pursuant to CPLR §§ 3211 or 3212 shall not stay the production of documents in this Part unless directed by the Court. Moreover, Rule 15 provides that counsel must consult with one another in a good faith effort to resolve all disputes about disclosure and where counsel are unable to resolve a disclosure dispute in this fashion, the aggrieved party shall contact the Clerk of the Part to arrange a conference. Wathne does not indicate in its cross motion a good faith effort to resolve the dispute about disclosure.

Accordingly, that branch of the cross motion is denied without prejudice, and Wathne is directed to contact the Clerk of the Part to arrange for a conference. It is expected that counsel will discuss their dispute over discovery and whether the discovery sought can possibly be used as evidence in chief, for rebuttal, or for cross-examination as well as the appointment of a computer expert and the allocation of the expense for retrieving electronic files (*see*, *Weiller v New York Life Ins. Co.*, 6 Misc3d 1038(A), 2004 West Law 3245345, *6; *citing*, *Schroeder v Centro Pariso Tropical*, 233 AD2d 314; CPLR § 3103[a]) in view of the dismissal of the affirmative defense of fraud, counterclaims and Third Party Complaint and the striking of the punitive damages and attorneys' fee.

CONCLUSION

To recapitulate, the plaintiff and third party defendant's motions are granted. Defendant's cross motion is denied. Wathne's remaining contentions have been considered and are without moment.

ORDERED that the affirmative defense of fraud, all counterclaims and the Third Party Complaint are dismissed, and it is further

ORDERED that the punitive damages and attorneys' fees requests are stricken; and it is further

ORDERED that the defendant shall contact the Clerk of the Part forthwith to arrange for a compliance conference and no later than fourteen (14) days after the service of the notice of entry of this Order; and it is further

ORDERED that pending the compliance conference all discovery is stayed.

This constitutes the decision and order of the Court.

Dated: July 14, 2005

ENTER:

J.S.C.

RICHARD B. LOWE III

FILED

JUL 20 2005

NEW YORK
COUNTY CLERK'S OFFICE