

Romero v Aveda Corp.
2005 NY Slip Op 30588(U)
February 14, 2005
Supreme Court, New York County
Docket Number: 101792/04
Judge: Herman Cahn
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

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ROBBY ROMERO,

Plaintiff,

-against-

Index No.: 101792/04

AVEDA CORPORATION,

Defendant.

-----X
Herman Cahn, J.:

Plaintiff brings this action to recover for services he allegedly provided to defendant Aveda Corporation and to obtain specific performance of what he alleges was Aveda's oral agreement to distribute charitable donations from the sales of its Native American product line (Native American Product Line or Product Line) exclusively to specific types of organizations. Aveda moves to dismiss based on what it contends is an integrated and unambiguous written contract that bars plaintiff's claims, CPLR 3211 (a)(1) and (7).

FILED
FEB 14 2005
NEW YORK
COUNTY CLERK'S OFFICE

The Allegations of the Complaint

Aveda is a global plant-based cosmetic and skin care company. Plaintiff Romero, a New York resident, is the leader of a Native American rock band, a United Nations Ambassador of Youth for the Environment and the founder of Native Children's Survival, a non-profit organization dedicated to creating

awareness of environmental and human rights issues through the arts. Romero contends that he provided services to Aveda leading to the creation and development of the Product Line. He provided said services based on the representations of various Aveda executives, made over a period of years, that it would enter into a written agreement to compensate him for the services through a percentage of ownership or sales of the Product Line, or otherwise.

In particular, Romero alleges that during a September 1998 meeting, he presented to Aveda's management the concept for the Native American Product Line, which was in development by Aveda at the time. The product line included a shampoo, rinse, "Pure-Fume," aroma candle and other personal care products that were to be manufactured using indigenous, organic and "wild crafted" raw materials and essential oils. Romero claims that based on the representations of Aveda executives regarding compensation made at that meeting, he continued his efforts to develop the Product Line.

The services Romero claims he provided include creating the Product Line's marketing story, concept, name, image, art and logo, as well as its aroma concept and the concept for a product called "Smudge Stick in a Bottle." In addition, Romero alleges that he worked with Aveda's research and development group to develop the final aroma for the products, selected Native

American families to harvest raw materials, "sourced," organized and delivered raw materials, including essential oils, to Aveda for research and development and organized a photo shoot in "Sacred Lands of native peoples" (Godler Supp. Aff., Exh. A, ¶ 20). Romero alleges that despite the promises and representations of its executives, Aveda refused to formalize an agreement for these services for which, in the first cause of action of the complaint, he seeks compensation.

Romero also alleges a second oral agreement pursuant to which, in exchange for support Romero had created in the Native American community, Aveda agreed to implement a program through which any charitable donations made from the proceeds of sales from the Product Line would be distributed exclusively to "Indigenous grass roots organizations" (Godler Supp. Aff., Exh. A, ¶ 21). Romero alleges that Aveda has not fulfilled this promise and in his second cause of action seeks specific performance.

The Consulting Agreement

On May 1, 2001, Aveda entered into a consulting agreement (Consulting Agreement or Agreement) with Eagle Thunder Enterprises, Inc., the effective date of which was January 1, 2001. Romero executed the Agreement as president of Eagle Thunder. Aveda and Eagle Thunder agreed that Romero would personally:

1) provide to Aveda, by October 31, 2001, a minimum of 1000 kilograms of sage, 7000 kilograms of cedar, and 1000 kilograms of sweet grass, all grown organically and in the Native American tradition;

2) perform public speaking engagements and make presentations to global journalists at various intervals throughout the term of the Agreement;

3) provide "Aveda consulting and advisory services with respect to Aveda's testing, marketing and education of the approved products, inclusive of conceptual and creative direction" (Godler Aff., Exh. A, Exh. 1, ¶ [B][3]); and

4) help to build smooth relationships and consensus with Native American Peoples, representatives and activists.

For these services, Eagle Thunder was to be paid \$5,500 per month for the term of the Agreement, January 1, 2001 to February 28, 2003, and reimbursed expenses up to \$500 per month. The Agreement contains a merger clause, a Minnesota choice of law provision and a provision prohibiting modifications or amendments except by a writing executed by the parties.

Romero asserts that Aveda launched the Native American Product Line under the name "Indigenous" in April 2002. It consisted of a hair and body cleanser, a "purifying Pure-Fume Composition" and an aroma candle.

Analysis

Aveda argues that Romero seeks additional compensation for services for which he was already paid,¹ when he is precluded from contradicting, varying or supplementing the compensation terms of the integrated Consulting Agreement with parol evidence. It further argues that Romero may not claim an implicit contract where an explicit one exists for the same services. Romero argues that the merger clause in the Consultant Agreement specifically addresses only the subject matter of the Agreement, and that the services he provided to Aveda concerning the creation and development of the Product Line were not part of that subject matter.

Pursuant to Minnesota law the interpretation of a contract is a matter of law (*First National Bank of Chaska v Shakopee Gravel, Inc.*, 2001 WL 1346098 *1 [Minn Ct App 2001]).² "The meaning of a contract is to be ascertained from the writing alone, if possible, the duty of the court being to declare the meaning of what is written in the instrument, not what was

¹Romero does not allege that Aveda has not performed its obligations under the Consulting Agreement.

²Although the parties agree that the Consulting Agreement is governed by Minnesota law, Romero does not concede that Minnesota law applies here because, he argues, his claims are based on a separate oral agreement unaffected by the Consulting Agreement's choice of law provision. Notwithstanding that, both parties represent that there appears to be no conflict between Minnesota and New York Law regarding the issues herein, and the court will consider that their posture for this motion.

intended to be written" (*id.*, quoting *Carl Bolander & Sons, Inc. v United Stockyards Corp.*, 215 NW2d 473, 475 [Minn 1974]). Only if the language of an agreement is susceptible to more than one meaning will a court resort to extrinsic evidence (*Hoyt v Brokaw*, 359 NW2d 310 [Minn Ct App 1984]).

"A merger clause establishes that the parties intended their writing to be an integration of their agreement" (*Alpha Real Estate Co. of Rochester v Delta Dental Plan of Minnesota*, 664 NW2d 303, 312 [Minn 2003]; see *W.R. Millar Co.*, 419 NW2d 852 [Minn Ct App 1988]; *Primex Inter. Corp. v Wal-Mart Stores, Inc.*, 89 NY2d 594 [1997]) and bars the introduction of extrinsic evidence, such as negotiations or discussions leading up to the execution of the contract, to vary or contradict the writing's terms (*Alpha Real Estate Co. of Rochester*, 664 NW2d at 311; *Primex*, 89 NY2d at 599). Where an express contract exists there can be no implied contract (see *Sharp v Laubersheimer*, 347 NW2d 268, 271 [Minn 1984]) or quantum meruit recovery with respect to the same subject matter (*Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382 [1987]).

Notwithstanding the presence of a merger clause, an earlier contract will not merge or be extinguished by a subsequent contract where the earlier and later contracts deal with different subjects (*Wattenberg v Wattenberg*, 277 AD2d 69 [1st Dept 2002]; *Gorden v Patchogue Surgical Co., Inc.*, 222 AD2d 651

[2d Dept 1995]; 22A NY JUR Contracts § 481; *W.R. Millar Co.*, 419 NW2d at 854). Moreover,

"[transactions between two parties sometimes follow each other in rapid succession and it is not always easy to decide whether they have made one complex contract or two successive contracts. If the parties have reduced to writing one of two of such successive parts, leaving the other part unwritten, it usually possible to prove the latter by parol evidence"

(6 Corbin on Contracts § 549, at 253-254 [2002 interim ed]).

The Consulting Agreement is integrated as it contains a merger clause that states "[t]his Agreement embodies the entire understanding of the parties with respect to the subject matter hereof and any previous understandings are hereby merged" (Godler Aff., Exh. A, ¶ 11). Thus, Romero is barred from introducing evidence as to any understandings between the parties prior to their entry into the Agreement, that concern the subject matter of the Agreement, or are closely enough related to it as to be naturally included therein (*Apple Valley Red-E-Mix, Inc. v Mills-Winfield Eng'g Sales, Inc.*, 436 NW2d 121, 123 [Minn Ct App 1989]), or that would vary or contradict the Agreement's terms.

Aveda's argument for the exclusion of parol evidence, and dismissal, is based on its claim that the compensation term of the Consulting Agreement will be varied if Romero is also compensated for the services described in the complaint. This argument, in turn, is predicated on Aveda's contention that the services for which Romero seeks compensation here are part of the

subject matter of the Agreement or so naturally related thereto as to be part and parcel of, and therefore inseparable from, the Agreement. Aveda supports this argument by characterizing the Consulting Agreement as broad and encompassing Romero's services toward the creation, development, manufacturing, marketing and sales of the Native American Product Line.

Romero argues that the Consulting Agreement concerns only those services rendered on or after January 1, 2001. He characterizes his Consulting Agreement obligations as limited to being the "face" of Aveda, providing raw materials needed for the manufacturing of Aveda products and providing consulting and advising services for "approved" products; that is, products not in the creation and development stage. Finally, Romero argues that while the parties to the Consulting Agreement are Eagle Thunder and Aveda, it was he, individually, who entered into the earlier agreements with Aveda.

Pursuant to CPLR 3211(a)(1), dismissal is warranted only if the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*New York Schools Ins. Reciprocal v Gugliotti Assoc., Inc.*, 305 AD2d 563, 564 [2d Dept 2003]; see e.g. *Leon v Martinez*, 84 NY2d 83, 88 [1994]). There are disputed factual issues concerning the connection between the Consulting Agreement's subject matter and the services enumerated in the complaint that

cannot be resolved at this early juncture.

For example, to support its argument that the Agreement was intended to cover any work Romero did from inception through sales of the Product Line and, perhaps, to make it appear more likely that the consideration for Romero's earlier services was included as part of the Agreement as well, Aveda argues that the Consulting Agreement provides Romero the opportunity to achieve bonuses based on the sales of the Product Line. The Agreement, however, contains no mention of bonuses linked to the sales of any Aveda product and, in fact, does not even specifically mention the Native American Product Line.

In addition, pursuant to the Agreement, Eagle Thunder was to deliver to Aveda tons of three specific raw materials, cedar, sage and sweet grass, on or before October 31, 2001. Whether this obligation was intended to encompass deliveries Romero made of raw materials, such as essential oils, not delineated in the Agreement and made before its commencement date is a disputed factual issue not resolved by the documentary evidence submitted on the motion.

Regarding Romero's consulting and advising services pursuant to the Agreement, Aveda argues that Romero's allegation regarding the Product Line's launch date, April 2002, is an admission that services provided pursuant to the Consulting Agreement were necessarily in the development stage of the Product Line's

progression. This issue, however, is also a factual one that is not conclusively disposed of by the motion papers.

Accordingly, it is

ORDERED that the motion to dismiss is denied.

Dated: February , 2005

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