

Cellco Partnership v Thor 139 5th Ave., LLC
2005 NY Slip Op 30609(U)
April 11, 2005
Supreme Court, New York County
Docket Number: 110032/04
Judge: Emily J. Goodman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS,

Plaintiff,

Index No. 110032/04

-against-

THOR 139 5TH AVENUE, LLC,

Defendant.

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EMILY JANE GOODMAN, J.S.C:

Plaintiff (hereafter "Verizon") brings this ~~Order~~ to Show Cause (1) for a declaration that the Stipulation of Settlement, dated October 15, 2004, and so-ordered by the court (the "Stipulation") is fully enforceable according to its express terms, (2) for an order compelling Defendant (hereafter "Thor") to execute and deliver certain permit applications and to comply with the Stipulation's terms, and (3) for an order requiring Thor to pay attorney's fees. Thor opposes the motion.

History

This action involved a dispute over whether the lease between Verizon and its landlord, Thor, permitted Verizon to hang a sign (which had been removed during renovations) on the exterior of Thor's building. After extensive litigation, the parties settled this case by Stipulation. Ironically, the Stipulation merely engendered more litigation. Verizon contends that an exhibit attached to the Stipulation reflects the parties

agreement that Verizon could install an illuminated sign. Thor contends that the sole purpose of the exhibit was to depict the graphical design of the Verizon logo. Further, the parties even have a dispute over what documents were intended to comprise the exhibit. Verizon maintains that the exhibit includes two pages, while Thor contends it includes only one page. The page indicated as "Exhibit A" (which Thor maintains is the only page of the exhibit) also includes a deleted reference to "page 1 of 2". That page includes a depiction of the Verizon logo, and, additionally contains a reference to a "Backlit Channel." The second page, indicated as "Exhibit A page 2 of 2," does not depict the Verizon logo, and, refers to a "Backlit Channel" and "10.5 Volt Incandescent Letter-Lites Powered By Remote Transformers."

Discussion

The relevant provision in the Stipulation provides that "(3) Plaintiff shall be permitted to immediately install and maintain a permanent Verizon Wireless sign on the Facade Area, consistent with the current national red, black and white signage (with the swoosh) currently in use, as shown on Exhibit A hereto." The Stipulation also contains a merger clause.

Verizon contends that the Stipulation is unambiguous and that purpose of the exhibit was not limited to a depiction of the Verizon logo, but was also meant to encompass illumination of the

sign. Thor, however, contends that the purpose of the exhibit was limited to a depiction of the graphics of the Verizon logo.¹

The court must decide, as a matter of law, whether the Stipulation is ambiguous (see W.W.W. Assocs. v Giancontieri, 77 NY2d 157 [1990]). The court finds that, contrary to Verizon's argument, the Stipulation is ambiguous.² It is unclear whether the reference "as shown on Exhibit A" modifies the language "consistent with the current national red, black and white signage (with the swoosh) currently in use" or, modifies the language "a permanent Verizon Wireless sign on the Facade Area" or, modifies both. Further, it is unclear whether the reference to the "current national red, black and white signage (with the swoosh) currently in use" was merely intended to describe the design of the logo (the term swoosh is expressly stated; however, an express reference to illumination is lacking). It is also unclear what the parties meant by a permanent "Verizon Wireless sign".

Although parole evidence cannot be used to create an ambiguity, if a document is ambiguous, parole evidence is

¹Thor also maintains that there could not have been a question in anyone's mind that the size and type of the sign was to be the same as the sign that was previously there.

²Contrary to Verizon's contention, W.W.W. Assocs. v Giancontieri, 77 NY2d 157 [1990]) does not support its position. In that case, the court determined that the contract was clear and unambiguous, which is not the determination made here.

admissible (id.). Accordingly, the affidavit of Thor's attorney, Matalon, can be considered by the court. Matalon explains that he added the language "as shown on Exhibit A hereto" and that his intent in doing so was to only refer to the graphical design of the Verizon logo. He also maintains that the parties did not intend to include the page indicated as "Exhibit A page 2 of 2" as part of the exhibit. Matalon explains that he initialed that page in error, discovered the mistake, and then crossed out the marking "page 1 of 2" on the first page. Matalon also states that he took the original of "Exhibit A page 2 of 2" with him since he believed it was not part of the Stipulation.³

Given the ambiguity in the Stipulation, the issue of (1) the identification of the documents which were intended to comprise the exhibit, and (2) whether the Stipulation included the parties' agreement that Verizon install an illuminated sign, is referred to a Special Referee to hear and report.

Accordingly, it is hereby

ORDERED that the issue of (1) the identification of the documents which were intended to comprise the exhibit, and (2) whether the Stipulation included the parties' agreement that

³Whether document marked "Exhibit A page 2 of 2" is part of the exhibit affects Matalon's argument that the exhibit was only meant to depict the Verizon logo. The document marked "Exhibit A page 2 of 2" does not depict the Verizon logo. Therefore, if the parties meant to include the second page as part of the exhibit, Matalon's contention that the sole purpose of the exhibit was to depict the logo would be contradicted.


Verizon could install an illuminated sign, is referred to a Special Referee to hear and report; and it is further

ORDERED that the motion is held in abeyance pending confirmation or rejection of the Special Referee's findings.

This Constitutes the Interim Decision and Order of the Court.

Dated: April 11, 2005

ENTER



J.S.C.
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