

F-O-R-T-U-N-E Franchise Corporation v Klein

2006 NY Slip Op 30117(U)

October 30, 2006

Supreme Court, New York County

Docket Number: 0060169/2006

Judge: Bernard J. Fried

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

PRESENT: BERNARD J. FRIED

Justice

PART 60

BF

F-O-R-T-U-N-E FRANCHISE CORPORATION,

INDEX NO. 601693-2006

Plaintiff,

- v -

MOTION DATE _____

MOTION SEQ. NO. 004

HOWARD G. KLEIN and JEMEL CONSULTING INC.
d/b/a F-O-R-T-U-N-E PERSONNEL CONSULTANTS
OF BERGEN COUNTY, INC.,

Defendants.

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MOTION CAL. NO. _____

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

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

This motion has been decided in accordance with the attached memorandum decision.

SO ORDERED.

Dated: 10/30/06

B. J. Fried
BERNARD J. FRIED

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
F-O-R-T-U-N-E FRANCHISE CORPORATION,

Plaintiff,

Index No. 601693/2006

-against-

HOWARD G. KLEIN and JEMEL CONSULTING INC.
d/b/a F-O-R-T-U-N-E PERSONNEL CONSULTANTS
OF BERGEN COUNTY, INC.,

Defendants.

-----X
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FRIED, J.:

Plaintiff F-O-R-T-U-N-E Franchise Corporation ("Fortune") filed this motion for summary judgment (Motion Seq. No. 004) under C.P.L.R. § 3212, seeking to enforce the 20-year automatic renewal provision of its franchise agreement with Defendant Jemel Consulting Inc. ("Jemel") because of Jemel's failure to provide timely written notice of its intent not to renew the franchise agreement. Oral argument took place on October 17, 2006. Because I find genuine issues of fact as to whether the parties continued to negotiate the terms of a potential renewal after the expiration of the period during which Jemel could decide not to renew, pursuant to an oral agreement to extend the notice period, Plaintiff's motion is denied.

Fortune is the head of a network of independently-owned national executive search companies, called "franchisees." The franchisees use Fortune's name, share job openings and candidates with each other, and pay royalties to Fortune on all the business they do.

Since 1989, Jemel has been a franchisee of Fortune, pursuant to an agreement that was scheduled to expire on May 14, 2006 (the "agreement"). Howard Klein ("Klein") is the principal of Jemel. The agreement provided that Jemel would pay Fortune a 7% royalty on its gross receipts. (Agt. § 5.) The agreement also provided:

[T]his Agreement shall... be automatically extended for successive twenty (20) year periods of time, unless at least twelve (12) months, but not more than fifteen (15) months before the expiration of the term or any extension thereof, notice of intention to finally terminate is given in writing by registered mail by [Jemel] to [Fortune].

(Agt. § 4.) Thus, under the agreement, the period during which Jemel was supposed to give written notice of termination was between February 14, 2005 and May 14, 2005 (the "notice period"). The agreement further provided that "[n]o waiver, modification or cancellation of any term or condition of this Agreement shall be effective unless made in writing." (Agt. § 15.)

In this motion, Plaintiff seeks an Order declaring that the agreement has been renewed for an additional 20-year term and enjoining Defendants from engaging in any related business, except as a Fortune franchisee, during this term.

According to Defendants, the parties began negotiating the terms of a potential renewal in late February or early March 2005, and continued these negotiations until May 2006. Defendants claim that, before the notice period expired, Fortune's President, Ron Herzog, expressly agreed to extend the notice period until the parties finished negotiating.

Nevertheless, allegedly in the middle of these negotiations, in a letter dated February 21, 2006, Fortune informed Defendants that the agreement had been renewed for another 20 years at the current 7% royalty rate, because Jemel had failed to provide written notification of its intent not to renew, in accordance with section 4 of the agreement. Notwithstanding this letter, the parties allegedly continued to negotiate Jemel's potential renewal; during conversations in March and April 2006, Herzog offered Klein a 5.5% renewal royalty rate.

Plaintiff denies ever having offered Defendants an extension of the renewal period or having continued negotiating Jemel's renewal after sending the February 21, 2006 letter.

It contends that the negotiations after the expiration of the notice period had only to do with the royalty rate upon renewal, and not with whether Jemel would renew.

Both parties have submitted affidavits and other documents in support of their sides of the story.

Generally, a provision in a written agreement that states that the agreement cannot be changed orally is enforceable. Gen. Oblig. Law § 15-301(1). But this rule is subject to at least two exceptions. The exception relevant here is that an oral modification of the written agreement is enforceable if it has been partially performed, so long as the partial performance is "unequivocally referable to the oral modification."¹ *Rose v. Spa Realty Associates*, 42 N.Y.2d 338, 343-44 (1977). "[O]ral exchanges between the parties" are not enough to justify a deviation from a written contract. But even "a contractual prohibition

1

A party may also be equitably estopped from invoking § 15-301 if he has induced the other party's "significant and substantial reliance upon an oral modification," as long as his conduct inducing the reliance is "not otherwise [] compatible with the agreement as written." *Rose*, 42 N.Y.2d at 344.

* 5]
against oral modification may itself be waived” by the parties’ conduct if it is “unequivocally referable to the oral modification.” *Id.* at 343.

Ordinarily, summary judgment is not warranted when there is a genuine issue of material fact, viewing the evidence in the light most favorable to the non-moving party. *Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Management, L.P.*, 7 N.Y.3d 96, 105-06 (2006).

Courts have refused to grant summary judgment enforcing the terms of a written agreement, where there is an issue of fact as to whether the parties have engaged in conduct that constitutes a partial performance of an alleged oral modification. *See, e.g., The Hawthorne Group, LLC v. RRE Ventures*, 7 A.D.3d 320 (1st Dept. 2004) (denying summary judgment, where there was a question of fact as to whether partial performance was unequivocally referable to modification of written agreement); *Greenberg v. Frey*, 190 A.D.2d 546 (1st Dept. 1993) (affirming denial of summary judgment, finding issues of fact as to whether there was an oral modification of the written contract, which contained clause stating that it could only be modified in writing).²

Defendants allege that, for a year after the notice period ended, the parties continued to negotiate the terms of Jemel’s potential renewal. I conclude that these alleged negotiations

2

In contrast, where there was no factual dispute about the conduct of the parties, courts have decided whether to enforce the written agreement as a question of law. *See, e.g., Joseph P. Day Realty Corp. v. Jeffrey Lawrence Assocs.*, 270 A.D.2d 140 (1st Dept. 2000) (granting summary judgment where tenant undisputably left premises before expiration of lease term and this conduct was susceptible of more than one reasonable explanation); *Bakhshandeh v. American Cyanamid Co.*, 8 A.D.2d 35 (1st Dept. 1959) (granting summary judgment upholding termination of agency agreement despite alleged oral agreement not to terminate, where parties’ undisputed conduct could also be explained by performance of original agreement).

are conduct, and not mere “oral exchanges between the parties,” which would be superceded by the written contract. Moreover, I find that this conduct – if it occurred – would be susceptible to only one reasonable explanation: that the parties had orally agreed to extend the notice period.

There is a factual dispute, however, as to whether this conduct occurred; Defendants contend that the parties continued to negotiate Jemel’s potential renewal for a year following the expiration of the original notice period, whereas Plaintiff maintains that they did not continue to negotiate the renewal after the notice period ended, but rather continued to negotiate the royalty rate.³

Despite this factual dispute, Plaintiff argues that summary judgment is compelled because there is an issue of fact as to whether there was “partial performance unequivocally referable to the alleged [oral] agreement,” and therefore the alleged oral agreement is unenforceable as a question of law. Plaintiff’s counsel argued at the oral argument: “The fact that... there are two interpretations of the conduct we believe results in summary judgment, your Honor.” (Oral Arg. Trans. at 20.)

Plaintiff seems to have misconstrued the term “unequivocally referable.” The word “unequivocally” does not refer to the lack of any factual dispute about what the parties’ conduct was. It means that the conduct of the parties can be explained in only one way, and that one way is that the oral modification of the written agreement occurred.

3

Plaintiff’s interpretation is not particularly plausible; it is hard to see what leverage Jemel could muster in such a negotiation if the agreement had already renewed at the old 7% royalty rate for another 20 years.

Because there is a factual dispute about what the parties' conduct was, I cannot decide as a matter of law whether that conduct was "unequivocally referable" to the alleged oral modification of the written agreement.⁴ Therefore, I cannot conclude as a matter of law that the automatic renewal provision was triggered.

Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment is DENIED.

Dated: 10/30/06

ENTER:



J.S.C.
BERNARD J. FRIED
J.S.C.

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Plaintiff contends that Defendants have waived the argument that the parties engaged in conduct that is "unequivocally referable" to the parties's oral modification of the agreement because they failed to discuss it in their opposition papers. I find, however, that since Plaintiff itself thoroughly analyzed this issue in its opening brief and made it the centerpiece of its oral argument, Plaintiff may not object to its applicability in this motion.