

Coming Up, Inc. v Revlon Consumer Prods. Corp.
2007 NY Slip Op 30194(U)
March 9, 2007
Supreme Court, New York County
Docket Number: 0602227
Judge: Karla Moskowitz
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

COMING UP, INC., f/s/o JAIME KING and PIXIE DUST, INC.,

Plaintiffs

-against-

REVLON CONSUMER PRODUCTS CORPORATION,

Defendant.

INDEX NO. 602227/2006

MOTION DATE _____

MOTION SEQ. NO. 001

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

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision and Order.

Dated: March 7, 2007



KARLA MOSKOWITZ J.S.C.

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: PART 3

-----X
COMING UP, INC., f/s/o JAIME KING and PIXIE
DUST, INC.,

Index No. 602227/2006

Plaintiffs,

-against-

DECISION and ORDER

REVLON CONSUMER PRODUCTS CORPORATION,

Defendant.

-----X
KARLA MOSKOWITZ, J.,

This is an action by the actress Jaime King, a former Revlon model and spokesperson, seeking damages for the continued display of her likeness in Revlon store advertisements after the expiration of the parties' agreements. Defendant Revlon Consumer Product Corporation ("Revlon") moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint of Coming Up, Inc. f/s/o Jaime King and severing defendant's counterclaim for further proceedings.

Coming Up, now known as Pixie Dust, is a company that provides the services of Jaime King ("King"), an actress and model. In December 2001, Revlon and Coming Up entered into an agreement ("Agreement") in which King was to be a photographic model and spokesperson for Revlon. Pursuant to the Agreement, the parties acknowledged that Revlon would distribute print advertising to various third parties for display at their stores. Upon the termination of the Agreement, Revlon was to utilize a "reasonable good faith effort to cause the use of such Advertising to be discontinued and if notified by [plaintiffs] of such continued third party use we shall use our reasonable best efforts to have same discontinued as soon as possible." (Ippolito Aff., ex. 3, at 7-8). Revlon contends that the best efforts clause of the Agreement is vague and unenforceable, because there are no clear set of guidelines against which to measure the sufficiency of Revlon's efforts. Revlon argues that, even if an enforceable obligation is found to

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exist, Revlon fully satisfied its obligation by acting quickly and effectively, upon plaintiffs' notification, to cause third parties to discontinue the use of advertising featuring King.

Plaintiffs contend that there is no absolute rule precluding enforcement of a best efforts obligation, even in the absence of articulated criteria, and, to the extent that the court finds the best efforts clause ambiguous, the court can consider extrinsic evidence to measure Revlon's efforts. Plaintiffs also argue that the court should deny defendant's motion for summary judgment because there is a question of fact as to whether Revlon satisfied its obligations under the Agreement's good faith and best efforts clauses and because discovery has not been conducted.

BACKGROUND

On December 18, 2001, Coming Up and Revlon entered into the Agreement in which King would serve as a Revlon model and spokesperson. The Agreement states that King's name and image would be used in connection with advertising and merchandising, including point-of-purchase display racks and posters that are set up in drugstores and other cosmetic retail outlets.

The Agreement provides for a time period in which Revlon will be able to utilize advertising featuring King following the termination of the Agreement. Paragraph 14(a) of the Agreement states:

We may continue to use the product of Artist's services for an additional period of two (2) full calendar months after termination of this Agreement or the completion of the Term including any extensions pursuant to paragraph 2 for P.O.P. [point-of-purchase] display only, without any obligation to pay you compensation therefor.

(Ippolito Aff., ex. 3 at 7). Paragraph 14(b) of the Agreement states that Revlon shall make a reasonable good faith effort to cause the use of advertising featuring King to be discontinued upon termination of the Agreement. Specifically this paragraph states, in full:

You understand that some of the Advertising may be distributed to third parties over which we have no control and some or all of said Advertising may be utilized by such third parties after the period of use. Accordingly, you agree that we shall not be liable to you for such continued third party use, provided we make a reasonable good faith effort to cause the use of such Advertising to be discontinued and if notified by you of such continued third party use we shall use our reasonable best efforts to have same discontinued as soon as possible.

(Id. at 7-8).

The parties amended and extended the term of the Agreement to February 15, 2005 by two further letter amendments dated November 1, 2002 and July 28, 2003. The November 1, 2002 amendment granted Revlon use of the point-of-purchase display for four months after the expiration of the Agreement. The November 1, 2002 amendment states:

We may continue to use, on a non-exclusive basis, the product of Artist's services for an additional period of four (4) full calendar months after termination of this Agreement or the completion of the Extended Term (including any further extensions) for P.O.P. [point-of-purchase] display only, without any obligation to pay you compensation therefor, with the understanding that Revlon shall use reasonable efforts to end such usage within two (2) months after termination of this Agreement or the completion of the Extended Term.

(Ippolito Aff., ex. 4, ¶ 6). Therefore, Revlon had until June 15, 2005 to cease using King's image for point-of-purchase displays.

By letter dated August 2, 2005, plaintiffs' attorney, Robert Myman ("Myman"), alleged that Revlon was utilizing advertising featuring King after the expiration of the Agreement, although the letter did not identify the location where the images were utilized. On August 3, 2005, Revlon's attorney, Kenneth Ippolito ("Ippolito"), responded to Myman's letter and requested that he provide Revlon information as to where he had found these materials so that Revlon could fulfill its obligation under paragraph 14(b) of the Agreement to use its reasonable best efforts to have this usage discontinued. Myman responded on September 7, 2005, taking the position that Revlon had the responsibility to locate and remove the advertisements. Again,

however, the September 7th letter did not include a location where King's image was utilized. On September 13, 2005, Ippolito again wrote to Myman to ask about the locations of the stores that still possessed advertising featuring King, and reiterated that "paragraph 14 (b) clearly covers the current situation. If you want us to continue to fulfill our obligation all we ask is that you tell us where you have found the material and hopefully we can put this matter to rest." (Ippolito Aff., ex. 10). On October 10, 2005, Myman identified two Duane Reade drugstores on Broadway and on 8th Avenue, a Rite Aid on Hudson Street and in Grand Central Station, and one unidentified location in the Phillippines, where he claimed King's image was still utilized. However, he concluded that "[s]ince we are not detectives, nor do we have your list of over 20,000 retailers, this is probably just the tip of the iceberg." (*Id.*, ex. 11).

Following the receipt of Myman's October 10, 2005 letter, Ippolito advised that, on October 12 and 13, 2005, Revlon sent merchandisers to check for advertising with King's image at the Duane Reade "on 8th Street" and the Rite Aid stores on Hudson Street and in Grand Central.¹ Ippolito advised that, at the Duane Reade on 8th Street and the Rite Aid on Hudson Street, the merchandisers removed the 2004 graphics with King's image and replaced it with the 2005 one. Ippolito further advised that (1) both of the stores did not allow Revlon merchandisers to set up the 2005 resets but had third parties perform the set ups; (2) Revlon directed its sales group "to reinforce with these accounts the need to immediately remove any such images that remain up on their stores" (Ippolito Aff., ex 12); and (3) if there had been an image of King in the Phillippines, it was no longer utilized.

Despite Revlon's efforts, plaintiffs contend that retailers continued to use King's image in

¹ Ippolito did not address Myman's contention regarding a Duane Reade store on Broadway, what was found or done at the Rite Aid store in Grand Central, or the discrepancy between 8th Avenue and 8th Street, as the location of the other Duane Reade store.

Revlon advertising. For example, the Rite Aid at 534 Hudson Street, New York City, featured a Revlon poster in the front window of the store until at least November 3, 2005. The Rite Aid Store on Montague Street in Brooklyn, New York, also featured a Revlon poster in the front window of the store until at least November 30, 2005. And, as recently as July 1, 2006, a Monoprix retailer in St. Jean de Luz, France, featured King's image in a point-of purchase display wall.

On June 23, 2006, plaintiffs commenced this action, alleging that Revlon breached its contractual obligations by failing to make a good faith effort to discontinue the use of King's image in Revlon's advertising. King alleges that the perception that she is still under contract with Revlon has substantially reduced and/or completely diminished her ability to secure further endorsement opportunities with other companies.

On July 19, 2006, Revlon filed an answer and counterclaim. Revlon alleges that the complaint fails to state a cause of action and that the claims are barred by laches, unclean hands, and plaintiffs' failure to act timely. The counterclaim alleges that plaintiffs breached paragraph 15 of the Agreement by attaching the full Agreement as an exhibit to the complaint and filing it with the court. Paragraph 15 states that the terms of the Agreement will not be disclosed except if required by law or judicial order.

DISCUSSION

Summary judgment is a drastic remedy that the court grants only when the party seeking summary judgment has established that there are no triable issues of fact. (*Andre v Pomeroy*, 35 NY2d 361 [1974]). "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact... ." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853

[1985]). The burden then shifts to the motion's opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact.” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]).

Revlon contends that the “best efforts” provision that it allegedly breached is unenforceable, because the Agreement fails to set forth objective criteria against which to assess Revlon’s efforts. The First Department has held that, to enforce a best efforts provision, objective criteria are necessary to measure a party's efforts. (*Timberline Dev. LLC v Kronman*, 263 AD2d 175, 178 [1st Dept 2000]; *Non-Linear Trading Co. v Braddis Assocs., Inc.*, 243 AD2d 107, 114 [1st Dept 1998]; *cf. Richbell Information Servs., Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 304 [1st Dept 2003]). Despite these pronouncements, many courts, including the Court of Appeals and the First and Second Departments, have enforced a “best efforts” provision without articulated objective criteria or have implied one without an explicit provision.

In *Van Valkenburgh, Nooger & Neville, Inc. v Hayden Pub. Co.* (30 NY2d 34, *cert denied* 409 US 875 [1972]), the Court enforced a best efforts provision in a publishing contract despite the absence of articulated objective criteria. Likewise, in *StoreRunner Network, Inc. v CBS Corp.* (8 AD3d 127 [1st Dept 2004]), despite the absence of objective criteria in the parties’ agreements, the court granted defendants summary judgment because the evidence conclusively established that they did make sufficient efforts to sell advertising on plaintiff’s website. In *Forward Indus., Inc. v. Rolm of New York Corp.* (123 AD2d 374 [2d Dept 1986]), the court denied summary judgment to defendant on a claim that it failed to use its “best efforts” to ensure the installation of telephone equipment by a specific deadline.

In *Wood v Lucy, Lady Duff-Gordon* (222 NY 88, 90-91 [1917]), the Court implied a promise by the plaintiff to use reasonable efforts to place the defendant’s endorsement and

market her designs. Similarly, in *Non-Linear Trading Co. v Braddis Assocs., Inc.* (243 AD2d 107, 114 [1st Dept 1998]), the court held “a party's promise to use best efforts to accomplish the purpose of an agreement is valid consideration that will be implied, if necessary, to avoid failure of the contract for lack of mutuality, especially where the parties have indicated the intent to be contractually bound.”

One lower court, that has addressed the conflicting case law as to whether best efforts clauses need an objective standard to be enforceable, reconciles the cases by concluding “that the obligation will be enforced where sufficient content may otherwise be read into it against which the promisor's performance may be measured.” (*Ashokan Water Servs., Inc. v New Start, LLC*, 11 Misc 3d 686, 690 [Civ Ct, Kings County 2006]). Thus, courts will refuse to enforce an express “best efforts” provision, or to imply one where it was not expressed, in those situations where it amounts to a mere “agreement to agree.” (See *Richbell Information Servs.*, 309 AD2d at 303; *Bernstein v Felske*, 143 AD2d 863, 865 [2d Dept 1988]). However, “where it is clear from the language of an agreement that the parties intended to be bound and there exists an objective method for supplying a missing term, the court should endeavor to hold the parties to their bargain.” (*166 Mamaroneck Ave. Corp. v 151 East Post Road Corp.*, 78 NY2d 88, 91 [1991]).

In this case, Revlon’s words and actions, prior to and after the receipt of Myman’s August 2, 2005 letter, provide an objective criteria, combined with common sense, under which a finder of fact can measure whether Revlon violated paragraph 14(b). This is not a situation where Revlon was unable to act because it was unsure of how to proceed. Indeed, at oral argument, plaintiffs’ attorney argued that Revlon added paragraph 14(b) to the Agreement in order to limit its liability for third parties’ use of King’s images. (Transcript of Oral Argument, dated October 26, 2006, at 17). Nor does this situation resemble *Timberline Dev. LLC v Kronman, supra*,

where the bankruptcy court had a duty to maximize the value of the debtor's assets and ordered a public sale, and, thus, a bankrupt limited partner could not meet its contractual obligation to "use reasonable efforts" to obtain approval from the court for a private sale of the assets to the plaintiff. (263 AD2d 175).

This court cannot rule, as a matter of law, that Revlon used its best efforts to see that third parties discontinue and remove advertisements featuring King by the contractual deadline. Whether a best efforts provision has been fulfilled "will almost invariably . . . involve a question of fact." (*Kroboth v Brent*, 215 AD2d 813, 814 [3d Dept 1995]; *see also Van Valkenburgh, Nooger & Neville, Inc. v Hayden Pub. Co.*, 30 NY2d at 46 [whether a publisher's failure to use best efforts in the promotion of an author's work was "essentially a fact value question"]). Here, a question of fact exists as to whether Revlon made a reasonable good faith effort to discontinue the use of advertising with King's image after June 15, 2005.

In support of its motion for summary judgment, Revlon submits an affidavit of James P. Burke, Revlon's Vice President of Retail Merchandising and Operations. Burke avers that, in December 2004, Revlon assembled a new graphics package for shipment to retail outlets, that included merchandising and graphic materials for the point of purchase display of cosmetics. (Burke Aff., ¶ 2). The new 2005 materials did not include any images of King. (*Id.*, ¶ 5). Burke states that the packages contained instructions for the assembly of the wall and that, to install the resets, the stores could use their own employees, contract with third parties, or ask Revlon. (*Id.*, ¶ 3). Burke further states that the third party is responsible for removing and replacing the old graphic materials with the new materials. (*Id.*, ¶ 5).

Revlon also submits the affidavit of Mayko McCormick, an employee of Revlon and a member of its Rite Aid team. McCormick states that, in the fall of 2005, he learned that several

Rite Aid stores in New York City still used King's image in window and display units. (McCormick Aff., ¶ 2). McCormick states that Revlon had not shipped shelf or window materials featuring King to stores since 2004 and that Revlon had sent the store reset kits with instructions to replace the wall display units nine months earlier. (*Id.*). McCormick further asserts that Revlon had no reason to believe that the advertising featuring King would be on display after June 15, 2005. (*Id.*). After hearing of plaintiffs' complaint, McCormick contacted Ed Beasley, Rite Aid's Senior Vice President of East Coast Operations, who agreed to take steps immediately to eliminate the use of materials featuring King's image. (*Id.*, ¶ 3).

Finally, Revlon argues, because there is an error rate of only seven stores out of approximately 28,000 domestically and two stores out of approximately 28,000 internationally, the conclusion that Revlon used its best efforts is "unquestionable."

Plaintiffs argue that, in order for Revlon to have fulfilled its obligation under the Agreement, Revlon should have expressly directed its retailers to remove all images of King from Revlon advertising when King was no longer under contract with Revlon and to follow through by ascertaining whether her images remained. Plaintiffs aver that, even if the retailers replaced all of the wall displays with the 2005 resets, retailers might still use King's image in Revlon posters and elsewhere in stores. Indeed, plaintiffs claim that King's poster remained in the front window of the Rite Aid on Hudson Street even after Revlon sent merchandisers there on October 12 and 13, 2005.

Plaintiffs argue that Revlon's conduct in alerting its foreign retailers to remove King's image creates a standard to measure Revlon's reasonable good faith and best efforts for its United States retailers. According to the affidavit of Erica Oroszlany ("Oroszlany"), Revlon's Director of International Marketing, in September and October of 2004, well before the

termination of the Agreement, Oroszlany held meetings with foreign distributors covering the markets for Revlon's products, including Latin America, the Middle East, Europe and Africa. (Oroszlany Aff., ¶ 2). At these meetings, Oroszlany specifically discussed the expiration of King's contract and the necessity to remove by June 14, 2005 all point of purchase advertising using her name or picture. (*Id.*, ¶ 3). Oroszlany submits written materials from her presentation at the Latin America Distributors Conference, that include specific directions to remove King's image by June 14, 2005, and states that Revlon circulated the same materials at the Distributors Conference for Europe, the Middle East and Africa, and gave similar instructions to those responsible for Revlon's distribution in Asia. (*Id.*).

By specifically alerting foreign retailers to remove King's image prior to the expiration of the Agreement, one can argue that Revlon set its own standard for what it needed to do to ensure that distributors and retailers removed advertising featuring King. Revlon does not submit any evidence that it gave United States retailers specific instructions to remove King's image prior to the expiration of the Agreement. Instead, Revlon shipped new display units without an explanation about King's expired contract. In addition, there is no proof that Revlon instructed or gave notice to its United States retailers to specifically remove posters of King that often appeared separate from the point of purchase materials. Therefore, a trier of fact could find that Revlon's actions in the United States were insufficient as compared to its actions with foreign retailers, taking into account the cost, feasibility and likelihood of success of its efforts.

It also remains disputed whether Revlon used its reasonable best efforts to have third party use discontinued once plaintiffs' counsel alerted it that King's image remained in various retailers after the expiration of her contract. Although Revlon submits correspondence from Ippolito that explains its efforts to remove images of King, advertising featuring King remained

in third party stores as late as November 2005 in the United States and as late as July 2006 in France.

The court also denies Revlon's motion for summary judgment because plaintiffs have not had an opportunity to conduct discovery and most of the relevant information is under the exclusive control of the defendant. (CPLR 3212[f]; *Esposito v Metropolitan Transp. Auth.*, 264 AD2d 370, 371 [1st Dept 1999]; *Overseas Reliance Tours & Travel Service, Inc. v Sarne Co.*, 17 AD2d 578, 579-80 [1st Dept 1963]). Plaintiffs are entitled to discovery regarding the identity of Revlon's retailers, how and when point-of-purchase advertising is changed or updated, and what Revlon did or did not do in response to plaintiffs' complaints. Thus, while Revlon contends that it has established only a de minimis error rate, without discovery, plaintiffs are unable to challenge Revlon's contentions.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant's motion is denied.

Dated: March 8, 2007

ENTER:



J.S.C.

