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

PRESENT: HON. RICHARD B. LOWE, III Justice

PART 54

Index Number : 604044/2004
BOB RUSSO PROMOTIONS
vs
AOL TIME WARNER
Sequence Number : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 2/2/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
JUN 13 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 6/4/07

HON. RICHARD B. LOWE, III
J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

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

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BOB RUSSO PROMOTIONS, INC., d/b/a Rob Russo Productions, Inc.,

Plaintiff,

-against-

Index No.
604044/04

AOL TIME WARNER, INC., TIME INC., and TIME4 MEDIA, INC.,

Defendants.

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RICHARD B. LOWE, III, J.:

Upon a prior motion to dismiss, this court dismissed the second, third, and sixth causes of action (see Bob Russo Promotions, Inc. v AOL Time Warner, Inc., Decision and Order, Index No. 604044/04, November, 7, 2005, hereinafter, the Prior Decision). Except as necessary, the facts of this matter will not be fully elaborated herein.

This dispute arose over the distribution, marketing, and revenue related to audio renderings of stories that appeared in Outdoor Life magazine (known as Outdoor Life Classic Stories, and hereinafter referred to as the Masters). After discovery, defendants now seek summary judgment dismissing the first, fourth, and fifth causes of action.

It is uncontested that defendant Time4 Media, Inc. (T4M) is the successor to the rights and obligations of non-party Time Mirror Magazines, Inc. (TMM). Thus, herein, "TMM" and "T4M" refer to the same entity. TMM, until 1999, was the publisher of Outdoor Life. In 1991, plaintiff Bob Russo Promotions, Inc., d/b/a Rob Russo Productions, Inc. (herein, RRP) and TMM agreed that RRP would serve as producer of the Masters, TMM and RRP would split the

production costs and the net profits from the Masters, and each party would have the right in perpetuity to market the Masters.

In 1995, TMM and RRP confirmed their agreement in a writing drafted by TMM (the Agreement). The Agreement, which includes a merger clause, states in paragraph 7 that TMM would reimburse RRP for fifty percent (50%) of all production costs and

> fifty percent (50%) in perpetuity of TMM's net receipts from the sale of the Masters produced hereunder, including, but not limited to, sublicensing and synchronization. Net receipts shall be defined as gross receipts less costs of production, manufacturing, duplication, marketing, paid advertising, fulfillment and distribution.

With regard to promotion of the Masters, paragraph 8 of the Agreement states that no payments shall be due on the first 1000 cassettes distributed by each of the parties, and sets rates for payments to be made for each party's amounts distributed in excess of that first 1000 cassettes.

RRP maintains that the language in paragraphs 7 and 8 of the Agreement obligated TMM to market the Masters, and TMM failed to do so. Despite this, in 2004, RRP made contact with non-party JSA Marketing Group (JSA). JSA expressed an interest in marketing the Masters, but, according to the complaint, T4M wrongfully refused to consent to permit JSA to market the Masters. Defendants argue that their right to refuse to consent is based upon paragraph 5 of the Agreement which states that

> RRP shall use good faith efforts to locate manufacturing, distribution and marketing outlets for the Masters in the Series created by you. With respect to distribution, marketing and sale of the Masters solely and only through the record retail trade, you and TMM shall both have the right in perpetuity to exploit the Masters, subject to the allocation by each party of any proceeds received therewith in accordance with paragraph 7 hereunder. Notwithstanding the preceding sentence, you shall not exploit the Masters in any manner whatsoever without TMM's prior written consent.

Emphasis added.

After the dismissals under the Prior Decision, RRP's remaining causes of action seek a declaratory judgment clarifying TMM's and RRP's obligations under the Agreement (fourth cause of action), breach of contract damages for TMM's failure or refusal to market the Masters (first cause of action), and damages for the concomitant breach of TMM's covenant of good faith and fair dealing (fifth cause of action).

Defendants move, pursuant to CPLR 3212(b), for summary judgment dismissing the remainder of the complaint on the grounds that RRP's claims are barred under the Agreement, and due to the applicable six-year statute of limitations governing contracts. In order to be granted summary judgment, TMM must show that RRP's remaining causes of action have no merit (CPLR 3212[b]) by making a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985); Muhammad v Bucknor, 228 AD2d 333, 334-335 (1st Dept 1996).

Withal, upon this motion, RRP is entitled to the benefit of every favorable inference that may be drawn from the pleadings, affidavits, and competing contentions of the parties. Myers v Fir Cab Corp., 64 NY2d 806 (1985); Rennie v Barbarosa Transp., 151 AD2d 379, 380 (1st Dept 1989).

Statute of Limitations (Second Affirmative Defense)

As a threshold issue, TMM seeks to dismiss the complaint on the basis that it is barred by the applicable six-year statute of limitations governing contracts. CPLR 213(2). TMM does not identify any specific claim that falls outside of the limitations period, but rather seeks to delimit

the claims that may be made by RRP through advice of the court. It is well settled that the function of the courts is to determine controversies between litigants, and not to give advisory opinions. Matter of Self-Insurer's Assn. v State Indus. Commn., 224 NY 13, 16 (1918); Cuomo v Long Is. Light. Co., 71 NY2d 349, 354 (1988).

What is more, the statute of limitations is an affirmative defense which must be pleaded and applied by the party invoking it. See e.g. Paladino v Time Warner Cable of New York City, 16 AD3d 646, 647 (2nd Dept 2005). Having addressed no specific claims, TMM has failed to show that there will be any effect from the judicial determination it seeks. New York Pub. Interest Research Group v Carey, 42 NY2d 527, 530 (1977) ("courts should not perform useless or futile acts and thus should not resolve disputed legal questions unless this would have an immediate practical effect on the conduct of the parties"). The motion for summary judgment dismissing the complaint due to the applicable statute of limitations is denied.

Obligation to Market the Masters (First Cause of Action)

RRP argues that paragraphs 7 and 8 of the Agreement obligate TMM to market the Masters, and that TMM has failed to meet its obligation. TMM argues that the sole marketing obligations in the Agreement arise from paragraph 5, aptly entitled "Manufacture, Distribution, and Marketing."[1] On this motion for summary judgment, the court is obliged to ascertain and enforce the language of the Agreement if it is unambiguous. Sterling Fifth Assoc. v Carpentille Corp., Inc., 9 AD3d 261, 261-262 (1st Dept 2004).

As a related matter, TMM argues that this court dismissed the second cause of action in

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[1]The court notes, however, that paragraph 14 of the Agreement states that "[t]he section headings are for convenience only and shall not serve to interpret any terms or conditions herein."

the Prior Decision on the merits, and RRP, hence, is not entitled "to seek recovery for an alleged failure to market the [Masters] as premiums." This is a misreading of the Prior Decision. This court held that although the Agreement may not be contradicted by evidence of a prior agreement, the Agreement may nevertheless be explained or supplemented by other evidence. See McKinney's Uniform Commercial Code, §2-202.

The court dismissed the second cause of action because, although there is a section on promotion of the Masters, there is no language in the Agreement specifically referencing the use of the Masters as "premiums." Hence, to the extent that the use of premiums is a marketing method, the obligation hypothesized in the second cause of action would be a subset of the first cause of action. See Sweeney v Prisoners' Legal Servs. of New York, 146 AD2d 1, 6 (3rd Dept 1989). Judicial efficiency, not a determination as to underlying merits, required dismissal of the second cause of action. Compare East Asiatic Co. v Corash, 34 AD2d 432 (1st Dept 1970); see also Jacobs v Macy's E., 262 AD2d 607, 608 (2nd Dept 1999) (issue is whether a cause of action has been stated, not its merits).

In any event, dismissal for failure to state a claim is not a dismissal upon the merits. Asgahar v Tringali Realty, Inc., 18 AD3d 408, 408-409 (2nd Dept 2005); Peros v Cia De Nav Mar Netumar, 75 Misc 2d 913 (Civ Ct, NY County 1973) (dismissal for failure to state a claim is on the merits in federal courts, but not in New York courts). Indeed, action on the merits would have been improper without converting the motion into one for summary judgment. See Del Castillo v Bayley Seton Hosp., 232 AD2d 602, 603-604 (2nd Dept 1996) (motion to dismiss distinct from motion for summary judgment); Wahl v Wahl, 122 AD2d 564, 565 (4th Dept 1986) (court erred in ruling on merits upon motion to dismiss).

This court's Prior Decision, therefore, only established that, based upon the complaint, there is no separate cause of action for failure to market the Masters as premiums. At the same time, the court recognized that evidence could be introduced that the marketing that TMM was obliged to do, if any, included the distribution of the Masters as premiums.

Turning to the salient question of whether the Agreement requires TMM to market the Masters, the court finds the Agreement to be ambiguous on the point. For instance, paragraph 8 of the Agreement sets forth the payment scheme for the distribution of cassettes by each party to "promote the Series." With that, paragraph 8 evidently contemplates promotion of the Masters by both parties. There is, hence, an open fact question as to whether TMM actually agreed to market the Masters by distributing the promotional cassettes.

In addition, paragraph 7, states that RRP would be paid from TMM's net receipts from the sale of the Masters. That paragraph then defines "net receipts" as "gross receipts less costs of ... marketing ...." As stated in the Prior Decision, a logical interpretation of this language is that TMM may have agreed to market the Masters; there might have been no provision to recoup marketing costs if marketing costs were not an expectation. See BT Commercial Corp. v Blum, 175 AD2d 43, 44 (1st Dept 1991) (ambiguity to be construed against drafter). This language also directly undermines TMM's argument that RRP was the sole marketer of the Masters.

Paragraph 7 also states that royalties would not be paid to RRP until TMM recouped its "cost of the creation, manufacture, distribution and marketing of the first cassette in the Series created prior to this Agreement." This language indicates that at least leading up to the Agreement, TMM engaged in marketing of the Masters. See Korff v Corbett, 18 AD3d 248, 251 (1st Dept 2005) (capacity or relationship in which agreement was executed may be considered to

explain the meaning of particular terms). There being no disclaimer of that role in the Agreement, it is feasible that TMM and RRP both had the expectation that TMM would continue to market the Masters.

Finally, paragraph 13 of the Agreement, which provides for termination of the Agreement, states that if RRP cannot comply with the Agreement, "TMM shall thereby be relieved of any and all obligations hereunder, except TMM's obligations with respect to the Masters produced hereunder prior to such termination." Emphasis added. Despite this phrase, TMM has only asserted rights, and not acknowledged any obligations under the Agreement whatsoever. TMM's interpretation would render the inclusion of this language irrelevant. Two Guys from Harrison-N.Y. v SFR Realty Assoc., 63 NY2d 396, 403 (1984) (court should avoid an interpretation that would leave contractual clauses meaningless); American Express Bank v Uniroyal, 164 AD2d 275, 277 (1st Dept 1990) ("contract should be construed so as to give full meaning and effect to all of its provisions").

Although the court has concerns about the confuted allegations of RRP that it did not receive any profits from the Masters, without a determination as to credibility (see S.J. Capelin Assoc. v Globe Mfg. Corp., 34 NY2d 338, 341 [1974]; Creighton v Milbauer, 191 AD2d 162, 166 [1st Dept 1993]) the court cannot reject the alleged reasonable expectation of RRP that the business purpose of the Agreement included marketing action by TMM. See e.g. Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC, 30 AD3d 1, 8 (1st Dept), affd 8 NY3d 59 (2006).

Paragraph 5 does not unambiguously place the sole obligation to market the Masters on RRP, but speaks of "good faith efforts" on the part of RRP to market the Masters. "Good faith

efforts" are not the same as sole responsibility. This distinction is underscored by consideration of the language of paragraph 9, for example, which states that RRP "shall be solely responsible for performing the work under this Agreement at [RRP's] sole cost and expense ...." Emphasis added. The existence of the sole-responsibility language in paragraph 9 raises the inference that if TMM wanted to place the sole responsibility to market the Masters upon RRP, they would have phrased it exactly that way.

Both common sense and the circumstances existing before the Agreement indicate that a reasonable interpretation of the Agreement is that TMM would participate in the marketing of the Masters. See Reiss v Financial Performance Corp., 279 AD2d 13, 19 (1st Dept 2000), affd as mod on other grounds 97 NY2d 195 (2001).

Indeed, even after the Agreement, TMM claims to have actively negotiated the terms of an agreement for the services of non-party Oasis Audio (the Oasis Agreement). See Rome Affidavit, Exhibit V. In the Oasis Agreement, TMM agreed that in exchange for requiring Oasis to pay an advance against Royalties, TMM "requires that [Oasis] increase its marketing expenditures for the [Masters] over that amount of marketing expenditures usually incurred by [Oasis] in marketing a similar product." Id. at ¶2(d). Moreover, the Oasis Agreement also gave TMM, and not RRP, the right "to examine or audit ... all applicable books and records of [Oasis] which relate to sales of [the Masters,]" and established that the Masters "may not be used as premiums, promotions, or loss leaders without the written permission of [TMM]." Id. at ¶4(d), (f).

If the parameters, expenditure, and review of the marketing under the Oasis Agreement belonged to TMM, the assertion that RRP was solely responsible for the marketing of the

Masters is patently debatable. The motion for summary judgment dismissing the first cause of action is denied.

Declaratory Judgment (Fourth Cause of Action)

TMM's motion to dismiss the fourth cause of action is also denied. Paragraph 5 of the Agreement states that "[w]ith respect to distribution, marketing and sale of the Masters solely and only through the record retail trade, [RRP] and TMM shall both have the right in perpetuity to exploit the Masters ...," but states in the very next sentence that "[n]otwithstanding the preceding sentence, [RRP] shall not exploit the Masters in any manner whatsoever without TMM's prior written consent."

The complaint claims that TMM "unreasonably" withheld its consent to JSA as a marketer for the Masters in breach of the Agreement. As noted in the Prior Decision, TMM was entitled, by the plain terms of the Agreement, to withhold its consent for any or no reason. Thus, the request for a declaratory judgment on the meaning of the consent provision, and whether TMM has the fundamental right to refuse to consent to RRP's marketing proposals is obviated.

Nonetheless, the remaining aspect of the fourth cause of action, which seeks a determination as to whether TMM has a right to prohibit and refuse to market the Masters through RRP or a third party, cannot be fully determined until TMM's marketing obligation, if any, under the first cause of action has been clarified. The motion for summary judgment dismissing the fourth cause of action is denied.

Fifth Cause of Action (Breach of the Covenant of Good Faith and Fair Dealing)

It is apodictic that every contract implies a covenant of good faith and fair dealing between the parties; however, when there is an express contract covering the contested matter,

the breach of that covenant is redundant and inessential. See Ezrasons, Inc. v American Credit Indem. Co., 257 AD2d 447, 448 (1st Dept 1999).

Here, the Prior Decision found that if the totality of TMM's actions were undertaken solely to deprive RRP of the right to receive the benefits of the Agreement, a breach of the covenant may be found. Jaffe v Paramount Communications, 222 AD2d 17, 22-23 (1st Dept 1996). Thus, the combination of a putative failure to market the Masters with an alleged absolute refusal to have any other parties market the Masters, while not clearly violative of the letter of the Agreement, may, nonetheless be deemed a breach of the covenant of good faith and fair dealing.

TMM has, however, submitted unrefuted evidence that it did market the Masters, and RRP did receive fruits of the Agreement. Thus, any other failure under the Agreement could be nothing more than a breach of contract, as covered under the first cause of action. The motion for summary judgment dismissing the fifth cause of action is granted.

Accordingly, it is hereby

ORDERED that the motion of defendants, AOL Time Warner, Inc., Time Inc., and Time4 Media, Inc., for summary judgment dismissing the complaint of plaintiff, Bob Russo Promotions, Inc., d/b/a Rob Russo Productions, Inc., is partially granted to the extent that the fifth cause of action is severed and dismissed, and it is otherwise denied; and it is further

ORDERED that the action shall otherwise continue.

Dated: June 4, 2007

ENTER:

HON. RICHARD B. LOWE, III
J.S.C.