

Hearst Mag. v Glaze, Inc.

2007 NY Slip Op 31989(U)

June 26, 2007

Supreme Court, New York County

Docket Number: 0603148/2005

Judge: Richard B. Lowe

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

PRESENT: HON. RICHARD B. LOWE, III

PART 56

Index Number : 603148/2005

HEARST MAGAZINES

vs

GLAZE

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE

5/17/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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
JUL 26 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 6/26/07

HON. RICHARD B. LOWE, III

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

THIS CASE IS REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S)

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

-----X

HEARST MAGAZINE, a division of
Hearst Communications, Inc.,

Plaintiff,

Index No. 603148/05

-against-

GLAZE, INC.,

Defendant.

FILED
JUL 06 2007
NEW YORK
COUNTY CLERKS OFFICE

-----X

Richard B. Lowe, III, J.:

In this action to recover monies allegedly due on a licensing agreement (Agreement), ~~defendant Glaze, Inc. (Glaze) moves for summary judgment dismissing the complaint, and partial~~ summary judgment on its first counterclaim, for the costs and expenses resulting from Hearst's alleged breach of the Agreement.¹ Plaintiff Hearst Magazine, a division of Hearst Communications, Inc. (Hearst,) cross-moves for summary judgment on its complaint, including its third cause of action for attorney's fees, for which it requests a hearing.

Hearst publishes Good Housekeeping Magazine (Good Housekeeping). Hearst also administers the programs of the Good Housekeeping Seal (Seal) and Good Housekeeping Consumer' Policy, whereby Good Housekeeping will replace or refund the purchase price of certain products advertised in Good Housekeeping, or bearing the Seal, which prove defective within two years of purchase. According to Hearst, manufacturers must earn the Seal by

¹In it's motion papers, Glaze also claims that it is seeking to recover for lost profits of \$2,400,000.

introducing products which pass evaluation by the staff of the Good Housekeeping Research Institute (Institute).

Cleaning products which are already designed and manufactured are called "market" products. In addition to the above method by which a manufacturer's market products are presented to Hearst for purposes of obtaining the Seal, Hearst claims that it also engages "in a program of seeking qualified manufacturers to manufacture and market goods branded by the Good Housekeeping name and trademark." *Glen Ellen Brown Aff.*, at 2-3. That is, Hearst alleges that it seeks licensees who will manufacture new lines of products specifically intended to meet Good Housekeeping's standards.

The parties entered into a licensing agreement on July 10, 2003 (the Agreement), whereby Glaze was granted the right to sell various types of household cleaning tools, such as mops, sweepers, and wet and dry cleaning wipes. *Id.*, Ex. D. According to Hearst, it found in Glaze, "an opportunity to develop a comprehensive Good Housekeeping branded line of quality products that were ergonomically designed, attractive, colorful, and thoughtfully marketed." *Brown Aff.*, at 5.

The Agreement contains, in "Schedule 1 - Products" a list of the cleaning products Glaze would manufacture. The list reads as follows:

1. Cleaning Accessories: pails, dust pans, squeegees
2. Mop head refills, rubber gloves.
 - a. Mops, Brooms, Sweepers.
 - b. Mops: Butterfly, wringer, roller, string, PVA mops.
 - c. Brooms: corn, rubber, angle, 36" wide garage broom
 - d. Upright and Electrostatic sweeper
3. Brushes: Sink, soap dispensing, tile and grout, dust, scrub, utility and wood.
4. Cloths: polishing, dusting, and electrostatic cloths.
5. Viscose wipes, synthetic chammies, flannel dusters, Furniture wipes
6. Sponges

7. "Drain Buster" for unclogging household drains.²

Glade characterizes the above list as denoting the seven "categories" of products that Hearst had agreed Glade would manufacture and sell.

The Agreement was to run for a term of three and one half years, and required Glaze to pay a single minimum royalty payment of \$50,000 in quarterly installments, and an additional royalty of five percent of all products sold. Agreement, Basic Provisions, ¶ 7 (a). Under the Agreement, Glaze was expected to sell a minimum of \$100,000 for the first year, \$125,000 for the second year, and \$150,000 for the third year.³ *Id.*, ¶ 7 (c). Glaze was also required to purchase at least one page of advertising in Good Housekeeping each year, and contribute 1% of its net sales per year of the term into a "Common Marketing Fund," which was to be spent "to promote and market Good Housekeeping-branded consumer products via retail initiatives." *Id.*, ¶ 10 (b).

Under the "Standard Terms and Conditions" portion of the Agreement⁴ (Standard Terms), Hearst was granted the right to exercise oversight over the design process of all products which would eventually receive the Seal. As applicable, the Agreement reads as follows: "[l]icensee may not manufacture, use, sell, promote, ship or distribute any Product or any Packaging Material until it has been approved in writing by Hearst. Such approval may be granted or

²"Drain Buster" is a type of plunger, not a chemical compound.

³In its Memorandum of Law, Glaze claims the minimum guaranteed royalty payment was to be \$375,000, while the minimum sales were to be \$3 million the first year, \$4 million the second year, and \$5 million the third year. Memorandum of Law, at 1. The discrepancy in these, and other numbers throughout the papers, is unexplained.

⁴The Agreement is made up of two parts: the "Basic Provisions" and the "Standard Terms and Conditions."

withheld as Hearst, in its sole discretion, may determine" Agreement, Standard Terms, ¶ 7

(b).

The Standard Terms further provides that

[b]efore commencing or authorizing third parties to commence the design or development of Products or of Packaging Material which have not been previously approved in writing by Hearst[,] Licensee shall submit at its own cost to Hearst for approval the following material in the following sequence: (I) a description of the concept, including full information on the nature and function of the proposed item and a general description of how Property, Trademarks and other material will be used thereon; (ii) complete layouts and descriptions of the proposed Products and Promotional and Packaging Material showing exactly how and where the Property, Trademarks, and all other artwork and wording will be used; (iii) pre-production models or prototype samples of the proposed Products and Promotion and Packaging material; and (iv) actual production samples of the proposed Products and Promotional and Packaging Material (the Production Samples). Licensee's shall not proceed beyond any stage where approval is required without first securing such approval. ... Licensees failure to adhere to the aforesaid approval requirements shall constitute a material breach of this ~~agreement.~~

Standard Terms, ¶ 7 (c).

The Agreement also contained a "Marketing Date" of November 1, 2003. Basic Provisions, ¶ 9. Paragraph 9 states that "[i]f Licensee has not commenced the manufacture, sale or distribution of at least one Product in each of the Product's major categories by the applicable Marketing Date, Hearst may, at its option, terminate this Agreement or eliminate that Product category from the definition of Products."

In the years following the execution of the Agreement, Glaze labored to fulfill its obligation under the Agreement to provide products which met with Hearst's approval. However, Glaze's progress, according to Glaze, was significantly hampered by Hearst's repeated requests for modifications to products presented to it.

Glade also professes great distress at Hearst's alleged choice to eliminate three categories

from the list of things Glaze would manufacture, due to competition in a marketplace already containing similar products, which were already advertised in Good Housekeeping. The three products were wet and dry wipes, and the market product Drain Buster. Hearst informed Glaze that it would not accept Drain Buster, because there already were similar items on the market, at least one of which was called "Drain Buster."

Glaze claims that wet and dry wipes were an especially important part of its repertoire, because Glaze could get these products on the market quickly, and so start a revenue stream, while other products proceeded through Hearst's approval process. To partially address this problem, the parties entered into a second licensing agreement on February 2, 2004 (the PM Agreement). Brown Aff., Ex G. Under the PM Agreement, Glaze would sell wet wipes under the imprimatur of Popular Mechanics. The PM Agreement did not address dry wipes, or "Drain Buster." Glaze maintains that the PM Agreement was a new license, rather than a modification of the Agreement, and that nothing in the PM Agreement removed the sale of wet wipes from the Agreement. Hearst, in contrast, maintains that the PM Agreement was a modification of the Agreement, which resolved any issue between the parties as to Glaze's right to sell wet wipes.

In a further agreement, contained in a letter dated June 21, 2004, the Agreement was specifically modified (the Modification Agreement). Brown Aff., Ex. I. In the Modification Agreement, the parties agreed to push back the payment of the \$12,500 guaranteed minimum royalty payments due in July and October, to September 1, 2004, and December 1, 2004. The Modification Agreement also lowered the minimum net sales figure expected during the first year of production. Glaze was further excused from paying, for the time being, the remittance of 1% of its net sales to the Common Market Fund. Modification Agreement, ¶ 10. The

Modification Agreement specified that “all other terms and conditions of the Agreement shall continue in full force and effect.” *Id.* at unnumbered 2.

In the next few months, Glaze determined that it could not continue with the Agreement, having become financially strapped, without having satisfied Hearst as to any of its products.⁵ Internal writings disclose that Glaze came to believe that performance under the Agreement was impossible⁶, due, among other things, to the rising costs of selling merchandise to retailers.⁷

In a letter to Hearst dated November 1, 2004, Glaze terminated the Agreement (the Termination Letter). Brown Aff., Ex. O. In the Termination Letter, Glaze stated that “as you are aware, at the time the Agreement was negotiated and executed the market climate allowed for a reasonable estimate of the costs and expenses the Licensee should expect to incur over the long term to make the transaction economically feasible for both parties.” *Id.* at unnumbered 2.

However, “[t]he unfortunate harsh reality is that as this business deal has evolved, since day one, the Licensee paid out costs and expenses well beyond what was intended and contemplated by both parties.” *Id.* at unnumbered 3.

Glaze then reviewed the Agreement’s terms, and concluded that “the reasonable legal

⁵The exception was wet wipes, which Glaze successfully sold under the PM Agreement.

⁶Glaze produces a memorandum, written by Glaze employee Mark Weinberger (Weinberger), concerning a trip he allegedly took to China to visit Glaze’s manufacturer. The memorandum allegedly serves to explain the difficulties Glaze was having with its China factory. Glaze Memo, Ex. 16. Hearst claims that the memorandum is a forgery, because Weinberger never actually went to China. The dispute is irrelevant for the purposes of this motion.

⁷The major obstacle to Glaze in placing its products in retail stores was “slotting fees,” fees charged by retailers to allow merchandisers to sell their products in their stores. Glaze’s research showed that the cost of slotting fees could be as much as \$1 million, and that other manufacturers had already paid enormous slotting fees with the major retailers Glaze would have approached, had it the means.

conclusion to be drawn from the current state of affairs is that, in light of the existence of both conditions precedent and conditions subsequent that have either taken place or can't be satisfied, the obligations of the Licensee under the License Agreement is vitiated, as performance, as contemplated, is impossible." *Id.* Glaze concluded that the Agreement was a "nullity," and that "as a result, the obligations of the Licensee thereunder from this day has ceased." *Id.* at unnumbered 4. Glaze never claimed that Hearst had breached the Agreement, or offered any other reason for its termination other than its unwillingness to continue in a losing project.

Glaze failed to make the guaranteed minimum royalty payment of \$12,500 due December 1, 2004, and made no further payments after that time. On March 2, 2005, Hearst terminated the Agreement, finding that Glaze was in breach. Glaze argues that the parties never intended that Glaze would produce an entirely new line of housewares products for Hearst's approval, but that Glaze offered Hearst its already existing market items, such as Drain Buster, which Hearst approved prior to the execution of the Agreement. See *Bihari Lund Dep., Brown Aff., Ex. B*, at 39. Glaze insists that, since Hearst had agreed to allow Glaze to produce all of the items listed in the Agreement, Hearst breached the contract, and caused Glaze to suffer damages, by eliminating the three categories of products, Drain Buster and wet and dry cloths, from the items Glaze could produce.

Next, Glaze maintains that, under the terms of the Agreement, Hearst had no right to comment on, or expect changes to any product, based on the design of the products, but was only authorized to ask for changes based on quality. Glaze alleges that Hearst breached the Agreement by compelling many changes based on the design of products, which fatally delayed the approval process, until Glaze could no longer continue under the Agreement.

Finally, Glaze, referring to the arguments made in the Termination Letter, claims that the Agreement created a “reasonable expectation” that its failure to sell any products by the market date would result in the termination of the Agreement, and exonerate Glaze from making any further payments under the Agreement.

II. Discussion

“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.” (*Kesselman v Lever House Restaurant*, 29 AD3d 302, 303 [1st Dept 2006]), (quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Upon the presentation of a prima facie case by the movant, the burden then shifts to the motion’s opponent to raise a triable issue of fact. (*Kesselman*, at 303-304). The evidence on a motion for summary judgment should be liberally construed in favor of the nonmovant. (*Id.*). The court’s role on a summary judgment motion “is solely to determine if any triable issues exist, not to determine the merits of any such issues.” (*Sheehan v Gong*, 2 AD3d 166 [1st Dept 2003]).

A. Summary Judgment on Complaint

In order to obtain summary judgment dismissing the complaint, Glaze must establish that it rightfully terminated the Agreement based on Hearst’s breaches, extinguishing any damages Hearst may claim arose from the termination. Glaze has not done so.

“Under New York law, if one party commits a material breach of contract, the other party to the contract is relieved of further performance.” (*AM Cosmetics, Inc. v Solomon*, 67 F Supp 2d 312, 317 [SD NY 1999]). However, a party to a contract may choose to continue to perform under that contract, after it perceives that the other party is in breach. (*Albany Medical College v*

Lobel, 296 AD2d 701 [3d Dept 2002]); (*Bigda v Fischbach Corporation*, 849 F Supp 895 [SD NY 1994]). By so choosing, the non-breaching party “surrenders his [or her] right to terminate later based on the breach.” (*Albany Medical College v Lobel*, 296 AD2d at 703),(quoting *AM Cosmetics, Inc. v Solomon*, 67 F Supp 2d at 317);(see also *Awards.com, LLC v Kinko 's, Inc.*, ___AD3d___, 834 NYS2d 147 [1st Dept 2007]).

Glaze chose to continue performing well after Hearst allegedly breached the Agreement by eliminating products which Glaze could sell, or by demanding changes to Glaze’s products based on design considerations. Therefore, Glaze waived the right to terminate on the grounds of Hearst’s alleged breaches. While, as a result of the foregoing, Hearst rightfully found Glaze’s termination a breach of the Agreement, entitling Hearst to summary judgment on its complaint, Glaze raises another excuse for its breach, based on breach of the Agreement not based on Hearst’s approval or disapproval of Glaze’s products.

Glaze contends that a “reasonable and likely” interpretation of the Agreement reveals that, if a licensee fails to start selling products by the licensing agreement’s market date, “early termination should occur, and that if a license agreement was terminated early for this reason, the termination would end the licensee’s obligation to continue making contract payments including minimum royalty payments.” Glaze Memorandum of Law, at 46.

Glaze’s claim, simply put, is that both parties shared a reasonable expectation that, under certain circumstances, Glaze could freely terminate the Agreement without suffering any consequences. This interpretation is not reasonable. It certainly is not supported by anything in the Agreement. In fact, the Agreement only deals with Hearst’s right to terminate the Agreement, not Glaze’s.

Hearst terminated the agreement pursuant to paragraph 20 (a) of the Agreement's Standard Provisions, which reads, in pertinent part, "Hearst shall have the right to terminate this entire Agreement by giving written notice to Licensee, if Licensee ... (iv) fails to make timely payment of Royalties or any other payments to Hearst when due" After Glaze failed to pay the November and December guaranteed minimum royalties, Hearst sent notice to Glaze which concluded thus: "[p]lease be advised that in accordance with section 20 (a) (iv) of the Standard Terms and Condition of the License Agreement Hearst is hereby exercising its right to immediately terminate the License Agreement and demands the immediate payment of \$287,500 due under the Agreement within ten (10) days hereof."

Glaze offers a labored argument, intending to prove that, regardless of Hearst's right to terminate the Agreement under paragraph 20 (a), paragraph 20 (b), upon which Hearst did not rely, gives plaintiff the "reasonable expectation" that it could terminate without consequences.

Glaze maintains that Hearst's failure to "use the termination provision most applicable to the situation giving rise to the termination" (i.e., paragraph 20 [b]), breached the implied covenant of good faith and fair dealing, interfering with Glaze's "reasonable expectations." Glaze Memorandum of Law, at 41.

In the first instance, paragraph 20 (a) is the termination provision "most applicable to the situation giving rise to the termination." Secondly, paragraph 20 (b) does not create the "reasonable expectation" upon which Glaze relies, and Hearst breach no implied covenant in the Agreement by exercising discretion not to use this provision.

"Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance." (*Dalton v Educational Testing Service*, 87 NY2d 384, 389 [1995]); (*see*

also *Marosu Realty Corporation v Community Preservation Corporation*, 26 AD3d 74 [1st Dept 2005]). “This covenant is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement [internal quotation marks and citation omitted].” (*P.T. & L. Contracting Corporation v Trataros Construction, Inc.*, 29 AD3d 763, 764 [2d Dept 2006]).

Paragraph 20 (b) deals with Hearst’s right to terminate the Agreement for the failure to begin selling or shipping products by the marketing date. The Agreement does not obligate Hearst to rely on this provision, and, in any event, there is no reasonable reading of this provision which would give it the interpretation Glaze imposes on it.

Glaze simply does not show how Hearst, by terminating the Agreement after Glaze’s termination, an act permitted under paragraph 20 (a) the Agreement, acted to deprive Glaze “of the right to receive the benefits under their agreement” (*id.*), much less show how paragraph 21 (b) allows it, as licensee, to walk away from its contractual obligations. Glaze cannot rely on any “reasonable expectation” that it would be able to terminate the Agreement without repercussion, and cannot rely on this argument to win summary judgment. As a result, Glaze has no adequate defense to Hearst’s claim for breach of the Agreement, and no basis upon which achieve dismissal of the complaint. Hearst’s cross motion for summary judgment on the complaint is granted.

B. Partial Summary Judgment on First Counterclaim re: Failure to Approve Products Based on Market Competition

A party’s decision to continue to perform under an agreement after a breach by the other party does not serve as a waiver of the non-breaching party’s right to sue for damages based on

the breach, as long as timely notice of the breach is given. (*Albany Medical College v Lobel*, 296 AD2d 701, *supra*; see also *AM Cosmetics Inc. v Solomon*, 67 F Supp 2d 312, *supra*).⁸ The failure to object to a perceived breach constitutes a waiver of the right to sue for damages stemming from that breach. (*See Melnitzky v Sotheby Parke Bernet, Inc.*, 300 AD2d 201 [1st Dept 2002]).

Glaze argues, in its first counterclaim, that it is entitled to damages because Hearst breached the Agreement when it improperly prevented Glaze from selling wet and dry wipes and Drain Buster, on the basis that these products would compete with products already in existence which were manufactured by important, and bigger, customers of Hearst's. Glaze also maintains that it was injured when Hearst improperly delayed the approval process by compelling Glaze to make changes based on design considerations, when, Glaze maintains, Hearst was only permitted under the Agreement to request changes based on quality issues.

Hearst retorts that, under the Agreement, Glaze had no right to expect that any of its proposed products would necessarily pass the approval process, and that its unfettered right to approve or disapprove products under the Agreement permitted it to disapprove Glaze's dry wipes and Drain Buster. Hearst claims, however, that the parties eliminated wet wipes from the equation by entering into the PM Agreement. Hearst also defends its right under the Agreement to bring considerations of design into the approval mix.

The first question in the matter of both proposed breaches is whether Glaze gave Hearst

⁸*But see Northeast Sort & Fulfillment Corp. v Reader's Digest Association, Inc.*, 261 AD2d 459 (2d Dept 1999)(choice to continue performing under contract waives opportunity to later sue on breach). The Court in *Northeast Sort & Fulfillment Corp.* relied on *Bigda v Fischbach Corporation* (849 F Supp 895, *supra*), and did not discuss its reasoning.

adequate notice of the possible claims Glaze would make against Hearst at a later date. Caselaw neglects to answer the question of the exact nature of the “notice” which has to be made to the breaching party by the party which continues to perform the contract despite the breach. Logically, the notice need not be as blatant as a declaration of an intent to sue in the future; the party choosing to continue performance should not be required to destroy the contractual relationship in order to preserve its right to sue on the breach at some later date. Thus, some lesser standard of notice must be required.

In *Capital Medical Systems Inc. v Fuji Medical Systems, U.S.A. Inc.* (239 AD2d 743 [3d Dept 1997]), the court found that a party to an agreement who “timely complained” about the other’s alleged breach, did not waive the right to later sue on that breach. *Id.* at 745. Likewise, in *Albany Medical College v Lobel* (296 AD2d 701, *supra*), defendant complained in writing⁹ about an alleged breach, while continuing to perform on the contract. Thus, it appears that complaints as to the nature of the alleged breach can suffice to save the claim for a later day, even though the complainer waives the right to terminate on the basis of the complaint.¹⁰

This court finds that there is evidence that Glaze gave Hearst sufficient notice, by means of its expressed complaints, concerning Hearst’s failure to approve Glaze’s wet and dry wipes, but not Drain Buster, based on the existence of competition in the marketplace.

Although there is sufficient evidence to show that Glaze provided Hearst with notice of Hearst’s alleged breach of the Agreement concerning the sale of wet wipes, the evidence also

⁹This court sees no reason why the complaint would have to be in writing.

¹⁰A failure to complain will result in the waiver of the right to sue. See *Melnitzky v Sotherby Parke Bernet, Inc.*, 300 AD2d 201, *supra*.

establishes that there is no question of fact that Glaze waived its right to sue for damages based on this alleged breach, when Glaze entered into the PM Agreement.

As Glaze points out, the PM Agreement does not refer to the Agreement at all. However, there is sufficient evidence that the parties intended that the PM Agreement replaced the Agreement in the matter of wet wipes.

“In interpreting a contract, the document must be read as a whole to determine the parties’ purpose and intent, giving a practical interpretation to the language employed so that the parties’ reasonable expectations are realized [internal quotation marks and citation omitted].” (*Queens Best, LLC v Brazal South Holdings, LLC*, 35 AD3d 695, 697 [2d Dept 2006]); (*see also Sterling Fifth Associates v Carpentille Corporation, Inc.*, 9 AD3d 261, 262 [1st Dept 2004])(where the terms of an agreement are unambiguous, the intent of the parties must be ascertained in accordance with the language of the agreement). Where that intent is “clear and unambiguous from the language employed on the face of the agreement, the interpretation of the document is a matter of law solely for the court.” (*Horewitz v 1025 Fifth Avenue*, 34 AD3d 248, 249 [1st Dept 2006]);(*see also Sterling Fifth Associates v Carpentille Corporation, Inc.*, 9 AD3d 261, *supra*).

However, it is equally settled that, when the writing is plain on its face, resort to parol evidence will not be permitted to “alter, vary or contradict the clear and unambiguous terms of an integrated agreement.” (*A.H.A. General Construction, Inc. v New York City Housing Authority*, 92 NY2d 20, 33 [1998]);(*see also W.W.W. Associates, Inc. v Giancontieri*, 77 NY2d 157 [1990]). Extrinsic evidence may not be introduced to create an ambiguity where none exists. (*R/S Associates v New York Job Development Authority*, 98 NY2d 29 [2002]); (*W.W.W. Associates, Inc. v Giancontieri*, 77 NY2d 157, *supra*).

The plain language of the PM Agreement allows Glaze to manufacture wet wipes under the Popular Mechanics brand. However, the PM Agreement does not address whether or not Glaze can still manufacture wet wipes under the Good Housekeeping brand at the same time. However, since the parol evidence offered to clarify the parties' intent on this front does not alter or vary the PM Agreement, nor create an ambiguity where none exists, it may be considered.

In an e-mail dated November 11, 2003, Glaze president Bihari Lund (Lund) wrote, "I am writing you to formally address the dry cloth and wet wipes issues with Good Housekeeping. As you are aware [Glaze] agreed to drop the wet wipes category from our licensing contract in return for Hearst Publications agreeing to offer the Popular Mechanics brand as a substitute." Glaze Memorandum of Law, Ex. 8. This, and other statements made by the parties¹¹, eliminates all questions of fact that the parties intended that the PM Agreement would replace the Agreement with regard to wet wipes. Therefore, there was no breach of the Agreement concerning Hearst's elimination of the category of wet wipes, and Glaze waived its right to sue for breach of its ability to manufacture these items under the Agreement. Therefore, Glaze is denied summary judgment on so much of its first counterclaim as seeks damages based on Hearst's refusal to allow Glaze to manufacture wet wipes. In fact, pursuant to CPLR 3212 (a), Glaze may no longer pursue this claim.

There is enough admissible evidence to show that Glaze gave Hearst notice of its complaints concerning the manufacture of dry wipes. As an example, in an e-mail to Hearst dated November 18, 2003, Lund wrote:

¹¹For example, in the deposition of Lund (Glaze Memorandum of Law, Ex. B., at 79), Lund admits that he agreed that the PM Agreement would replace the Agreement as far as wet wipes were concerned.

unfortunately with the dry cloth category no acceptable alternative has been offered by Hearst Publications for [Glaze] to exit [the dry cloth] licensed category. We recognize and respect the dilemma Hearst is in with not wanting to alienate their valued advertisers; however, the dry cloths which [Glaze] has previously submitted did not in our opinion cause a conflict.

Glaze Memorandum of Law, Ex. 8.¹² Therefore, as a result of this, and other evidence, this court finds that Glaze provided sufficient notice to Hearst of the grounds of Hearst's alleged breach of Glaze's right to sell dry wipes.

Finally, as to the product Drain Buster, while there is evidence of internal discussions among Glaze personnel concerning their dismay over the deletion of Drain Buster from the products it could manufacture (*see e.g.* Glaze Memorandum of Law, Ex.6, internal e-mail¹³), there is no competent, non-hearsay, evidence in this record which shows that Glaze expressed its displeasure to Hearst, sufficient to give Hearst the required notice that Glaze might seek redress from Hearst at some later date. Therefore, Glaze has failed to show that it is entitled to summary judgment on so much of its first counterclaim as seeks redress for Hearst's failure to allow the manufacture of Drain Buster.

In conclusion, there is no question of fact that Glaze provided Hearst with sufficient notice of its complaints regarding dry wipes; that Glaze did not show *prima facie* that the same

¹² *See also* Glaze Memorandum, Ex. 40, which is a letter to Hearst from Glaze concerning Hearst's failure to approve dry wipes, based on market conditions.

¹³ The e-mail is between Glaze' Mark Weinberger to Lund, and states:

Guys it is clear to me from this e-mail that [Glaze] has somewhat missed the message. By missing the message, I point to his comment about the drain buster. It is irrelevant if there are similar products on the market, we look to compete with ours and need approval on its design so we can move forward.

can be said about Drain Buster; and that Glaze waived any right to sue on Hearst's alleged refusal to allow the manufacture of wet wipes, regardless of the question of notice.

As a result, with regard solely to the breach allegedly caused by Hearst's elimination of dry wipes, based only on market competition, the issue remaining for this court's consideration at this time is whether Glaze can show that there are no questions of fact that Hearst could not withhold approval based on this ground.

In order to prevail on this part of its motion, Glaze must show that Hearst declined to approve dry wipes solely on the basis of competition in the marketplace, and that it was not permitted to do so under the Agreement. There is, first of all, scant evidence before the court that Hearst disapproved Glaze's dry wipes based only on competition in the marketplace. For example, in an e-mail dated September 9, 2003, Hearst wrote, apparently in response to a prior discussion with Glaze, "[t]he products that GHI considers competitive to the dry cloths were: Connoisseur's Silver & Jewelry Wipes, SC Johnson's Grab It, P & G's Swiffer Dry Wipes." Glaze Memorandum of Law, Ex. 5. This e-mail presupposes a conversation between Glaze and Hearst, which has not been verified. However, there is also evidence that Glaze's dry wipes were put through the approval process, and simply failed to make the grade. *See* Brown Aff., Ex. V, "GHI Report." Therefore, there is a question of fact as to reason for Hearst's disapproval of dry wipes.

The language of the Agreement gives Hearst extremely broad authority to approve or disapprove products based on design and quality, as will be discussed below. However, the Agreement says nothing about a flat-out refusal to consider an entire category of products based on the fact that the same category of products is already being sold by other, competing,

companies.

This court finds that there is no question of fact that the language of the Agreement does not permit Hearst to disallow Glaze to produce a category of products based only on existing competition. Since Glaze drafted the Agreement, any ambiguity as to this matter must be construed against it, which begs the above conclusion. (*See Burgos v Metro-North Commuter Railroad*, ___ AD3d ___, 836 NYS2d 76 [1st Dept 2007]). Therefore, Glaze will prevail on this claim if it proves that Hearst relied only on the existence of competing companies to eliminate dry wipes from those products which Glaze would produce under the Agreement. However, for purposes of this motion, Glaze's motion must be denied as to this claim, based on the existence of triable issues.

As a result of the foregoing, this court, in the context of Glaze's claim that Hearst's reliance on market competition to withhold approval, (1) dismisses, pursuant to CPLR 3212 (b), so much of Glaze's first counterclaim as seeks damages for Hearst's refusal to sell wet wipes under the Agreement; (2) denies the remainder of Glaze's motion concerning the category of dry wipes, based only on Glaze's failure, at this time, to show that dry wipes were disapproved only on the basis of market competition; and (3) denies the remainder of Glaze's motion as to the product Drain Buster, because there are questions of fact as to whether (i) Glaze complained to Hearst about this problem, sufficient to amount to notice under *Albany Medical College v Lobel* (296 AD2d 701, *supra*), concerning Hearst's alleged final choice to disapprove this product on the basis of market competition, and (ii) whether Hearst failed to approve Drain Buster solely on that basis.

C. Partial Summary Judgment on First Counterclaim re: Failure to Approve Products

Based on Design Considerations

As previously explained, Glaze must first prove that it gave Hearst notice that Glaze considered the use of design considerations to be improper under the Agreement. However, the evidence presented on this motion does not support any such finding; it only shows how unhappy Glaze was making changes to its products at all. This court finds that Glaze waived its right to pursue a claim for breach of the Agreement based on Hearst's consideration of design issues, as well as quality ones.

As an initial matter, Glaze maintains that its expectation was that it was presenting already existing "market products" to Hearst, for assured acceptance of the Seal without further inspection (*see e.g. Brown Aff., Dep. of Bihari Lund, at 39*). In fact, Lund, Glaze's President, states, in his deposition, that Glaze did not, at the execution of the Agreement, expect to make any changes to its product line, and that many items had already been pre-approved before the Agreement was ever signed. Lund Dep., at 44. However, the Agreement states otherwise.

In the Agreement, Hearst does not rely on pre-set specifications for the manufacture and design of products; rather, it relies on its manufacturers to provide the products for its approval. There is nothing in the noted provision which negates Hearst's broad authority to approve or disapprove items.

As is well accepted in this State, "antecedent oral representations which vary or add to the terms of [a writing] are barred by the parol evidence rule." (*Ralco, Inc. v Citibank, N.A.*, 32 AD3d 301, 301 [1st Dept 2006]). Despite Glaze's expectations prior to the execution of the Agreement, the Agreement ruled thereafter. As a result, this court agrees that the Agreement provided for a strict approval process for Glaze's products, and that its belief that many (if not

all) of its products had already been approved pre-contract, is not borne out by the parties' writing. Therefore, Glaze cannot rely on any belief that its products were being accepted "as is" when it executed the Agreement.

Even if Glaze could prove that it provided sufficient notice to Hearst, the language of the Agreement, as recited above, gave Hearst an extremely broad hand in the approval process. In fact, design was a specific ground on which approval would be based. In the Agreement's Standard Terms and Conditions, paragraph 7 (a), it states, "Licensee shall present all new and developing innovations in product design, manufacture and technology to Hearst and, subject to Hearst's prior approval, incorporate such innovations in the Products." On the basis of the Agreement's broad language, this court finds that Hearst was permitted to consider, and base its approval on, the design of Glaze's products, and did not breach the Agreement by doing so.

Thus, Glaze is denied partial summary judgment on so much of its first counterclaim as seeks damages based on Hearst's failure to approve Glaze products based on design considerations.

III. Conclusion

In conclusion, because Glaze chose to continue to perform under the Agreement after it believed that Hearst had breached the Agreement, it waived its right to terminate the Agreement based on those alleged breaches. Glaze has also failed to show that it had further reason to terminate, based on any alleged "reasonable expectation" that it was permitted by the Agreement to do so. Therefore, Glaze breached the Agreement by failing to make minimum guaranteed payments, and Hearst is entitled to summary judgment on its complaint, including on its cause of action for attorney's fees.

Glaze's motion for summary judgment dismissing the complaint is denied. The part of its

motion seeking partial summary judgment is denied, as set forth above. Further, Glaze may not pursue so much of Glaze's counterclaim as seeks damages stemming from Hearst's elimination of wet wipes from the Agreement.

Accordingly, it is

ORDERED that the motion by defendant Glaze, Inc. for summary judgment dismissing the complaint, and for partial summary judgment on its first counterclaim, is denied; and it is further

ORDERED that the cross motion by plaintiff Hearst Magazine, a division of Hearst Communications, Inc., for summary judgment on its complaint is granted, and severed, in the total sum of \$454,289, plus contractual interest in the amount of the prime rate plus 5%, from March 2, 2005; and it is further

ORDERED that the issue of the amount of reasonable attorney's fees is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this motion for attorney's fees is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for plaintiff shall, within 30 days from the date of this order serve a copy of this order with notice of entry, together with a completed information sheet¹⁴,

¹⁴Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.

upon the Special Referee Clerk in Motion Support Office Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part. (PART. 50 R) for the earliest convenient date; and it is further

ORDERED that the remainder of the action shall continue.

Dated: June 26, 2007

ENTER:

A handwritten signature in black ink, appearing to be 'J.S.C.', written over a horizontal line.

J.S.C.

FILED
JUL 06 2007
NEW YORK
COUNTY CLERK'S OFFICE