VO2MAX, LLC v Greenhouse Intl., LLC
2007 NY Slip Op 32192(U)
July 16, 2007
Supreme Court, New York County
Docket Number: 0102624/2007
Judge: Richard B. Lowe
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SCANNED ON 7/20/2007

[* 1]

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

PRESENT: ______________ Justice PART 56

VO2 Max LLC

- v -

Greenhouse International

INDEX NO. 102624/07

MOTION DATE 5/7/07

MOTION SEQ. NO. 001

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

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

Motion is decided in accordance with the attached memorandum decision.

FILED
JUL 20 2007
COUNTY CLERK'S OFFICE NEW YORK

Dated: 7/16/07 HON. RICHARD B. LOWE, III J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 56

---X

VO2MAX, LLC,

Plaintiff,

-against-

Index No. 102624/07

GREENHOUSE INTERNATIONAL, LLC
and GREENHOUSE NUTRITIONALS, LLC

Defendants.

---X

FILED
JUL 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

RICHARD B. LOWE III, J:

In this breach of contract action, defendant Greenhouse International, LLC (International) moves pursuant to CPLR 3211(a)(5) and (7) to dismiss the complaint.

Background

Plaintiff, VO2MAX, LLC ("VO2Max"), owns all of the rights and intellectual property relating to an appetite suppressant known as Blokk which is delivered to the body through the application of a lip balm or lip gloss. In April, 2006, VO2Max and International entered into a distribution and license agreement ("the License Agreement") wherein International, as licensee, agreed to pay VO2Max, the licensor, royalty fees on dates certain (4/5/07 de Dios Aff, Ex. A, para. 3.2) and to spend a minimum of one million dollars in the first year of its marketing campaign for Blokk. (4/5/07 de Dios Aff, Ex. A, para 4.1[a]).

The License Agreement permits International to assign its interest in the agreement. Paragraph 13.2 states, in pertinent part:

> LICENSEE shall be entitled to enter onto one or more assignments or sub-licenses for any of the rights granted to LICENSEE hereunder, to any person or entity without the consent of the LICENSOR. . . .

> Upon any assignment of this License Agreement, the assignee shall become the LICENSEE hereunder and shall assume and be liable for all of the LICENSEE'S obligations hereunder. Notwithstanding the foregoing, the LICENSEE shall guarantee the performance of all of the obligations in this License Agreement. (Emphasis added)

In July, 2006, pursuant to an "Assignment Agreement And First Addendum to Distribution And License Agreement" (the "Addendum"), International, as licensee, did, in fact, assign its interest in the License Agreement to Greenhouse Nutritionals, LLC ("Nutritionals"). Paragraph 3 of the Addendum states:

> The aforementioned Distribution and License Agreement is hereby amended so that [Nutritionals] is substituted in full for [International] as the LICENSEE therein, effective the date hereof. All the other provisions of said License Agreement remain intact.

(4/24/07 Marmon Aff, Ex. B)

The complaint alleges that the defendants defaulted on their obligations under the contract in that neither defendant made a $125,000 minimum royalty payment that was due on December 31, 2006 and neither defendant expended a required minimum $1 million in marketing. In its complaint, VO2Max states causes of action for breach of contract and specific performance against both defendants.

International argues that an assignment and novation took place on July 19, 2004, when all three parties entered in the Addendum, and Nutritionals was substituted in full for International. It claims that, on that date, International ceased being a party to the License Agreement. In addition, International argues for the first time in its reply brief: a) that the guaranty was only meant to enable "the marketer and prime licensee" to transfer marketing rights

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to marketers in other countries in order to conduct marketing in foreign countries while remaining obligated to the licensor and b) that the term LICENSEE in the last sentence of Paragraph 13.2 of the License Agreement refers to Nutritionals, not International.[1]

VO2Max, in turn, argues that the Addendum does not release International as guarantor under Paragraph 13.2 of the License Agreement and that on August 1, 2006, International performed under the guaranty.

DISCUSSION

On a motion addressed to the sufficiency of the pleadings, the court must accept every factual allegation as true, and liberally construe the allegations in a light most favorable to the pleading party. (*Guggenheimer v. Ginzburg,* 43 N.Y.2d 268 [1977]; *see* CPLR 3211[a][7]). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v. Martinez,* 84 N.Y.2d 83, 87-88 [1994]) "The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" (*511 West 232nd Owners Corp. v. Jennifer Realty Co.,* 98 N.Y.2d 144, 151-152 [2002][internal citations omitted])

In addition, the well established law of contract interpretation provides that:

> In interpreting a contract, the intent of the parties governs.

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[1] This court notes that the function of reply papers is to address arguments made in opposition to the position taken by the movant and not to address new arguments in support of the motion. (*Merchants Bank of NY v. Gold Lane,* 228 A.D.3d 266, 269 [1st Dept 2006]). International's submission of these arguments for the first time in their reply memorandum of law was improper and therefore need not be considered by the court. (*City of NY v. District Council 37,* 2006 WL 1465724 [Sup. Ct. N.Y. County]) However, the court also notes that International's argument about the meaning of the term licensee in the License Agreement is without merit as the preamble to the License Agreement clearly identifies International as the licensee.

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> A contract should be construed so as to give full meaning and effect to all its provisions. Words and phrases are given their plain meaning. Rather than rewrite an unambiguous agreement, a court should enforce the plain meaning of that agreement.

(*American Express Bank, Ltd. v. Uniroyal, Inc.*, 164 A.D.2d 275, 277 [1st Dept. 1990], lv. denied 77 N.Y.2d 807 [2005][internal citations omitted]) Indeed, the "mere assertion by a party that contract language means something other than what is clear when read in conjunction with the whole contract is not enough to create an ambiguity. . . ." (*Innophos, Inc. v. Rhodia, S.A.*, 38 A.D.3d 368, 369 [1st Dept. 2007]; *New York Off-Track Betting Corp. v. Safe Factory Outlet*, 28 A.D.3d 175 [1st Dept. 2006])

Paragraph 13.2 of the License Agreement clearly states that notwithstanding International's assignment of the License Agreement, International, as the licensee, "shall guarantee the performance of all of the obligations in this agreement." Contrary to International's assertion, the Addendum did not release International from its obligation to guarantee Nutritional's performance as assignee of the License Agreement. Although Paragraph 3 of the Addendum may have been in artfully drawn in stating that the License Agreement is amended "so that [Nutritionals] is substituted in full for [International] as the LICENSEE therein. . .", it is clear when Paragraph 13.2 of the License Agreement and Paragraph 3 of the Addendum are read together, that the parties intended International to remain obligated as guarantor of Nutritionals' performance as assignee. (11 *Williston on Contracts,* Section 30.26 [4th Ed] ["Where the agreement of the parties is evidenced by several documents that refer to each other, are closely related and constitute [an] . . .interdependent transaction, the meaning of those documents must be gleaned from the entire transaction and not simply from an isolated portion of

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a single document. . . ."]; *Two Guys from Harrison N.Y., Inc. v S.F.R. Realty Assoc.*, 63 N.Y.2d 396, 403 [1984]["one of a court's goals is to avoid an interpretation that would leave contractual clauses meaningless']) International's strained interpretation of Paragraph 3 of the addendum would eviscerate and render meaningless the language in Paragraph 13.2 of the License agreement that was drafted specifically to address International's obligation to serve as guarantor in the event of an assignment .

Accordingly, based on the language of the agreements at issue, International's assertion that the Addendum released it from its guarantee under the License agreement is without merit. (*See, Chemical Bank v. Sepler,* 60 N.Y.2d 289 [1983][a single, continuing guarantee, supported by consideration, is not automatically terminated by a change in the parties' relationship]) and, since International has not produced another document to evidence its release, International's claim of release cannot be sustained.

Moreover, the Addendum did not constitute a novation. The requisite elements of a novation include a previous valid obligation, agreement of all the parties to a new obligation, extinguishment of the old contract, and a valid new contract. (*Wasserman v. Interstate Litho Corp.*, 114 A.D.2d 952 [2nd Dept. 1985]) In order to prove a novation, there must be a clear and definite intention of all parties concerned that such is the purpose of the agreement, and such intent may be determined from the writings and the conduct of the parties. (*Water St. Development Corp. v. City of New York,* 220 A.D.2d 289, 290 [1st Dept 1995]; *County Glen LLC v. Himmelfarb*, 2004 WL 1852889 [Sup. Ct. N.Y. County]) Here, the Addendum expressly states, in Paragraph 3 that its purpose is to amend the License agreement to substitute Nutritionals for International and that "[a]ll other provisions of said Agreement remain intact." Clearly, by its

terms, the parties did not intend the Addendum to be a novation. Moreover, the court notes that on August 1, 2006, after the Addendum was executed, International performed under the guarantee by paying VO2Max $30,000 from its own operating account to satisfy Nutritionals' contractual obligations regarding prepaid inventory. (4/24/07 Marmon Aff, Ex. C)

Accordingly, defendant International's motion to dismiss the complaint is denied.

This decision constitutes the order of the court.

DATE: July 16, 2006

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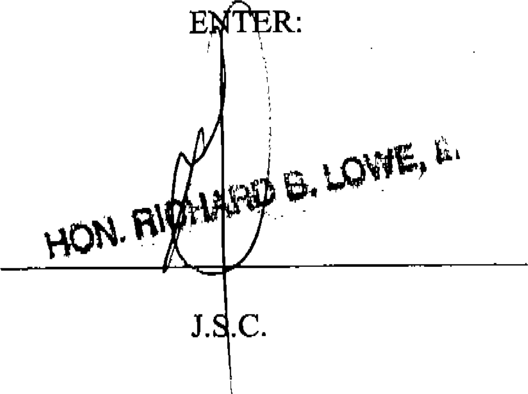

J.S.C.

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