Matter of Joan Hansen & Co., Inc. v Everlast World's Boxing Headquarters Corp.
2007 NY Slip Op 33471(U)
October 19, 2007
Supreme Court, New York County
Docket Number: 0107114/2005
Judge: Joan Madden
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SCANNED ON 10/25/2007

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

PRESENT: Hon Joan A. Madden, *Justice* — **PART** 11

Joan Hansen

INDEX NO. 107114/05

MOTION DATE

MOTION SEQ. NO. 02

- v -

MOTION CAL. NO.

Everlast

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

	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 is decided in accordance with the annexed memorandum Decision & Order.

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

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B)

Dated: October 19, 2007

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 11

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--X

IN THE MATTER OF THE ARBITRATION OF CERTAIN CONTROVERSIES BETWEEN

JOAN HANSEN & CO., INC.,

Petitioner,

-against-

Index No. 107114/05

EVERLAST WORLD'S BOOXING HEADQUARTERS CORP.,

Respondent.

-- X

MADDEN, J:

Petitioner Joan Hansen & Company, Inc. (Hansen) moves for an order punishing respondent Everlast World's Boxing Headquarters Corp. (Everlast) and its Chief Financial Officer, Gary Dailey (Dailey), for contempt of a February 7, 2006 order and judgment entered by the Honorable Rosalyn Richter confirming an April 14, 2005 arbitration award (the Award), and (1) directing Everlast to resume payments of commissions to Hansen commencing January 1, 2007 together with interest at 9% per annum; (2) directing that a fine of $10,000 per day be jointly and severally imposed on Everlast and Dailey for each day for which arrears are not paid; and (3) directing Everlast and Dailey to pay Hansen the costs and disbursements it incurred in making this motion, including its attorneys' fees.

For the reasons set forth below, Hansen's motion is denied.

BACKGROUND

Beginning in 1983, Hansen performed services for Everlast as a non-exclusive licensing agent and consultant, pursuant to a written agreement. The essence of the agreement

was that Hansen would be paid commissions, or "consultation fees" on license agreements that Hansen had secured for Everlast. The 1983 agreement, which by its terms was to terminate on September 30, 1983, was extended for an additional six months by written extension. Thereafter, the parties' dealings continued through the years, until a new Representation Agreement, dated January 1, 1994 ("The Agreement"), was executed which explicitly stated that "EVERLAST hereby continues the appointment previously in effect, of HANSEN as EVERLAST's non-exclusive Licensing Consultant" (Representation Agreement, Section I [Aff. of Joan Hansen, Exh I]).

The Representation Agreement was for a five-year term which ended on December 31, 2004, unless the Agreement was terminated sooner for cause:

> The initial term of this agreement shall be from the date hereof until December 31, 1999. Thereafter, this agreement shall be automatically renewed under the terms and conditions in effect as of December 31, 1999 for five (5) years ending December 31, 2004 unless sooner terminated in accordance with the following provision:
>
> 1. At the option of either party, at any time, upon not less than thirty (30) days' prior written notice: (i) in the event of the failure of the other party hereto to fulfill its obligations hereunder in any respect ... .

Representation Agreement, Section IV (1) (i).

As of the termination of the Representation Agreement, Hansen was to receive only consultation fees "for the earlier of two (2) years after termination" or the end of the license agreements in effect:

> 3. the participation by HANSEN in royalty payments shall continue for so long as licensees remain licensees of EVERLAST, except that: ...

> e. In the event of a termination of this Agreement, HANSEN shall continue to receive consultation fees on existing agreements for the earlier of two (2) years after termination or the end of the license agreements then in effect.

Id., Section VI (3) (e).

In the event of a termination of the Representation Agreement, Hansen's rights to continued receipt of compensation obtained by her were diminished by the following terms of the Representation Agreement:

> For the first year after termination, Hansen will receive the full amount of the consultation fee for that year; and in the second year Hansen will receive fifty (50%) of such fee for that year and thereafter payment of any fees will cease entirely.

Id., Section VI (3) (f).

In October 24, 2000, Everlast merged into Active Apparel Group. Subsequently, Hansen was informed that Everlast's licensing business was going to be performed in house, and her compensation was cut by one-third. On January 9, 2003, Everlast sent Hansen a written notice, terminating the Representation Agreement on various grounds (the Termination Notice). On February 11, 2003, Hansen filed a demand for arbitration, claiming that the Termination Notice was invalid.

On April 14, 2005, the arbitrators issued the Award. In the Award, the arbitrators expressly listed the relief sought by Hansen in the arbitration: "As a relief, the Demand seeks (1) an award declaring the Termination Notice to be of no force or effect; [and] (2) an award declaring that Respondent must continue to compensate Hansen as per the Agreement" (Award, at 1 [Hansen Aff., Exh C]). The arbitrators then awarded the following relief:

> The Panel hereby determines and holds in this Award that the

> Termination Notice lacked any valid ground for issuance – that its stated grounds, (i) in effect, failure to "locate and/or solicit" qualified licensees, and (ii) bringing the December 21, 2000 litigation, could not be properly invoked by the Company given its conduct towards Hansen both prior to and after the Stipulation. As a result, payment pursuant to the Stipulation is owed by the Company to Hansen both now and in the future on the basis of the Agreement being in full force and effect up to its stated December 31, 2004 term expiration date, pursuant to the Agreement, as though no termination notice had been given.

Award, at 7.

By decision and order dated January 3, 2006, Justice Richter confirmed the Award, and dismissed Everlast's counterclaims, which sought to vacate the Award (see Hansen Aff., Exh B]). On February 7, 2006, Justice Richter entered an order and judgment confirming the Award (the Order), and quoting, inter alia, the following provision of the Award:

> 1. The Termination Notice is hereby held to be void, invalid and of no effect. The Agreement is hereby declared not to have been terminated. The Respondent is hereby directed to account for, and pay to Claimant, **all unpaid moneys payable under the Agreement**, including with respect to licenses existing as of the date of the Termination Notice and any renewals or extensions of such licenses, or licenses granted to such licensees on other products or in other territories, and to pay such amounts promptly after they are payable under the Agreement, with interest on any amounts unpaid as of the date of this Award at 9% per annum from the dates such amounts were payable had the contract not been terminated, until the date such amounts are paid to Claimant.

Order, at 2 [Hansen Aff., Exh A]; Award, at 10 (emphasis added).

On February 15, 2006, in consideration for a $20,000 reduction in the monies due Hansen under the Order, Everlast waived its right of appeal. The Order and the Award are therefore final.

Thereafter, Everlast paid Hansen, on a monthly basis, 100% of the commissions

earned and due under the Representation Agreement, until December 31, 2006, when Everlast stopped making any further payments. In response to Hansen's question as to why the payments had ceased, Dailey responded in a March 1, 2007 e-mail as follows:

> According to the terms of your Representation Agreement Joan Hansen & Company is not entitled to any payments for commissions on royalties received after December 31, 2006.

Hansen Aff., Exh D.

DISCUSSION

Contempt is a drastic remedy, which should not issue absent a clear right to such relief (Coronet Capital Co. v Spodek, 202 AD2d 20 [1st Dept 1994]; Usina Costa Pinto, S.A. v Sanco Sav. Co. Ltd., 174 AD2d 487 [1st Dept 1991]). To establish civil contempt based on an alleged violation of a court order, the movant must establish, by clear and convincing evidence, that a lawful order of the court expressing an unequivocal mandate was in effect, and that the order was disobeyed to a reasonable certainty (see Matter of Department of Envtl. Protection of City of N.Y. v Department of Envtl. Conservation of State of N.Y., 70 NY2d 233 [1987]; McCormick v Axelrod, 59 NY2d 574, amended 60 NY2d 652 [1983]; Vujovic v Vujovic, 16 AD3d 490 [2d Dept 2005]). The party to be held in contempt must be shown to have had knowledge of the order, and the disobedience must have prejudiced the right of another party (see McCain v Dinkins, 84 NY2d 216 [1994], McCormick v Axelrod, supra; Garcia v Great Atl. & Pac. Tea Co., 231 AD2d 401 [1st Dept 1996]).

Both parties offer completely differing interpretations of the Order, the underlying Award, and the terms of the Representation Agreement.

In support of its motion to hold Everlast and Daily in contempt, Hansen contends

that both the Order and the underlying Award provide an "unequivocal mandate" that the Representation Agreement was improperly terminated and that, consequently, Everlast remains bound to pay Hansen commissions based on royalties received from Hansen-obtained licensees "for so long as those licensees remained licensees" of Everlast. Hansen notes that as the Award was rendered on April 14, 2005, which is after the expiration of the Agreement, the Award's reference to future payments means payments beyond that date. Hansen also notes that while the termination provision provides for full payments after the first year and fifty percent payments during the following year, Everlast paid her full payments from December 2004 and 2006, thus evidencing that Everlast interpreted the Award and the Agreement "for so long as those licensees remained licensees," and contrary to its contention herein. Hansen thus contends that Everlast and Daily have willfully violated the plain language of the Order by unjustifiably withholding payment of all commissions to Hansen, after December 31, 2006, notwithstanding Everlast's continued receipt of such royalties from licensees obtained by Hansen.

Everlast counters that Hansen's motion must be denied because, pursuant to the express terms of Section VI (3) (e) of the Representation Agreement, as of the termination of the Agreement, which it argues occurred on December 31, 2004, Hansen was only to receive consultation fees "for the earlier of 2 years after termination, or at the end of the license agreements in effect." Therefore, Everlast argues since the Representation Agreement terminated as of December 31, 2004, Hansen was not entitled to any further payments after December 31, 2006. It is undisputed that Everlast paid Hansen through December 31, 2006. Accordingly, Everlast argues, it has fully complied with both the Award and the Order, and it cannot be held in contempt.

In response to this argument, Hansen claims that expiration of the Representation Agreement, and termination of the Agreement for cause, are two completely different things. Hansen argues that the arbitrators ruled that the termination provisions in Sections VI (3) (e) and (f) of the Representation Agreement are only applicable if the Agreement was terminated "for cause," prior to the termination date of December 31, 2004, but are inapplicable where the Agreement merely expired. Hansen concedes that its authority to act as Everlast's licensing consultant under the Representation Agreement expired by its terms on December 31, 2004. However, Hansen contends, the Representation Agreement was never terminated, for cause or otherwise, and thus, Section IV (3) (e) does not come into play. Consequently, Hansen argues, Everlast and Dailey remain obligated to pay commissions to Hansen for so long as the licensees remain licensees of Everlast.

Contrary to Hansen's arguments, however, the arbitrators did not determine that Sections VI (3) (e) and (f) are only applicable if the Representation Agreement was terminated for cause since the issue of the interpretation of Sections VI (3) (e) or (f) was not a subject of the arbitration. Rather, the primary issue before the arbitrators in this matter was whether the Termination Notice was valid (see Award, at 1). Thus, the arbitrators did not rule on the meaning of "termination" in those provisions, or what monies would be payable to Hansen once the Representation Agreement ended on December 31, 2004.

In any event, even if the court were to accept Hanson's interpretation of the Agreement, the remedy of contempt against Everlast and Dailey would not be warranted here. In order to sustain a finding of civil contempt based upon a violation of a court order, it must be shown that the mandate purportedly violated was clear and explicit (McCormick v Axelrod, 59

NY2d 574, supra). Consequently, a litigant may not be held in contempt for violating a vague or ambiguous court order (Matter of Department of Envtl. Protection of City of N.Y. v Department of Envtl. Conservation of State of N.Y., 70 NY2d 233, supra; McCormack v Axelrod, 59 NY2d 574, supra; Pereira v Pereira, 35 NY2d 301 [1974]; see e.g. Quick v ABS Realty Corp., 13 AD3d 1021, 1022 [3d Dept 2004] [when the order "'contains ambiguous and vague language, a finding of civil contempt is not tenable'"], quoting Matter of Upper Saranac Lake Assn. v New York State Dept. of Envtl. Conservation, 263 AD2d 916, 917 [3d Dept 1999]). "Any ambiguity in the court's mandate should be resolved in favor of the would-be contemnor" (Richards v Estate of Kaskel, 169 AD2d 111, 122 [1st Dept], appeal dismissed in part 78 NY2d 1042 [1991] [judgment directing cooperative corporation to offer renewal leases to nonpurchasing tenants in rent-stabilized apartments lacked necessary clarity and precision to sustain contempt]).

Here, the Order, which is based on the underlying Award, does not specify the period for which moneys payable under the Agreement are due and owing, but instead reads:

> The Termination Notice is hereby held to be void, invalid and of no effect. The Agreement is hereby declared not to have been terminated. The Respondent is hereby directed to account for and pay to Claimant, **all unpaid moneys payable under the Agreement** ... .

Order, at 1, quoting Award, at 10 (emphasis added).

As the Order directs Everlast to pay Hansen commissions that are "payable under the Agreement," without any recitation that they are payable "for as long as those licensees remain licensees" and given that there exists an arguable basis for Everlast's interpretation of the Agreement, the Order is not a "clear and unequivocal mandate," and a finding of civil contempt against Everlast and Daily is not tenable (see Guillot v Australia and New Zealand Banking

Group Limited, 270 AD2d 73 [1st Dept 2000] [motion for civil contempt denied as it was not established with reasonable certainty that subject order was disobeyed]; Matter of Scotto v Giuliani, 259 AD2d 412 [1st Dept 1999] [claimed directive to award retroactive service credit was not clear and unequivocal so as to warrant holding respondents in contempt]; see also Bellman v McGuire, 176 AD2d 583 [1st Dept 1991] [probationary police officer was not entitled to have police officials held in contempt of prior court order on ground that officer was not reinstated with back pay, as prior order did not specifically direct reinstatement with back pay]).

Moreover, under the circumstances here, the court cannot intervene to interpret the Award to direct future payments to Hansen. While the Award states that Agreement remains in "full force and effect up to its stated December 31, 2004 term expiration date, pursuant to the Agreement, as though no termination notice had been given," and that Hansen should be paid accordingly, it does provide a time frame in which Hansen should be paid, or that Hansen should be paid until "the end of the license agreements in effect." When, as here, an arbitration award is not sufficiently explicit or is otherwise ambiguous, "the court may not impose its own interpretation of the award." Hamilton Partners Limited v. Singer, 290 AD2d 316 [1st Dept 2002]; see also, L. Thompson v. S.L. T. Ready-Mix Division of Torrington Industries, Inc., 216 AD2d 656 [3d Dept 1995][court cannot enforce arbitrator's award which "warrants more than ministerial acts or arithmetic calculations to arrive at the amount of damages due petitioner"]; New York Bus Tours Inc. v. Kheel, 864 F2d 9, 13 [2d Cir 1988][the courts "should not undertake to construe the meaning of arbitration awards where they are unclear...[t]his would serve only to undermine the authority of the arbitrators and would entangle the courts in disputes which the parties originally agreed to settle privately"].

Finally, since neither the Award nor the Order resolve the issue of the time frame in which Hansen should be paid consulting fees, contrary to Hansen's argument, it cannot be said that the doctrine of res judicata bars Everlast's position here.

In view of the above, it is

ORDERED and ADJUDGED that the motion by petitioner Joan Hansen & Company, Inc to hold respondent Everlast World's Boxing Headquarters Corp. and its Chief Financial Officer, Gary Dailey, in contempt and for related relief is denied.

Dated: October 19, 2007

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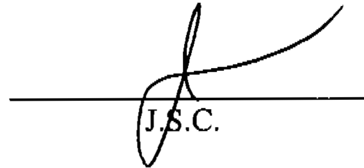

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