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

PRESENT: HON. MICHAEL D. STALLMAN PART 7

Index Number : 600681/1999
BYKOWSKY, JOHN
VS
ESKENAZI, IRVING
Sequence Number : 009
DISMISS

INDEX NO. _____
MOTION DATE 8/9/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion to/for Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-M	1-2
Answering Affidavits — Exhibits A-I & Second Amended BP	3-4
Replying Affidavits	5

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided in accordance with the annexed memorandum decision and order.

Dated: 11/14/07

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

MICHAEL D. STALLMAN J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

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JOHN BYKOWSKY and THE NEW YORK URBAN PROFESSIONALS ATHLETIC LEAGUE,

Plaintiffs,

Index No. 600681/99

- against -

Decision and Order

IRVING ESKENAZI, IRV LANDAU, BRUCE RADLER, MICHAEL MILLER, SCOTT LANDAU, JAY FURMAN, RICHARD BIRDOFF, BASKETBALL CITY NEW YORK, INC., BASKETBALL CITY USA, INC., ELRM GROUP, LLC, FB BASKETBALL ASSOCIATES, BASKETBALL CITY USA, LLC, BASKETBALL CITY NEW YORK, LLC, COURTS & SPORTS, LLC, DANEKA SMITH and HEATHER WAGNER,

Defendants.

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HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiffs allege that defendants committed anticipatory breaches of their agreement with plaintiffs to develop a chain of indoor basketball/volleyball complexes through two corporations, Basketball City of New York, Inc. (BBC-NY), and Basketball City USA, Inc. (BBC-USA).

The trial of this action was bifurcated, with liability tried before Judicial Hearing Officer Beverly Cohen, who found that defendants anticipatorily breached the parties' stock purchase agreement.

Defendants Irving Eskenazi and Irving Landau now move for summary judgment dismissing plaintiffs' damages claims as against them. In their second amended bill of particulars, plaintiffs allege as their damages: (1) $50,000 on a promissory note; (2) lost profits from the operation of the

limited liability companies that defendants formed with another party; (3) damages from lost income to Bykowsky and lost business to the League; and (4) a $150,000 rescission fee (see Second Amended Bill of Particulars ¶¶ 4, 5).

Plaintiffs cross-move for summary judgment in their favor to recover the unpaid promissory note and rescission fee. Plaintiffs also seek leave to amend their bill of particulars to allege as damages defendants' use of plaintiffs' names in acquiring financing to develop another sports complex on Pier 35 in Manhattan.

BACKGROUND

Plaintiff John Bykowsky is the president of the New York Urban Professionals Athletic League (League). Bykowsky and the League entered into a stock purchase agreement dated January 6, 1996 with Eskenazi, Landau, BBC-NY and BBC-USA for the sale and exchange of shares of one another's stock. In contemplation of a multi-court sports complex to be built by BBC-NY, the stock purchase agreement also provided, among other things, that the League and BBC-NY are the only groups permitted to conduct "sports league play" at the facility, as defined in the stock purchase agreement. The stock purchase agreement called for the League to lease two courts at the facility, and for BBC-USA to issue a $50,000 promissory note to Bykowsky, with BBC-NY as a co-maker.

By decision and order dated March 14, 2002, Justice Moskowitz decided, among other things, that defendants Eskenazi, Landau, BBC-NY, and BBC-USA anticipatorily breached their obligations under the stock purchase agreement "by entering into financial agreements that altered Bykowsky's interest in the Project and failing to notify Bykowsky of those financing agreements . . . " However, Justice Moskowitz ruled that there were issues of fact as to whether defendants repudiated their anticipatory breach.

The trial of this action was bifurcated, with liability tried before Judicial Hearing Officer Beverly Cohen. By decision dated February 17, 2006, JHO Cohen found, among other things, that Eskenazi, Landau, BBC-NY and BBC-USA are liable for breach of the stock purchase agreement and any consequential damages from the breach. JHO Cohen found that a letter dated June 5, 1997, which purported to retract defendants' repudiation of the parties' agreement, was "bare of the undergirding necessary to show bona fides." JHO Cohen found that construction of the facility was virtually completed by the date of the retraction letter, and noted that, "it is not controverted that defendants had no intention of nor ability of providing such courts to plaintiffs." JHO Cohen determined from the circumstances surrounding the retraction that the financing agreements that defendants entered with third-parties conflicted in many ways with plaintiffs' rights under the stock purchase agreement, and that defendants had changed the form of business ownership from corporations to limited liability companies, thus depriving Bykowsky of his contractual right to serve on the board of directors.

Eskenazi and Landau move for summary judgment dismissing plaintiffs' damages claims as against them. Plaintiffs cross-move for summary judgment in their favor in the amount of $50,000 for a promissory note and $150,000 for a rescission fee, and request leave to amend their bill of particulars. By so-ordered stipulation dated July 13, 2006, this Court found good cause for the belated motions, and the parties agreed that the motions are timely and permissible.

DISCUSSION

Eskenazi and Landau's Motion

Eskenazi and Landau argue that they are not liable for the unpaid promissory note, or for the rescission fee, because those obligations purportedly belong only to BBC-NY or BBC-USA.

Eskenazi and Landau contend that their only obligation under the stock purchase agreement was to exchange shares of stock with plaintiffs. As to plaintiffs' lost profits and business, Eskenazi and Landau argue that such damages are speculative, and that the damages do not flow from the breach of their promise to exchanges shares of stock with plaintiffs. Finally, Eskenazi and Landau argue that plaintiffs suffered no damages resulting from breach of Eskenazi's and Landau's promise to exchange shares.

The Promissory Note and Rescission Fee

The stock purchase agreement is among several parties: Bykowsky, Landau, Eskenazi, BBC-USA, BBC-NY, and the League.

> "Every party to such a [multi-party] contract is bound only to the extent of the promises made by him, and any party thereto may insist upon the performance of every promise made to him, or for his benefit, by the party or parties who made it. The mere fact that there are [multiple] parties to the agreement does not enlarge the effect of any promise, except as it may extend the advantage to two persons, instead of one, where that is the intention."

Berry Harvester Co. v Walter A. Wood Mowing & Reaping Mach. Co., 152 NY 540, 547 (1897).

Here, section 1.1 (c) the stock purchase agreement states, unambiguously: "BBC-USA shall issue and deliver to the Seller [Bykowsky] . . (2) BBC-USA's Promissory Note in the form attached hereto as Exhibit A ("Note") in the aggregate principal amount of $50,000." See Reichman Affirm., Ex C. As to payment of the $150,000 rescission fee, section 6.0 (a) of the stock purchase agreement states,

> "At any time during the period of two years to five years from the opening of the Facility . . . , Seller [Bykowsky] or BBC-NY and BBC-USA (together 'BBC') may rescind this Stock Purchase Agreement at will. . . . (i) if BBC [r]escinds BBC shall pay Seller the greater of $150,000, or the increase in value of the BBC shares originally exchanged under this agreement. . . ."

Ibid. Thus, the language of these provisions clearly indicate payment of the promissory note and the rescission fee were not promises that Eskenazi and Landau made to plaintiffs.

Plaintiffs contend that Eskenazi and Landau's obligations go far beyond the exchange of shares, in that they agreed to indemnify plaintiffs for breach of the stock purchase agreement pursuant to Section 8.1. Plaintiffs also argue that limiting Eskenazi's and Landau's liability to their express promises contravenes prior decisions in this case, which found that defendants anticipatorily breached the stock purchase agreement.

Section 8.1 of the stock purchase agreement states,

> "8.1 Survival of Representations! [*sic*] Warranties and Agreements Indemnity. The representations, warranties, and agreements of the Purchasers and the Seller in this Agreement shall survive the Closing. Seller on the one hand and Purchasers on the other hand shall indemnify and hold harmless the other (and their respective affiliates) from and against any and all claims, damages or losses caused by the other Party's material default hereunder or material breach of any representation or warranty set forth herein."

Contrary to plaintiffs' argument, this provision did not bind Irving and Eskenazi personally for any material breach of the stock purchase agreement. The first page of the Agreement defines Irving and Eskenazi as the "Individual Purchasers"; BBC-USA and BBC-NY are the "Purchasers." Thus, the promises contained in indemnification provision are between Bykowsky and BBC-USA and BBC-NY.

"Where, as here, two or more parties to a contract promise separate performances, each party is bound only for the performance he promised." Kranze v Cinecolor Corp., 96 F Supp 728, 729 (DC NY 1951); Walter v Rafalsky, 98 NYS. 915,9 16 (1 Dept 1906). Plaintiffs' law of the case argument is without merit. Although JHO Cohen found that defendants breached the stock purchase agreement, her decision cannot be read as a finding that all defendants promised the same

performance to plaintiffs. Each defendant—Eskenazi, Landau, BBC-NY and BBC-USA—promised to exchange his or its own shares of stock with plaintiffs' stock.

Therefore, plaintiffs' claims for recovery of the unpaid promissory note and rescission fee are dismissed as against Eskenazi and Landau.

Lost Profits

In their second amended bill of particulars, plaintiffs seek the lost profits from the operation of the limited liability companies that defendants formed with a third party (see Seconded Amended Bill of Particulars ¶¶ 4 (B),5 (A)).

"A basic principle of damages in a contract action is that the injured party should be left in as good a position as it would have been had the contract been fully performed, and that the injured party should not recover more from the breach than it would have gained had the contract been fully performed." Bogdan & Faist P.C. v CAI Wireless Sys., 295 AD2d 849, 853-854 (3d Dept 2002). Had the parties' agreement been fully performed, plaintiffs would have been only shareholders of corporations. It is speculative whether the corporations would have made any profit, and it is unclear whether plaintiffs' status as shareholders would have entitled them to any corporate dividends even if there were profits. Thus, plaintiffs conceded at the August 9, 2007 conference on the motion and cross motion that they are not entitled to any profits or tax deductible losses from operation of limited liability companies that defendants formed.

To the extent that plaintiffs seek to recover lost income or business from operation of the League, Landau and Eskenazi have not demonstrated, as a matter of law, that these damages are speculative. Eskenazi and Landau contend that the operation of the facility resulted in losses of $1.2 million in 1998, and almost $600,000 in 1999. See Reichman Affirm., Exs D, E.

However, this is not the proper measure of plaintiffs' damages. Any lost income or profit to the League could be measured by the difference between the cost of participating in the League and the cost of renting the facility from defendants for League games. By this measure, the fact that the facility lost money is irrelevant. Landau and Eskenazi have not shown that, as a matter of law, the lost profits from League games at the facility cannot be ascertained with a reasonable degree of certainty. Indeed, the Facility's rental rate is set forth in Section 1.2 of the stock purchase agreement.

Nevertheless, Eskenazi and Landau cannot be held liable for these damages, because these are damages that are not "the natural and probable consequence of the breach." Kenford Co., Inc. v County of Erie, 73 NY2d 312, 319 (1989). Section 1.2 of the stock purchase agreement gives the League and BBC-NY the exclusive use of the Facility for "sports league play," as defined in the agreement. Plaintiffs' right to use the facility, which BBC-NY proposed to build, did not depend whether Eskenazi and Landau exchange shares of stock with plaintiffs.

Plaintiffs maintain that the alleged lost profits of the League's operations are consequential damages, and that JHO Cohen found that defendants are "liable to plaintiffs for breach of the Stock Purchase Agreement and any consequential damages resulting from the breach." Bykowsky Affirm., Ex B, at 4. However, this argument begs the question of what constitutes "the unusual or extraordinary damages [that] must have been brought within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting." Kenford Co., Inc., 73 NY2d at 319.

Here, the parties clearly intended to limit the performance promised by Eskenazi and Landau in consideration of the League's use of the facility. Section 1.1 (3) of the stock purchase agreement states, "In consideration of the League playing at least the number of basketball and volleyball games

per year at the Facility, as set forth in Section 1.2, the Individual Purchasers [Eskenazi and Landau], shall cause BBC-NY to co-sign the Note as Co-Maker." See Reichman Affirm., Ex C. To hold Eskenazi and Landau liable for the alleged lost profits from League operations runs contrary to the parties' express intent.

Therefore, plaintiffs' claim for alleged lost profits from League operations is dismissed as against Eskenazi and Landau.

Damages from the Exchange of stock shares

Eskenazi and Irving argue that plaintiffs did not suffer any damages from their failure to exchange shares, as promised under the stock purchase agreement. As discussed previously, they contend that the facility lost money in the first two years of its operation. Eskenazi and Irving contend that Bykowsky profited from the deal not going through because he did not have to share profits from League operations with defendants.

This argument is without merit. The measure of damages for Eskenazi's and Irving's breach is the value of the shares as of the date that plaintiffs should have received them. See Matter of Katz, 43 AD3d 442 (2d Dept 2007); cf. Riskin v Natl. Computer Analysts, 37 AD2d 952, (1st Dept 1971) (measure of damages for bad faith delay in transfer of stock was the difference in value of stock at date of trial and date of earlier transfer). The profitability of the corporations whose shares plaintiffs should have received could be a factor in assessing the value of the shares. However, Eskenazi and Irving submit no expert appraisal stating that, based on the profitability of the corporations, the shares that plaintiffs should have received at the time of defendants' breach were worthless.

"In so far as [a breach of contract] prevents loss, the amount will be credited in favor of the wrongdoer. At times, a breach creates a net savings to the nonbreaching party." 11 Corbin on

Contracts § 57.10 (2005). Here, Eskenazi and Landau have not demonstrated that the amount of savings to plaintiff, if any, resulting from defendants' breach entirely offsets the amount of damages that plaintiffs are entitled to recover from Eskenazi and Landau.

Therefore, this branch of their motion to dismiss plaintiffs' claims against Eskenazi and Landau, for breach of their promise to exchange shares of stock in BBC-NY and BBC-USA with shares of the League, is denied.

Plaintiffs' Cross Motion

Plaintiffs cross-move for summary judgment in their favor against defendants to recover payment on a promissory note and a rescission fee of $150,000. Plaintiffs also seek leave to amend their bill of particulars.

The branch of plaintiffs' cross motion for summary judgment against defendants is partially granted to the extent that Bykowsky is entitled to summary judgment against BBC-NY and BBC-USA in the amount $50,000, with interest. BBC-NY and BBC-USA issued a promissory note to Bykowsky in the amount of $50,000, payable with interest in 36 equal installments, commencing on the first day of the first month four months after the facility opened. See Bykowsky Affirm., Ex G. Defendants do not dispute that the promissory note was never paid. Thus, Bykowsky is entitled to recover the principal of the note, plus interest. The trial on damages must determine, among other things, the date from which interest must be calculated and the rate of interest, which is calculated as 1% above the prime lending rate, adjusting semi-annually. The exact date that the facility opened is not in the record before this Court.

Plaintiffs have not demonstrated prima facie entitlement to a $150,000 rescission fee as a matter of law. By its terms, Section 6.0 of the stock purchase agreement, which provides for the

rescission fee, does not apply. It states,

> "(a) At any time during the period of two years to five years from the opening of the Facility ('OPTION PERIOD ONE') and/or within three years of the death, disability or retirement of the Seller ('OPTION PERIOD TWO'), Seller or BBC-NY and BBC-USA (together 'BBC') may [r]escind this Stock Purchase [A]greement at will.
>
> * * *
>
> (ii) if BBC [r]escinds BBC shall pay Seller the greater of $150,000 or the increase in value of the BBC shares originally exchanged . . ."

Bykowsky Affirm., Ex A. By its terms, Section 6.0 applies only after two years after the opening of the facility to be built. Defendants breached the stock purchase agreement prior to its closing, before the facility was ever built. Under the circumstances, Section 7.5 applies, which states,

> "7.1 Termination. This Agreement may be terminated at any time prior to the Closing Date: . . .
> (b) by the Seller, if any of the Purchasers deliberately fails to perform in any material respect any of its respective obligations under this Agreement.
>
> 7.2 Effect of Termination. In the event of termination of this Agreement by . . . the Seller, as provided below, this Agreement shall forthwith become void and there shall be no liability on the part of the any of the Purchasers or the Seller, except for liability at law, arising from a willful breach of this Agreement."

Ibid. Thus, in the event of termination prior to closing due to defendants' material breach, defendants are not liable for the rescission fee.

The branch of plaintiffs' cross motion to amend the bill of particulars to plead damages from the use of plaintiffs' names is denied. In dismissing plaintiffs' causes of action under the Lanham Act and Civil Rights Law § 50, JHO Cohen left open the possibility that plaintiffs might be able to recover damages from defendants' use of their names under a theory of breach of contract.

Plaintiffs have not set forth any basis entitling them to additional compensatory damages under a breach of contract theory. Plaintiffs did not submit a copy of the proposed bill of particulars with their cross motion. Barry v Niagara Frontier Tr. Sys., 38 AD2d 878 (4th Dept 1972); Goldner

Trucking Corp. v Stoll Packing Corp., 12 AD2d 639 (2d Dept 1960). Plaintiffs do not cite any part of the stock purchase agreement that entitles them to compensation for use of their names separate from what they would have received had the parties' agreement been fully performed. Thus, any damages award that plaintiffs recover for defendants' breaches of the stock purchase agreement would make plaintiffs whole for any contractual right entitling defendants to use plaintiffs' names.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendants Eskezani and Landau is granted to the extent that plaintiffs' claims for recovery of a promissory note, rescission fee, and lost profits from operation of the League are dismissed as against these defendants, and the motion is otherwise denied; and it is further

ORDERED that plaintiffs' cross motion is granted to the extent that Bykowsky is entitled to summary judgment in his favor against defendants Basketball City of New York, Inc. and Basketball City USA, Inc. in the amount of $50,000, with interest to be determined at a trial on damages, and the motion is otherwise denied.

This opinion constitutes the decision and order of the Court.

Dated: November 14, 2007
New York, New York

ENTER:

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J.S.C.

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