Bon Jour Group LLC v Wathne Ltd.
2007 NY Slip Op 34283(U)
January 22, 2007
Supreme Court, New York County
Docket Number: 0603432/2004
Judge: Richard B. Lowe
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[* 1] SCANNED ON 2/8/2007

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

PRESENT: PART 56

Index Number : 603432/2004
BON JOUR GROUP LLC.
vs
WATHNE LTD.
Sequence Number : 007
SUMMARY JUDGMENT

INDEX NO. ____
MOTION DATE 11/21/06
MOTION SEQ. NO. 007
MOTION CAL. NO. 002

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

	PAPERS NUMBERED
Δ Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... Memo in Support	1, 2
Answering Affidavits — Exhibits Simmons Aff. Opp. Π Memo	3, 4
Replying Affidavits and Affs. Δ Counterstatement 19A, Δ Response Π Counterstatement, Δ Reply to Support SJ Δ Memo to Bayliff 11/20/06	5, 6 / 7, 8, 9

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is disposed in accordance with the attached decision and order

FILED
FEB 08 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 1/22/07

RICHARD B. LOWE III
J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

[* 2]

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

--X

BON JOUR GROUP, LLC,

Plaintiff,

-against-

WATHNE, LTD.,

Defendant.

--X

Index No., 603432/04

DECISION & ORDER

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

Motions under Sequence Numbers 006 and 007 are consolidated for disposition. Under Motion Sequence Number 006, the defendant Wathne, Ltd., ("Wathne"), moves for an order directing the plaintiff Bon Jour Group, Inc., ("Bon Jour") to pay for the costs it incurred for its computer expert DOAR Litigation Consultants, Inc., ("DOAR") relating to the electronic discovery of Bon Jour's computers and database and to pay Wathne attorneys' fees and disbursements in connection with its motion to sanction Bon Jour for spoilation of evidence and for wilful violation of the Court's Order, dated May 24, 2006 (the "May 2006-Order"). Under Motion Sequence Number 007, Wathne moves for summary judgment dismissing the complaint and granting summary judgment as to liability on its first counterclaim (breach of contract).

After oral argument of Motion Sequence Number 006 on or about November 21, 2006, that branch of the motion as to the amount of fees and expenses is held in abeyance until the time of trial. The issue of the amount of the fees and expenses shall be referred to the Special Referee to hear and report (see, Grey Sheet Order 11/21/06).

BACKGROUND

The salient facts giving rise to the two motions are set out in the decisions and orders, dated February 8, 2006, May 24, 2006, and September 8, 2006 (Wathne Notice of Motion for

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Sanctions, 09/28/06 [Exhibits A-C]).[1] Wathne premises both motions on findings made by the Court in its September 8, 2006-decision, wherein the Court determined that Bon Jour discarded and/or destroyed computers, documents and data contained therein - all deemed subject to disclosure - as well as continually manipulated Wathne and the Court by "intentionally withholding relevant evidence from the defendant" (Dec., & Ord., 09/08/06). The Court particularly noted Bon Jour's conduct with respect to its haphazard production of electronic discovery or the lack thereof as well as its intentional conduct of discarding computers or erasing data and its failure to apprise both Wathne and the Court of the same rather than cause Wathne to engage "in the proverbial 'wild goose chase' to retrieve" the data files (Dec., & Ord., 09/08/06, p 7). Accordingly, the Court granted Wathne's motion for sanctions (CPLR § 3126[2]) and precluded Bon Jour from offering proof as to those matters related to discovery which was demanded (but, destroyed) and refused. Moreover, the Court granted Wathne leave to make an application at the time of trial for a negative inference.

DISCUSSION

Wathne's motion for summary judgment (Mot., Seq., No., 007) is premised on the Court's September 8, 2006-Order, precluding Bon Jour from offering proof as to those matters related to discovery which was demanded and refused. Wathne relies on the preclusion order to support its summary judgment motion.

Summary judgment may be granted on the basis of an order of preclusion (*Le Frois Foods Corp. v Policy Advancing Corp.*, 59 AD2d 1013, 1014; *Vandoros v Kovacevic,* 79 Misc2d 238).

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[1] Bon Jour has appealed and obtained a stay on or about November 17, 2006, of the trial of the matter pending the disposition of the appeal (*Bon Jour v Wathne, et al.*, Slip Op., No., 2006 NYSlipOp 80356 [U]).

[2] Apparently, Wathne moved for sanctions under CPLR § 3126, and not pursuant to 22 NYCRR Rule 130.1-1.

However, summary judgment based on an order of preclusion is not automatic in the First Department (*Israel v Drei Corp.*, 5 AD2d 987, *rehearing denied*, 6 AD2d 1005).

Rather, the Court must analyze the effect of the preclusion order in each particular case (*Crump v New York,* 67 AD2d 634 [the First Department, Appellate Division does not make any determination that as a general policy summary judgment must be granted upon an order of preclusion, but here where third-party plaintiffs failed to comply with demands for bills of particulars served by the moving third-party defendants, as a result of which preclusion orders were entered, said preclusion orders, which restricted third-party plaintiffs' case in chief, also mandated dismissal of the third-party complaint]; see also, *Jawitz v British Leyland Motor, Inc.*, 42 AD2d 536 [the unique facts and circumstances warranted summary judgment, where complaint was loosely drawn and the merits of the cause of action dubious. There was little to establish that the defendant distributed the automobile in question and the demand for the bill of particulars (never provided) was co-extensive with each and every element of the cause of action required in order to establish a prima facie case. The outstanding order of preclusion and willful nature of default, justified the granting of summary judgment and served to confirm the action had no merit]).

It also follows testimony that is premised on precluded documents is barred as the best evidence rule requires the actual document rather than the testimony that is merely collateral (see, *DuValle v Swan Lake Resort Hotel, LLC*, 26 AD3d 616 [when order of preclusion prevented plaintiff from introducing canceled checks evidencing her health insurance payments, such amounts could not be established through plaintiff's direct testimony; such testimony would have violated best evidence rule, since absence of checks was not properly excused. As plaintiff failed to set forth any admissible proof in opposition to this contention, Supreme Court properly dismissed the complaint]; *Koslosky v Khorramian,* 31 AD3d 716 [the order of preclusion prevents the plaintiffs from establishing a prima

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facie case, the trial term correctly, in effect, granted that branch of the defendants' motion which was for summary judgment dismissing the complaint]).

The preclusive effect of the previous order impacts proof relating to documents that were generated and/or received by Bon Jour during the period of May 1, 2003 through January 1, 2004 contained in Bon Jour's computer system and used by the following personnel: Charles Dayan, Carmine Porcelli[3], Dedra Adams[4], Leslie Croft, Rachel Clementi, Ave Dayan, Dmitri Gibbs, Bengu Ronay, Ilona Jusino, Susan Edlinger, and Marty Dayan (Ord., Appt., Computer Expert, 07/21/06 [Exhibit A]; see also, Dec., & Ord., 02/08/06). Bon Jour's interpretation of the scope of the preclusion order as well as other contentions relating to the order are rejected.

As the movant for summary judgment relief, Wathne must demonstrate its burden of proof to establish its claim as a matter of law (CPLR § 3212; *SRM Card Shop, Inc. v 1740 Broadway Assocs., LP*, 2 AD3d 136). As the proponent of a summary judgment motion, it must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of material issues of fact (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center, supra*, 64 NY2d at 853). In like manner, should Wathne demonstrate its burden then Bon Jour must show sufficient evidentiary proof that there is a disputed material issue of fact sufficient to require a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562).

[3] Carmine Porcelli died sometime after May 2005 (see, Porcelli 05/16/05 Aff.,).

[4] Bon Jour maintains that Dedra Adams was not employed by it after March 2003 and, thus, could not have created or edited documents from May 2003 to January 2004 (Dayan 11/20/06 Aff.).

Wathne moves for summary judgment on the ground that the preclusive effect of the prior order bars Bon Jour from offering any testimony or documents to rebut Wathne's proof that the parties entered into the subject Modification Agreement in May 2003 as evidenced by the June 20, 2003-letter from Wathne to Bon Jour as well as by the parties' conduct which is unequivocally referable to the Modification Agreement and that Bon Jour breached the same by demanding payment of royalties from Wathne and by suing Wathne in this action.

Wathne maintains that since Bon Jour is precluded from submitting proof relating to documents that were generated and/or received by Bon Jour during the period of May 1, 2003 through January 1, 2004 contained in its computer system, there is no material disputed fact that Bon Jour agreed to modify the original agreement, that the Modification Agreement was drafted and sent to Bon Jour without an objection, that the parties' performance thereafter is referable to the Modification Agreement, and that Bon Jour's commencement of this action breached the Modification Agreement.

Therefore, Wathne argues it is entitled to damages in the form of legal fees and costs as provided under that part of the parties' original agreement that was not modified by the Modification Agreement (Gunther 10/04/06 Aff., In Support of Motion for Summary Judgment, Exhibits A-B, I [¶ 20]).

Wathne maintains its moving papers establish through the affidavits of Laura Gunther ("Gunther") and Matthew LaFague ("LaFague") that in June and August 2003, the parties orally agreed to modify the original agreements and that thereafter they agreed to a modification that was not repudiated by Bon Jour from May 2003 through January 2004. She further avers that it was not until February 2004, that Bon Jour then demanded payment of royalties under the terms of the original agreements (Wathne Reply Memo of Law In Support of Summary Judgment Motion 11/02/06). Wathne maintains that its moving papers demonstrate entitlement to summary judgment dismissing

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the complaint and granting judgment on its counterclaim for breach of contract.

Summary judgment can be demonstrated by affidavits submitted by the movant (see, *Commissioners of State Ins. Fund v Albany Capitaland Enterprises, Inc.*, 18 AD3d 934 [on motion for summary judgment against former insured for unpaid premiums, insurer established prima facie case by affidavits of those with personal knowledge who authenticated insurer's business records concerning the policy and explained methodology in calculating the associated premiums; insurer's business records included insured's application, policy itself, statements of account, audit worksheets, and balance summary which demonstrated amounts due for years in question and sufficiently accounted for payments made by insured along with other downward adjustments]; *Sallusti v Jones*, 273 AD2d 293 [defendants established a prima facie case through the affidavits and incorporated reports of a physician who examined the plaintiffs and concluded that they had not sustained an accident-related injury action]).

Gunther, officer of Wathne, submits her affidavit and avers to a certain meeting that took place in late May 2003 between her and the head of Wathne's sales, LaFague, with Bon Jour's officer, Carmine Porcelli ("Porcelli") (now decease). She claims that at that meeting Porcelli agreed that Wathne would not be required to perform further work under the original agreements (id., [Exhibits I and J]) unless and until he (Bon Jour) developed sales of handbags to J.C. Penny. She avers that at that conversation the parties had a "first agreement" to modify certain portions of the original agreements. Gunther avers that the decedent acknowledged, among other things, Wathne's inability to carry out the terms of the original agreements. She avers that after the May 2003-meeting, Bon Jour never objected to the cessation of performance under the agreements by Wathne and that she had her lawyers draft up a "letter" formalizing the parties' understanding and the letter was sent to Porcelli (see, Gunther 10/04/06 Aff., pp 8-9 [Exhibit A]).

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Gunther avers that in August 2003, she and Matthew LaFague met again with Porcelli, who, at that time, agreed on behalf of Bon Jour to amend the original agreements thereby relieving Wathne from performing certain obligations. She averred Porcelli never indicated a lack of authority to modify the original agreements and confirmed to her that a deal was done. Gunther avers this agreement was then drafted by her attorneys constituting the Modification Agreement and hand delivered to Porcelli on September 5, 2003, who assured her that he would have it signed and returned (id., [Exhibit B]). This agreement was never returned to Gunther signed, although she avers meeting with Porcelli in a coffee shop in November 2003, where he confirmed that Bon Jour was abiding by the terms of the Modification Agreement (Gunther 10/04/06 Aff., pp 10-13). In December 2003, Porcelli leaves Bon Jour's employment. To further support the motion, Wathne submits the affidavit of Matthew LaFargue (LaFargue 01/26/05 Aff.,), who avers to similar facts.

In opposition, Bon Jour refers to Porcelli's May 16, 2005-Affidavit, wherein he indicated that in the Summer of 2003, he had three telephone conversations with Gunther, confirming her requests to amend or modify the original agreements, but that Bon Jour's president, Charles Dayan ("Dayan") would have to sign off on any modification. He also confirmed at the time that Gunther followed with a written proposed modification in the Fall of 2003 (Porcelli 05/16/05 Aff.).

It is noted that Porcelli's affidavit does not refer to any document generated or received from May 2003 to January 2004 relating to Bon Jour's computers or database subject to the preclusion order.

Bon Jour contends that Porcelli's affidavit raises the material disputed fact that Gunther knew at that time that any modification had to be approved and signed by Dayan. Bon Jour also contends that Porcelli's affidavit raises the material disputed fact that Porcelli had no apparent authority to bind Bon Jour to a modified agreement as Dayan's consent was first required for such an

agreement.

Bon Jour also submits the affidavit of Leslie Croft ("Croft"). It is noted that there are portions of the Croft Affidavit (Croft 10/12/05 Aff.,) that refer to email exchanges between Croft and Wathne and those electronic communications took place between May 2003 and January 2004. Bon Jour's reliance on testimony (or affidavits) by any employee or non party that is premised on email communications or any other document generated or received in its computer system from May 1, 2003 through January 1, 2004, is barred by the preclusion order[5]. The testimony (and affidavits) regarding the email communications during the above period is precluded as it is collateral to the documentary proof (*DuValle v Swan Lake Resort Hotel, LLC, supra*, 26 AD3d 616).

Nevertheless, there are portions of Croft's affidavit that have no connection to her email correspondences or received email correspondences. Croft avers that throughout her tenure from March 2003 to May 2004, as Marketing and Public Relations Director of Bon Jour, she understood that the original agreements were in full force and effect (Croft 10/12/05 Aff., p 1). She avers that during her tenure Bon Jour engaged in a marketing campaign for the Bon Jour handbag line Wathne was to manufacture and that throughout the Fall 2003, she called one, Leslie Krause ("Krause"), Wathne's National Sales Manager, to request samples from Wathne, which had not been provided. Croft avers that at no time during her telephone conversations with Krause was she informed that Wathne would not provide any samples or that the original agreements had been modified (id., p 3). Croft also avers she contacted Krause in September 2003 regarding Bon Jour's employees personal handbag orders from Wathne and was directed by Krause to contact another Wathne employee, Ms. Natalie Galarza,

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[5] In view of this finding, the Court does not reach Wathne's alternative argument for preclusion (emails appear to conceal that they are printed from another data port (source) that dates the printing, "01/03/2005"(Turkle Reply Aff., in Support of Defendant Motion for Summary Judgment, 11/02/06, pp 2-3).

it was at that time Krause provided Croft with an email address (id., p 4)[6].

Bon Jour contends that Croft's affidavit raises the material disputed fact that employees of Wathne performed and/or conducted themselves in a manner indicative of performance under the original agreements, and not that Bon Jour or Wathne believed the original agreements had been modified.

The Bon Jour's affidavits submitted above (excluding consideration and not weighing any reference to testimony or documents subject to the preclusion order) raise material disputed facts that preclude the granting of summary judgment dismissing Bon Jour's complaint or granting summary judgment on Wathne's counter claim for breach of contract (*Zuckerman v City of New York*, 49 NY2d 557, 562).

Based on a fair reading of the Bon Jour affidavits (also considering the record of affidavits filed in prior motion practice, e.g., Dayan) there are material disputed facts of whether Bon Jour agreed to modify the agreements, that Porcelli had apparent authority to modify the agreements, that consent by Dayan was a prerequisite, and that the parties' performance after May 2003 was referable solely to the Modification Agreement or to the original agreements. Wathne's contentions to the contrary (Defendant Reply Memo of Law in Support of Summary Judgment, 11/02/06, pp 5-9) are insufficient to support summary judgment.

Accordingly, Wathne's motion (Mot., Seq., No., 007) for summary judgment dismissing the complaint and granting judgment on its counterclaim for breach of contract is denied.

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[6] Croft's averment as to what she was told (email address) (and thereafter, what she observed) is not precluded as it is not based on her reading or reliance on an email communication generated or received from Bon Jour's computers or database.

CONCLUSION

To recapitulate, Wathne's motion (Mot., Seq., No., 007) for an order granting summary judgment dismissing the complaint and granting judgment on liability as to the first counterclaim is denied. .

ORDERED that defendant's motion for summary judgment dismissing the complaint and granting judgment on its first counterclaim is denied.

This constitutes the decision and order of the Court.

Dated: January 22, 2007

ENTER:

RICHARD B. LOWE III

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

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