

**Violations Settlement Bur., Inc. v Kraft Foods
Global, Inc.**

2008 NY Slip Op 30158(U)

January 8, 2008

Supreme Court, Suffolk County

Docket Number: 0010220/2006

Judge: Sandra L. Sgroi

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1-8-08

SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Present:

Hon. SANDRA L. SGROI

Mot Seq: 001MotD
 Adj. Date: 12-13-07
 Return Date: 10-4-07

comment:
 MD

VIOLATIONS SETTLEMENT BUREAU, INC.,
 Plaintiff,

-against-

KRAFT FOODS GLOBAL, INC.,
 Defendant.

LAW OFFICE OF DAVID JUDE JANNUZZI
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Upon the following papers numbered 1 to 22 read on this Motion: Notice of Motion and supporting papers 1-14; Affidavit in opposition and supporting papers 17-20; Exhibits 15-16; 21-22; it is,

ORDERED that the motion of the Defendant, Kraft Foods Global, Inc., for summary judgment dismissing the Plaintiff's complaint is denied.

This action arises from a contract dispute between the Defendant Kraft Foods Global, Inc. (hereinafter "Kraft") as successor in interest to Nabisco, Inc. and the Plaintiff Violations Settlement Bureau. Employees of Kraft, while driving motor vehicles owned by the Defendant, make direct store deliveries to various small New York City grocers. While delivering Kraft merchandise into New York City, the Defendant's motor vehicles receive many traffic tickets for parking violations and the Plaintiff, pursuant to a contract with Kraft, managed the payment of these parking tickets for fleet vehicles of Kraft.

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On or about September 13, 2000, Nabisco, Inc. executed a written agreement with the Plaintiff for legal representation and administrative services with the New York City Department of Finance Parking Violations Operations Division for the Kraft delivery fleet vehicles based in the Westbury, New York and Edison, New Jersey facilities. Michael Hogan signed that agreement on behalf of Nabisco, Inc.

This contract was renewed on September 1, 2003 for a three year term by Kraft, the successor to Nabisco and Hector Dilan signed that agreement on behalf of Kraft. According to the affidavit submitted by Dilan on this motion for summary judgment, the Plaintiff knew the identity of all of the fleet vehicles used by Kraft that were located in both the Edison, New Jersey facility and the Westbury, New York facilities. Additionally, Dilan alleges that the Plaintiff knew all of the plate numbers for the vehicles because the Plaintiff supplied all of the tax stamps for them. The truth or falsity of these statements are important because the Plaintiff alleges that Kraft did not provide it with the information necessary to dispose of the traffic tickets issued to the Kraft fleet vehicles and that this lack of cooperation prevented it from performing under the contract.

Dilan alleges that Riccio & Beletsky, Esq., the new vendor that now has replaced the Plaintiff and is responsible for paying the parking violation tickets, has been able to access all outstanding summonses issued in New York City because New York City has a website that provides information as to all traffic summonses sorted by ticket number and plate number. Dilan implies that Riccio & Beletsky, Esq. has been able to handle the account with the same information that Kraft had provided the Plaintiff.

While the Plaintiff was still servicing the Kraft parking violations account, Dilan alleges that, despite many meetings and discussions between Kraft and the Plaintiff and the payment of an additional \$15,000.00 in October of 2005, the Violations Settlement Bureau, Inc. was unable to adequately manage the account. Kraft was not satisfied with the services being provided by the Plaintiff. In late 2005, Dilan, a representative of Kraft, informed the Plaintiff that it did not intend to renew the contract in September 2006 when it expired.

In December 2005, after Dilan had informed the Plaintiff that Kraft would not be renewing the contract, the Defendant received a letter from the attorney for the Plaintiff stating that Kraft was not providing the paper traffic tickets or paying the fines and fees on a timely basis. The letter stated that Kraft was in default under the contract and further provided that the Plaintiff would not "appear on new summonses until there is a resolution of the issues raised herein." (see Defendants' Exhibit "B").

Dilan states that he contacted Marc Hittner, a principal of the Plaintiff, and "told him this contract had been in effect for over 5 years and our level of providing documentation had not changed. I also said he could hardly complain about not having funds to pay fines and fees since we had just given him \$15,000 more in October." According to Dilan, Hittner told him "****that unless the contract was renewed for another year at double the previous rate for services, VSBI (the Plaintiff) would not continue their services" (affidavit of Hector Dilan).

On March 6, 2006, Dilan received an email from Hittner wherein Hittner informed him that unless Kraft agreed to pay additional monies, the Plaintiff would "immediately stop any further representation of Kraft****." (affidavit of Dilan). This email outlined three options offered by the Plaintiff to Kraft. The first option was for Kraft to sign a one year extension of the contract for additional monies (Option A). The

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second option was for the Plaintiff to continue services for the remainder of the contract term but for additional money (Option B). The third option was for the Plaintiff to “immediately stop any further representation of Kraft***.” (Option C) (Defendant’s Exhibit “C”).

On March 29, 2006, Kraft sent a letter to the Plaintiff wherein it asked for an accounting of the monies paid and stated that “[u]pon reconciliation of these accounts, Kraft proposes that the parties mutually agree to terminate their business relationship. Please advise me of your clients’ position at your earliest convenience.” (see Defendants’ Exhibit “D”). Dilan states that he then received notification that the Plaintiff was assuming that Kraft was advising them to stop any further representation of the Defendant. The Defendant alleges that the Plaintiff’s refusal to continue performance under the contract unless either Option A or Option B was selected was a repudiation of the contract agreement. The Defendant then retained the firm of Riccio & Beletsky, Esqs. to pay the traffic tickets issued to the Kraft vehicles, the duties that Plaintiff had performed for Kraft. The Defendant has moved for summary judgment stating that the facts as shown indicate that the Plaintiff repudiated its contract to represent the Defendant.

In opposition to Kraft’s motion for summary judgment, Marc Hittner states in an affidavit that the Plaintiff was in default of its obligations under the contract and that it failed to provide a designated client contact person, failed to submit paperwork in a timely fashion and failed to pay all faxed and electronically mailed hearing results within seven days of receipt. According to the Plaintiff, these and other failures to adhere to the agreement prevented the Plaintiff from effectively performing under the contract.

Marsha Rosenstein, the office manager of the Plaintiff, also has submitted an affidavit in opposition to the motion of the Defendant for summary judgment wherein she states that she personally worked on the Defendant’s account and that she knew of the failures of the Plaintiff to perform that Hittner has detailed in his affidavit. Further, she states that she was unable to obtain the backup documents from the Defendant that she needed to properly process the traffic tickets received in New York City by the motor vehicles owned by the Defendant.

Summary judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of a triable issue (see, *Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923; *Bennett v Knipfing*, 262 AD2d 260, 692 NYS2d 403). The Court will not determine issues of credibility or the probability of success on the merits on a motion for summary judgment, and issue finding rather than issue determination is the key to summary judgment (*Graham v Columbia-Presbyterian Medical Center*, 185 AD2d 753, 588 NYS2d 2). If material facts are in dispute or if different inferences may reasonably be drawn from the facts or testimony, a motion for summary judgment must be denied (see, *Gusek v Compass Transp. Corp.*, 266 AD2d 923, 697 NYS2d 886; *McShane v Foster*, 235 AD2d 462, 652 NYS2d 1004; *Morris v Lenox Hill Hosp.*, 232 AD2d 184, 647 NYS2d 753, *aff’d* 90 NY2d 953, 665 NYS2d 399). The decision to grant or deny summary judgment is based on the facts in the entire record and not simply the pleadings (see, *McIntyre v State*, 142 AD2d 856, 530 NYS2d 898), and these facts must be analyzed in a light most favorable to a non-moving party, here the Plaintiff (*Jastrzebski v North Shore School District*, 223 AD2d 677, 637 NYS2d 439).

The record and conflicting statements of the persons involved with implementing the contract between Kraft and the Violations Settlement Bureau, Inc. present triable issues as to whether Plaintiff repudiated

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the contract by its actions (see, *Gardiner Intl. v. J.W. Townsend & Assocs.*, 13 A.D.3d 246, 788 N.Y.S.2d 312; see generally *Tenavision, Inc. v. Neuman* 45 N.Y.2d 145, 150, 408 N.Y.S.2d 36, 379 N.E.2d 1166) the Defendant was in breach of performance under the contract (see, *Tokayer v. Seetin Design, Inc.*, 22 A.D.3d 226, 801 N.Y.S.2d 600) and/or whether the Defendant's alleged failure to perform its contractual obligations prevented the Plaintiff from completing its contractual responsibilities under the agreement (see, *MK West Street Co. v. Meridien Hotels, Inc.*, 184 A.D.2d 312, 584 N.Y.S.2d 310). Since triable issues of fact exist, the motion for summary judgment must be denied.

Dated:

1/8/08


SANDRA L. SGROI, J. S. C.