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

PRESENT: RICHARD B. LOWE III Justice

PART 9/6

Index Number : 602046/2007

KATZ COMMUNICATIONS, INC.

vs

NEW YORK TIMES CO.

Sequence Number : 001

COMPEL DISCLOSURE

INDEX NO. _____

MOTION DATE 1/23/08

MOTION SEQ. NO. _____

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 DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

MAR 31 2008

NEW YORK COUNTY CLERK'S OFFICE

RECEIVED

MAR 21 2008

MOTION SUPPORT OFFICE

Dated: 3/18/08

RICHARD B. LOWE III

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 ☐ REFERENCE MSeM/11

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

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KATZ COMMUNICATIONS, INC. and KATZ MILLENNIUM SALES & MARKETING, INC.,

Plaintiffs

Index No: 602046/07

-against-

DECISION AND ORDER

THE NEW YORK TIMES COMPANY, NY TIMES BROADCASTING SERVICE, INC., WTKR-TV, INC., WNEP-TV, INC., NYT SOUTHWESTERN BROADCASTING INC., and NYT BROADCAST HOLDINGS, LLC,

Defendants.

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RICHARD B. LOWE III, J:

This dispute arises out of the efforts by Plaintiffs Katz Communications, Inc. ("Katz") and Katz Millennium Sales & Marketing, Inc. ("Millennium," together with Katz referred to as "Plaintiffs"), to recover termination obligations and unpaid commissions that Defendants, a group of television stations and their affiliated entities, agreed to pay Plaintiffs. Motion sequence numbers 001 and 002 are consolidated for disposition.

BACKGROUND

The Parties

Plaintiffs are engaged in the business of promoting and procuring the sale of time for the broadcast of national advertising on and for the benefit of television stations throughout the United States.

Defendant The New York Times Company ("NYT") owned a group of television stations, which comprises Defendants NY Times Broadcasting Service, Inc., WTKR-TV, Inc., WNEP-TV, Inc., NYT Southwestern Broadcasting Inc., and NYT Broadcast Holdings, LLC (collectively referred to as the "NYT Entities").

The Master Agreement

Plaintiffs and the NYT executed an agreement dated November 1, 2000 (the "Master Agreement"), under which NYT agreed to appoint Plaintiffs as its sole national advertising representatives and sales agents for certain television stations (collectively the "Stations") then owned and operated by NYT or the NYT Entities.

The Representation Agreements

Pursuant to the Master Agreement, NYT, through each of the NYT Entities, agreed to enter into representation agreements with Plaintiffs (the "Representation Agreements") appointing Plaintiffs as the exclusive sales agents of the Stations in the sale of time for the broadcast of national broadcast advertising. Accordingly, Plaintiffs and the NYT Entities entered into separate Representation Agreements pursuant to which both Katz and Millennium were appointed as the exclusive national sales representatives of one or more of the television stations.[1]

Under Paragraph 7(c) of each Representation Agreement, each of the NYT Entities agreed that if the license to operate a Station was assigned or transferred, or if a third party was given the right to operate or program the Station, the NYT Entity would assign the

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[1] The stations are: WREG-TV, WTKR-TV, WQAD-TV, KFOR-TV, WHO-TV, WNEP-TV, KFSM-TV, WHNT-TV, and KAUT-TV

Representation Agreement to the appropriate assignee, transferee, operator or programmer of the Station.

Plaintiffs allege that because the Representation Agreements were not assigned upon the sale of the Stations, the National Broadcast Advertising available to Plaintiffs under the Representation Agreements was reduced to zero because the NYT Entities no longer owned any Stations and therefore had no time to sell for broadcast advertising.

Under Paragraph 5(a) of each Representation Agreement, Katz or Millennium held the right to terminate the agreement by providing written notice (the "Termination Notice").

Under Paragraph 5(a)(iii) of each Representation Agreement, if Katz or Millennium gave a NYT Entity a Termination Notice and, at the time the Termination Notice was given, the NYT Entity had materially changed the format or operation of a Station in a manner that materially and adversely affected commissions, including reducing the National Broadcast Advertising availabilities available for Plaintiffs to sell, the Representation Agreement would terminate effective on a date specified by Katz or Millennium in the Termination Notice (the "Termination Date").

The Termination Obligation

Under Paragraph 5(b) of each Representation Agreement, if Katz or Millennium terminated pursuant to Paragraph 5(a)(iii), the applicable NYT Entity would pay to Katz or Millennium termination obligations (the Termination Obligations") defined and calculated pursuant to Paragraph 5(c) of each of the Representation Agreements.

The Recited Rationale for Obligation

Under Paragraph 5(e) of each Representation Agreement, Katz and the NYT Entities

agreed to the following with respect to the amount and calculation of the Termination Obligations: the payments required pursuant to this Article are fair and reasonable compensation to Plaintiffs and a fair and reasonable allocation of risk and expenses between the parties.

The Sale of the Stations

In March 2007, Plaintiffs learned that various NYT Entities were selling the Stations to a third-party buyer (the "Buyer"). As part of the sale of the Stations, the NYT Entities did not assign the Representation Agreements. Plaintiffs allege that the closing of the sale of the Stations occurred on May 7, 2007.

On May 8, 2007, Plaintiffs sent written Termination Notices to each of the NYT Entities pursuant to Paragraph 5(a)(iii) of the Representation Agreements. The Termination Date set forth in the Termination Notices was May 7, 2007, the date of the closing of the sale of the Stations. The Termination Notices notified the NYT Entities that the NYT Entities became indebted to Plaintiffs for Termination Obligations pursuant to Paragraphs 5(b) and 5(c) of each of the Representation Agreements, among other things.

On May 21, 2007, Plaintiffs sent acceleration notices pursuant to Paragraph 5(d) of the Representation Agreements to each of the NYT Entities, demanding payment of the full amount of the Termination Obligations.

Subsequently, Plaintiffs commenced this action. On June 25, 2007, Plaintiffs filed an Amended Summons and Complaint, asserting nine causes of action for breach of each Representation Agreement between Plaintiffs and the NYT Entities for the Stations.

Defendants served Plaintiffs with interrogatories on July 25, 2007, August 28, 2007, and October 19, 2007. Additionally, on July 25, 2007, Defendants noticed a deposition on matters

related to the first set of interrogatories, also dated July 25, 2007.

In motion sequence number 001, Defendants move to compel Plaintiffs to answer Defendants' outstanding interrogatories and to produce a witness to testify to topics noticed for deposition. In motion sequence number 002, Plaintiffs move pursuant to CPLR 3212(b) for summary judgment.

DISCUSSION

Motion for Summary Judgment

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Smalls v AJI Indus., Inc.*, 2008 NY Slip Op 1250, *2 [2008]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

In motion sequence number 002, Plaintiffs move for summary judgment. Plaintiffs assert that the undisputed evidence demonstrates that Plaintiffs and Defendants entered into Representation Agreements, that the Representation Agreements provided for Termination Obligations upon certain conditions, that those conditions were met, and that Defendants have not paid the Termination Obligations. Thus, Plaintiffs argue that they have established a prima facie showing of entitlement to summary judgment in their favor.

Plaintiffs rely on the assertion that the Termination Obligations constitute break-up fees, rather than liquidated damages provisions. Plaintiffs argue that the parties intended the Termination Obligations to be break-up fees in the event that one party elected to terminate the Representation Agreements. Further, Plaintiffs advance the distinction that liquidated damages

compensate a party for a breach whereas a break-up fee compensates a party regardless of a breach. Thus, Plaintiffs seek to enforce the Termination Obligations as break-up fees triggered by the termination of the Representation Agreements, rather than as liquidated damages triggered by the breach of the same.

Indeed, liquidated damages serve the purpose of estimating compensation for a breach (*JMD Holding Corp. v Cong. Fin. Corp.*, 4 NY3d 373, 380 [2005]). However, whether a break-up fee should be analyzed as a liquidated damages provision or strictly enforced is an issue that has not been addressed by the higher of courts New York. Nonetheless, despite the occasional usage by other courts of the terms "break-up fees" and "liquidated damages" interchangeably,[2] New York trial courts have directly addressed the issue of whether a provision was a break-up fee or a liquidated damage provision (*see e.g. Seltel, Inc. v Sinclair Broadcast Group, Inc. et al.*, Sup Ct, New York County, September 19, 1997, Gammerman, J., index No. 606076/96; *Katz Communications, Inc. v Salem Communications Corp.*, Sup Ct, New York County, June 10, 2004, Cahn, J., index No. 603896/02). In *Seltel*, Justice Gammerman found that the subject provision was not a liquidated damages clause (index No. 606076/96 at *4). Justice Gammerman reasoned that the subject clause was a break-up fee because the clause provided for

[2]*See e.g. Timberline Dev. LLC v Kronman*, 263 AD2d 175, [1 st Dept 2000] ["Given the . . . the explicit provision for liquidated damages . . ., plaintiff is limited to the remedy provided by the 'break-up' fee clause of the contract."]; *McMurray v De Vink*, 27 Fed Appx 88, 89 [3d Cir 2002] ["The [] agreement also contained a liquidated damage clause or 'break-up fee'" that required" payment upon termination of the agreement.]; *Gorman v Marcon Capital Corp. (In re Gorman)*, 274 BR 351 [DC Vt 2002] ["the break-up fee represents a liquidated damages provision"].

compensation regardless of whether there was a breach (*id.*).[3] In *Salem*, Justice Cahn followed the reasoning in *Seltel* and also found the subject clause to be a break-up fee, and not a liquidated damages provision, because the fee obligation was triggered regardless of breach (index No. 603896/02 at *8). Justice Cahn added to the distinction that the break-up fee was consideration for the right to terminate the agreement early (*see id.* at *8-9). Thus, New York law establishes that a termination fee which is not dependent upon a breach of contract does not constitute liquidated damages.

Under this rubric, Defendants attempt to argue that the Termination Obligation is dependent on a breach of the Representation Agreement, therefore, the Termination Obligation constitutes a liquidated damages provision. Defendants contend that a party breaches a contract when it terminates a contract of indefinite or perpetual duration. Thus, the Termination Obligation constitutes a liquidated damages provision because the termination was a breach that triggered the Termination Obligation. Assuming the truth of the proposition that a termination of an indefinite or perpetual contract constitutes a breach, here, the proposition would still be inapplicable. While the Termination Obligation is triggered if Defendants terminate the Representation Agreements, the Termination Obligation is also triggered if Plaintiffs terminate the Representation Agreement under Paragraph 5(a)(iii). Because the Representation Agreement

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[3]Defendants suggest that the reasoning in *Seltel* is flawed because it mistakenly assumes that where there is a contract which provides for consequences in the event of termination, a termination cannot constitute a breach. However, nowhere in *Seltel* does the court make such an assumption nor suggest that a termination cannot constitute a breach. Indeed, the court in *Seltel* recognized that a termination may constitute a breach, but, notwithstanding, it was ultimately the termination that triggered the obligation (*see* index No. 606076/96 at *4 ["The six defendants are obligated to pay the termination fee *regardless* of whether or not there was a breach of the contract."] [emphasis added]). Thus, the court in *Seltel* reasoned that a breach may lead to termination, however, a breach is not required to terminate.

expressly allows Plaintiffs to terminate if the conditions under Paragraph 5(a)(iii) are met, the Termination Obligation is not dependent upon any breach. Accordingly, because this Court finds that the Termination Obligations constitute break-up fees, Plaintiffs have demonstrated prima facie entitlement to summary judgment.

Although a motion for summary judgment may be denied if the facts essential to establish opposition "may exist but cannot then be stated" (CPLR 3212 [f]), "'[m]ere hope that somehow the [opponent] will uncover evidence that will prove their case, provides no basis . . . for postponing a decision on a summary judgment motion'" (*Jones v Surrey Coop. Apts., Inc.*, 263 AD2d 33, 38 [1999], quoting *Kennerly v Campbell Chain Co.*, 133 AD2d 669, 670 [1987]).

Because the Termination Obligations constitute break-up fees, disclosure relating to the issue of whether the Termination Obligations are valid liquidated damages provisions or unenforceable penalties is irrelevant. Accordingly, because Defendants fail tp raise a triable issue of fact in opposing Plaintiffs' motion for summary judgment, the motion is granted.

Motion to Compel

In motion sequence number 001, Defendants seek to compel Plaintiffs to answer outstanding interrogatories and document demands because the information sought may demonstrate that the recited rationale for finding the liquidated damages provision valid were not true and, thus, that the liquidated damages constitute an unenforceable penalty. Defendants' motion is denied as moot.

CONCLUSION

ORDERED that Defendants' motion (sequence number 001) is denied; and it is further

ORDERED that Plaintiffs' motion (sequence number 002) is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of Plaintiffs and against Defendants in the amount of $_____, together with interest as prayed for allowable by law at the rate of ___% per annum from the date of ___, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs..

Dated: March 18, 2008

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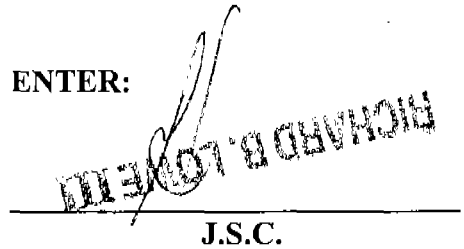

J.S.C.