Atrium Enters., Ltd. v Fitrewards, LLC

2008 NY Slip Op 30985(U)

March 26, 2008

Supreme Court, Nassau County

Docket Number: 3389-07/

Judge: Leonard B. Austin

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SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 12 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 10-25-07
Submission Date: 11-21-07
Motion Sequence No.: 002/MOT D

x

ATRIUM ENTERPRISES, LTD.,

Plaintiff,

- against -

FITREWARDS, LLC d/b/a INCENTIVE SOLUTIONS, MARIA PARELLA-TURCO, STRAND MANAGEMENT SOLUTIONS, INC., and DAVID KRUMHOLZ,

Defendants.

x

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ORDER

The following papers were read on Plaintiff's motion to reargue:

Notice of Motion dated September 27, 2007;
Affirmation of Mark Krassner, Esq. dated September 24, 2007;
Affirmation of David Bolton, Esq. dated November 5, 2007;
Affirmation of Mark Krassner, Esq. dated November 8, 2007.

Plaintiff moves to reargue the Court's order of August 13, 2007, which granted Defendants' motion to dismiss the complaint. Upon reargument, Plaintiff seeks to have the Court deny Defendants' motion to dismiss as to the first, second, third and sixth causes of action.

BACKGROUND

A. Factual

Plaintiff, Atrium Enterprises, Ltd. ("Atrium"), is in the rewards and incentives business.

Defendant, fitRewards, LLC d/b/a Incentive Solutions ("fitRewards"), was in the business of providing reward benefits in the health and fitness market.

On January 17, 2005, Atrium was offered an opportunity to work with the Defendants as an independent contractor working on sales and account maintenance. Atrium was to receive a marketing commission of 10% of the monthly gross revenue for each account serviced.

As part of this agreement, Atrium provided a complete product assortment to be used by fitRewards clients.

In January 2006, Atrium approached a new potential new client, Royal Pet Supplies, Inc. ("Royal Pet"), to determine if it was interested in developing a rewards incentive program.

In February 2006, Atrium asked Defendants to enter into agreement that would create a partnership to offer a customer rewards program for Royal Pet and others.

Atrium alleges it entered into a partnership with fitRewards and Defendant, Strand Management Solutions, Inc. ("Strand"), to create and service an incentives program for Royal Pet. Atrium, fitRewards and Strand were equal partners in this business venture, which was to be named "Experience the Rewards". Atrium was to be responsible for sales, marketing, product management and vendor relationship negotiations. fitRewards was to be responsible for reward management systems, program administration and customer support. Strand was to develop the technology platform and to meet the technology needs of the customer.

In addition to being a partner in this business, Atrium was to receive a commission of ten (10%) percent of the initial implementation fee for each customer brought to the partnership.

Atrium alleges Royal Pet agreed to commit upwards of $500,000 for its incentive program for the program's first year.

Royal Pet paid $6,000 as the initial implementation fee. Atrium was paid $600 from this fee representing the ten percent (10%) commission due fee.

Although Atrium performed the required services pursuant to its agreement with fitRewards and Strand, fitRewards established the Royal Pet program under Incentives Solutions. Incentives Solutions is alleged to be a business name used by fitRewards for its incentive rewards programs.

Atrium alleges that, as a result of fitRewards failure and refusal to transfer Royal Pet incentive program to Experience The Rewards, it has been denied its share of the profits earned on this business.

Based upon these facts, Atrium alleged causes for unjust enrichment (first cause of action), promissory estoppel (second cause of action), equitable estoppel (third cause of action), fraud (fourth cause of action), breach of fiduciary duty (fifth cause of action), *quantum meruit* (sixth cause of action) and conversion (seventh cause of action).

B. Prior Motion

Defendants moved to dismiss the action pursuant to CPLR 3211(a)(7) asserting that none of causes of action set forth claim upon which relief could be granted. Defendants further asserted the action was barred by the Statute of Frauds (General Obligations Law §5-701[a][10]). Defendants also sought to dismiss the complaint as to Defendants Maria Parella-Turco and David Krumholz. Parella-Turco is the principal of fitRewards. Krumholz is the principal of Strand. Defendants assert the facts alleged in the complaint which purported to give rise to the causes of action all involve fitRewards and/or Strand; not the individual defendants.

By order dated August 13, 2007, this Court granted Defendants' motion to dismiss. The Court found Atrium's causes of action all arose from the Atrium, fitRewards and Strand partnership. Atrium was seeking to recover its share of the profits made by the partnership business. Atrium's remedy in such a case was to commence an action to compel an accounting. In order to obtain an accounting, Atrium

had to establish it had made a demand for an accounting from the partner in possession and control of the partnership books and that partners failure and refusal to account.

Atrium also sought to recover the ten (10%) percent commission on the implementation fee for each new customer it brought to the partnership. While Atrium received the implementation fee relating to Royal Pet, it did not allege that it brought any customers other than Royal Pet to the partnership. Thus, the complaint failed to allege any facts that would entitle Atrium to any additional implementation fee commissions.

For these reasons, the court granted Defendants motion to dismiss the complaint.

C. Motion to Reargue

Atrium asserts that the Court should grant reargument and, upon reargument, should deny Defendants' motion to dismiss as to the first, second, third and sixth causes of action.

Atrium relies on a letter it sent on September 20, 2007 to Maria Parella-Turco and David Krumholz demanding that they account for the business of Experience The Rewards. They have failed and refused to account. Since Atrium has now demanded an accounting, and the Defendants have failed or refused to comply, the complaint should be deemed a action to compel an accounting.

Atrium further asserts that the Court misconstrued the facts by finding the causes of action were based upon the existence of a partnership. Atrium claims that the first,

second and third causes of action are not based upon the existence of a partnership. The first, second and third causes of action are premised upon the failure of fitRewards and Strand to honor their agreement to form a partnership in connection with the Royal Pet rewards program. Thus, the cause of action for unjust enrichment, promissory estoppel and equitable estoppel should not have been dismissed.

Atrium asserts on the same basis that it should be compensated on a *quantum meruit* basis for the work it performed in regard to the Royal Pet rewards program. Thus, the sixth cause of action was improperly dismissed.

DISCUSSION

A motion to reargue must be so designated, shall be based upon an assertion that the court overlooked or misapprehended matters of law or fact when it decided the prior motion and shall be made within thirty (30) days of service of the order with notice of entry from which reargument is sought. CPLR 2221 (d).

A reargement motion is addressed to the discretion of the court and may granted upon a showing that the court overlooked relevant facts or misapplied or misapprehended the applicable law or for some other reason improperly decided the prior motion. Carrillo v. PM Realty Group, 16 A.D.3d 611 (2nd Dept. 2005); Hoey-Kennedy v. Kennedy, 294 A.D.2d 573 (2nd Dept. 2003); and Foley v. Roche, 68 A.D.2d 558 (1st Dept. 1979).

A motion to reargue is based solely upon the papers submitted in connection with the prior motion. New facts may not be submitted or considered by the court. James v.

Nestor, 120 A.D.2d 442 (1st Dept. 1986); and Philips v. Village of Oriskany, 57 A.D.2d 110 (4th Dept. 1997).

Atrium's service of a demand for an accounting in September 2007 constitutes new facts not before the Court in connection with the prior motion. Thus, it may not be considered in connection with this motion and does not serve as a basis for granting reargument.

Partnership Law §10(1) defines a partnership as "...an association of two or more persons to carry on as co-owners a business for profit."

"A partnership is defined to be a contract of two of more persons, to place their money, effects, labor or skill, or some or all of them, in lawful commerce or business, and to divide the profits and bear the loss in certain proportions." Pattison v. Blanchard, 5 N.Y.186, 189 (1851). See, Manning v. Whelan, 259 A.D. 490 (3rd Dept.1940); and 15A NY Jur2d, *Business Relationships §1379..*

A partnership results from an express or implied contract. Martin v. Peyton, 246 N.Y. 213 (1927). The essential element of a partnership is the sharing of profits or losses as principals. Missan v. Schoenfeld, 95 A.D.2d 198 (1st Dept. 1983).

While Atrium, fitRewards and Strand did not enter into a written partnership agreement, a writing not needed to create a partnership. Martin v. Peyton, *supra.* The allegations in the complaint establish that Atrium's claim is to recover its share of the profits generated by the operation of the partnership business.

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Atrium alleges the responsibilities of each of the partners and their agreement to share equally in the profit and loss of the enterprise.

Paragraph 33 of the complaint specifically alleges:

> "Plaintiff lost its share of the agreed upon partnership profits from the Royal Pet relationship plus funding to the company that they were unable to secure as a result of defendants actions, thus creating additional hardship and furthering (*sic*) damaging plaintiff."

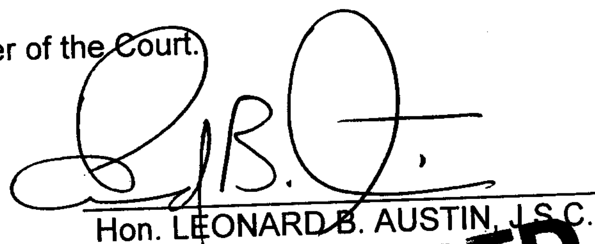
This specific factual allegation establishes that Atrium is seeking to recover its share of the profit generated by the operation of the partnership it had with fitRewards and Strand involving the Royal Pet incentives program. Thus, Atrium's proper remedy is to commence an action to compel an accounting. 1056 Sherman Avenue Assocs. v. Guyco Construction Corp., 261 A.D.2d 519 (2nd Dept. 1999); and Kreigsman v. Kraus Ostreicher & Co., 126 A.D.2d 489 (1st Dept. 1987).

The Court did not misconstrue the facts or the law. Thus, reargument must be denied.

Accordingly, it is

ORDERED, that Plaintiff's motion to reargue is **denied**.

This constitutes the decision and Order of the Court.



Dated: Mineola, NY
March 26, 2008

Hon. LEONARD B. AUSTIN, J.S.C.

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