

Storeboard Media, LLC v Tori Group Inc.

2008 NY Slip Op 31752(U)

June 10, 2008

Supreme Court, New York County

Docket Number: 0603739/2007

Judge: Charles E. Ramos

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

PRESENT: Charles Edward Ramos
Justice

PART 53

Index Number : 603739/2007

STOREBOARD MEDAI LLC

vs

THE TORI GORUP INC.

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

C

his 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

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JUN 24 2008
NEW YORK
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Is decided in accordance with
accompanying memorandum decision and order.

Dated: 6/10/08

CR
HON. CHARLES E. RAMOS
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FOR THE FOLLOWING REASON(S):

TO BE REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION
-----X
STOREBOARD MEDIA, LLC and BROCK CAPITAL
GROUP, LLC,

Index No. 603739/07

Plaintiffs and
Counterclaim Defendant,

-against-

THE TORI GROUP INC. and DOUGLAS B. LEEDS,

Defendants and
Counterclaim Plaintiffs.

-----X

THE TORI GROUP INC., DOUGLAS B. LEEDS and
STOREBOARD MEDIA, LLC

Third Party Plaintiffs,

-against-

CHARLES L. BROCK

Third Party Defendant.

-----X

Charles Edward Ramos, J.S.C.:

Defendants, The Tori Group Inc. ("Tori") and Douglas B. Leeds move pursuant to CPLR 3212 for summary judgment dismissing the First Amended Verified Complaint.

Background

Storeboard Media, LLC ("Storeboard") is a Delaware limited liability company that sells, installs, and maintains advertising in retail stores. In 2006, Leeds, through his private corporation Tori, together with other investors, acquired Storeboard from its founders and has since controlled its day-to-day operations. Subsequently in 2006, Storeboard sought

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investors to expand the company's business. To this end, Storeboard came in contact with third-party defendant Charles L. Brock, Chairman of plaintiff and counterclaim defendant, Brock Capital Group, LLC ("Brock Capital").

In February 2007, the parties entered into the Amended LLC Agreement (the "Agreement") whereby Brock Capital and two other investors recruited by Brock Capital, Alain LeBec and Burt Manning, were to invest \$650,000 "in aggregate," in exchange for membership interests in Storeboard. Section 3.2 of the Agreement provided that the contribution of funds shall be made "to the Company [Storeboard]," "[c]ontemporaneously with the execution of this Agreement." Although Brock Capital made its contribution of \$100,000 directly to Storeboard prior to the execution of the Agreement, Manning and Lebec timely transferred their contribution into a "Special Account," that Storeboard was not permitted access to. Rather, Brock Capital disbursed funds piecemeal to Storeboard over a ten month period. While Leeds essentially begged for funds to keep the business afloat, Brock Capital claimed Storeboard was being mismanaged. This action followed.

Plaintiffs have filed a complaint alleging five causes of action; declaratory judgment, seeking a declaration as to the validity of the Agreement; breach of loyalty and fiduciary duty by Leeds for refusing to acknowledge the Executive Board, self-dealing, and for failing to disclose certain information to plaintiffs; breach of the Agreement; and for an injunction

permanently restraining Leeds from self-dealing and acting without permission from the Executive Board.

Choice of Law

Storeboard is a Delaware limited liability company, and the Agreement provides that it shall be governed by, construed and enforced in accordance with the internal laws of the State of Delaware. Therefore, this Court shall apply Delaware law.

Summary Judgment

Pursuant to CPLR 3212(b), a court will grant a motion for summary judgment upon a determination that the movant's papers justify holding, as a matter of law, "that there is no defense to the cause of action or that the cause of action or defense has no merit." Further, all of the evidence must be viewed in the light most favorable to the opponent of the motion (*Marine Midland Bank v Dino & Artic's Automatic Transmission Co.*, 168 AD2d 610 [1990]).

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact as to the claim or claims at issue (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Matter of Redemption Church of Christ of Apostolic Faith v Williams*, 84 AD2d 648, 649 [1981]; *Greenberg v*

Manlon Realty, 43 AD2d 968, 969 [1974]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Once the prima facie showing has been made, the party opposing a motion for summary judgment bears the burden of "produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Zuckerman*, 49 NY2d at 562; see also *Romano v St. Vincent's Med. Ctr. of Richmond*, 178 AD2d 467, 470 [1991]; *Tessier v New York City Health & Hosps. Corp.*, 177 AD2d 626 [1991]). The substantive law governing a case dictates what facts are material, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." (*Anderson v Liberty Lobby, Inc.*, 477 US 242, 248 [1986]).

Discussion

Defendants move for summary judgement dismissing the First Amended Complaint as a result of plaintiff's non-compliance with the terms of the Agreement. Defendants argue that the condition precedent to entering into a valid contract was not met, that is, plaintiffs did not tender the agreed upon sum of money at the execution of the Agreement. As a matter of law, it is clear to this Court that Manning and Lebec's capital contribution to the "Special Account" was not in fact made "to the Company [Storeboard]" as required by the Agreement. Section 3.2, Agreement. Accordingly, the transfer to the "Special Account" did not satisfy the Agreement's terms that required funds to be

contributed "in aggregate" at the execution of the Agreement. Recital 3, Page 1, Agreement. Furthermore, it is clear from the evidence submitted, that Brock Capital, by restricting the distribution of the investor funds, effectively put a strangle hold on Storeboard, an already financially strapped company. The Court finds these self-serving tactics were destructive and unethical.

Nevertheless, the Agreement did not require Manning and Lebec to provide funds immediately. When the contract fails to contain a time of the essence clause, time of the essence will be implied only if the circumstances surrounding the contract or the parties' course of dealing clearly indicate that strict compliance with a specified time-frame was intended. *Hifn, Inc. v Intel Corp.*, 2007 Del. Ch. LEXIS 58. Otherwise, a court will imply a reasonable time for performance. *Martin v Star Publishing Co.*, 50 Del. 181 (Del. 1956). Here, the last of the incremental payments was made in December 2007, that is, ten months after the Agreement was executed.

Whether a party to a contract performed within a reasonable time is ordinarily a question of fact and thus, often inappropriate for resolution at the summary judgment stage. E.g. *Dechant v Williams*, 1990 WL 1104786, at 2 (Del. Ch. 1990). Nonetheless, a party to a contract will not always survive summary judgment merely by parroting the general rule that reasonableness is a question of fact. *Hilf* at 38. Rather, Delaware Courts have long recognized that a reasonableness

inquiry, such as the one presented here, can be decided on summary judgment in appropriate cases. See e.g. *Belanger v Fab Indus., Inc.*, 2005 Del. Ch. LEXIS 58, at 2 (Del. Ch. 2005) (holding that a party's delay in filing a certificate of dissolution was reasonable as a matter of law); *Architectural Signage Co., Inc. v Minker Const., Inc.*, 1996 Del. Super. LEXIS 240, at 3 (Del. Super. 1996) (rejecting plaintiff's argument that reasonableness is a factual question and holding that, based on the undisputed facts, defendants rejected goods within a reasonable time as a matter of law). Thus, a pivotal issue is whether plaintiffs satisfied its burden of presenting evidence from which a rational trier of fact could conclude that it performed its contractual obligations within a reasonable time. See e.g. *Tanzer v International General Industries, Inc.*, 402 A2d 382 (Del. Ch. 1979). Because plaintiffs have introduced no such evidence, it has not satisfied that burden.

Furthermore, it is clear from the record, including various emails, and supplemental submissions regarding a December 20, 2007 email¹ from defendant's counsel to plaintiff's counsel, that defendants have reserved their rights under the Agreement and that the withholding of funds was having an obviously negative impact on Storeboard's operations. Although the Special Account arrangement was acknowledged by defendants, the circumstances by which it accepted monies as a result of

¹ It should be noted that the December 20, 2007 email was sent prior to the last payment being transferred to Storeboard from the Special Account.

plaintiff's action does not amount to consent of such an arrangement. Hence, there is no waiver and no estoppel.

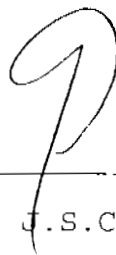
Accordingly, Brock Capital has no standing to sue on behalf of Storeboard, and no right to seek relief, injunctive or otherwise, resulting from alleged breaches of fiduciary duties by defendants to Storeboard and its members. Therefore, summary judgment must be granted to defendants dismissing the First Amended Complaint in its entirety.

It is;

ORDERED that the First Amended Complaint dismissed with prejudice; and it is further

ORDERED that Storeboard LLC be realigned as a counterclaim and third-party plaintiff.

Dated: June 10, 2008



J.S.C.

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