INDEX NO.10220-2006

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

Mot Seq: 002MotD
Adj. Date: 7-24-08
Return Date: 6-12-08

Present:
Hon. SANDRA L. SGROI

VIOLATIONS SETTLEMENT BUREAU, INC.,
Plaintiff,

-against-

KRAFT FOODS GLOBAL, INC.,
Defendant.

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Mattituck, New York 11952

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Attorney for Defendant
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Upon the following papers numbered 1 to 37 read on this Motion: Notice of Motion and supporting papers 1-14;15-37; it is,

ORDERED that the motion of the Defendant, Kraft Foods Global, Inc., to reargue a decision of this Court denying the Defendant's motion for summary judgment is denied.

The attorney for the Defendant has moved to reargue the previous decision issued by this Court denying the Defendant's motion for summary judgment. A motion to reargue is based upon no new proof. It seeks to convince the Court that it was wrong in the first instance and it should change the previous decision (see, ***CPLR*** 2221; see also ***DeSoignies v. Cornasesk House Tenants' Corp.***, 21 A.D.3d 715, 800 N.Y.S.2d 679). A motion to reargue is often combined with a motion to renew the prior motion and is usually in a combined motion to renew and reargue. However, the two motions are distinguishable and the motion to reargue generally cannot be based on additional facts whereas the motion to renew may be based on

additional facts(see, ***Somma v. Richardt***, --- N.Y.S.2d ----, 2008 WL 2521361, 2008 N.Y. Slip Op. 05917, N.Y.A.D. 2 Dept. Jun 24, 2008). The Defendant has not moved to renew, but has only moved to reargue.

The Defendant's motion for summary judgment was denied by this Court on January 8, 2008, upon a finding that triable issues of fact existed that precluded judgment. The Defendant alleges on this motion to reargue that its reply affirmation was not considered by this Court when the Defendant's motion for summary judgment was denied and that the statements in this reply affirmation requires the Court, upon reconsideration, to grant the motion of the Defendant for summary judgment. However, the arguments and issues raised in that reply were considered by the Court on its own initiative in the prior decision despite the Court not having the reply affirmation in its possession when motion sequence # 001 was decided. The reply affirmation, which contains no new facts and only addresses the legal issues surrounding anticipatory breach, does not require that this Court modify its previous decision.

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, Inc.

Employees of Kraft, while driving motor vehicles owned by the Defendant, make direct deliveries of merchandise 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 the fines resulting from the issuance of parking tickets issued in New York City to the fleet vehicles owned or controlled by Kraft.

On or about September 13, 2000, Nabisco, Inc. executed a written agreement with the Plaintiff for legal representation and administrative services performed before the New York City Department of Finance Parking Violations Operations Division for the 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 or about September 1, 2003 for a three year term by the Plaintiff Kraft, the successor to Nabisco. Hector Dilan signed that agreement on behalf of Kraft. Hector Dilan is the Manager of Customer Logistics of the Edison Facility and has been an employee of Kraft since January of 2001. According to the affidavit submitted by Dilan on the 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 accuracy of these statements are important because the Plaintiff alleges that Kraft failed to provide it with the information that it required to dispose of the traffic tickets issued to the Kraft fleet vehicles and that this lack of cooperation prevented it from performing its obligations under the contract.

Dilan alleges that Riccio & Beletsky, Esq., the new vendor that Kraft has retained to replace the Plaintiff, now is responsible for paying the parking violation tickets issued to Kraft vehicles and it has been able to access all outstanding summonses issued in New York City using a New York City Department of Finance Parking Violations Operations Division website that provides information as to all traffic summonses sorted by ticket number and plate number. Dilan states that this new vendor is able to service the Kraft

account and pay all traffic parking tickets using this website and implies that therefore Plaintiff's claim that Kraft failed to properly provide the necessary data for Plaintiff to perform under the contract is without merit.

While the Plaintiff was still servicing the Kraft parking violations account pursuant to the written contractual agreement, 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 Plaintiff was unable to adequately manage the account. Dilan states "Kraft became increasingly dissatisfied with (Plaintiff). It was not entirely clear what was being done and how it was being done. I kept asking that we 'flush' the system and get an accounting of the monies going back and forth. There were many meetings and discussions but I never received a satisfactory explanation." In late 2005, Dilan informed Hittner that Kraft did not intend to renew the contract with the Plaintiff in September of 2006, when it expired.

In December 2005, after Dilan had informed Hittner that Kraft would not be renewing the contract with the Plaintiff, 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 from the Plaintiff's attorney stated that Kraft was in default under the terms of the contract and with "the result being an inability of VSBI (the Plaintiff) to properly administer its services." The letter further provided that the Plaintiff "is not able to appear on new summonses until there is a resolution of the issues raised herein." (see, Defendants' Exhibit "B"). Neither party has alleged that the language in this letter resulted in an anticipatory breach by the Plaintiff. The letter from Plaintiff's attorney also stated that:

> It is VSBI(sic) desire to resolve these issues so that they may continue to provide the results its customers expect and deserve. Towards,(sic) that end, I would like to suggest an informal meeting between the parties to see if a resolution of theses(sic) issues can be reached. Failing that, there must be a rescission of the contract, subject to the remedies outlined in the agreement.

The attorney's communication ended with the following language:

> I look forward to the possibility of reached(sic) an amicable solution to the problems outline(sic) above. Please let me know your response at your earliest convenience.

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).

Despite the above disputes, the Plaintiff continued to represent the Defendant from December 5, 2005 until April of 2006. Hittner states that "in essence" Kraft acknowledged "their failure to pay VSBI's requests for timely payment of adjudicated fines" and "agreed to pay NYCDOF (New York City) directly from their

own accounts (as opposed to having VSBI do so)."

On March 6, 2006, Dilan received an email from Hittner wherein Hittner informed him that unless Kraft agreed to pay additional monies to the Plaintiff, the Plaintiff would "immediately stop any further representation of Kraft***." (affidavit of Dilan). This email is attached as an Exhibit "C" to the Defendant's original motion. The email of March 6, 2006, outlined three "scenarios". While the Defendant has chosen to call these choices "options", the language actually used is "scenarios".[1] Since the words "scenario" and "option" have different meanings, the Court will use the term actually written by the agent for the Plaintiff in the email to Dilan. "Option", by definition, implies a choice that must be made while "scenario" is a possible plan that may be chosen.

The first scenario in the email provided that Kraft sign a one year extension of the term of the contract with the Plaintiff for additional monetary compensation (Scenario A). The second suggestion was that the Plaintiff continue providing services to the remainder of the contract term but for additional money (Scenario B). The third scenario stated in the email entailed the Plaintiff immediately stopping "any further representation of Kraft***"(Scenario C)(see Defendant's Exhibit "C").

A non-defaulting party is, prior to time of performance, entitled to treat the conduct of another as a complete anticipatory breach to a bilateral contract where the other party has unequivocally repudiated or renounced the contract and in that case there is no necessity for tender of performance or waiting for time of performance to arrive(see, ***American List Corp. v. U.S. News & World Report,*** 75 N.Y.2d 38, 550 N.Y.S.2d 590, 549 N.E.2d 1161). Therefore, if the email from Marc Hittner had unequivocally stated that the unless Kraft paid additional monies to the Violations Settlement Bureau, Inc., the Plaintiff would not perform under the contract, there would have been an anticipatory breach of the contract (see, ***Yitzhaki v. Sztaberek***, 38 A.D.3d 535, 831 N.Y.S.2d 267; ***Zack Associates, Inc. v. Setauket Fire Dist.***, 12 A.D.3d 439, 783 N.Y.S.2d 827; ***Gardiner Intern., Inc. v. J.W. Townsend & Associates, Inc.***, 13 A.D.3d 246, 788 N.Y.S.2d 312).

According to Dilan, Kraft chose to treat this email as an anticipatory breach of the contract by the Plaintiff. Whether that action on its part was justified is the central issue in this law suit. On March 29, 2006, Kraft's litigation counsel, John J. Verscaj, sent a letter to the attorney for the Plaintiff by facsimile transmission wherein it asked for an accounting of the monies paid and stated that:

> Kraft understands that VSBI has unilaterally made a decision to abandon its legal representation of Kraft with respect to New York City Department of Finance matters and reserves its rights with respect to damages suffered by Kraft as a result of your client's decision.***Kraft is willing to pay any outstanding fees earned by VSBI upon receipt of

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[1]"Option" is defined, by Dictionary.com as among other definitions 1. the power or right of choosing; 2. something that may be or is chosen; choice; and 3. the act of choosing. "Scenario", as used in the email sent by Dilan is defined as "an imagined or projected sequence of events"especially "any of several detailed plans or possibilities."

an accurate accounting.

The letter concluded 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").

The attorney for the Plaintiff responded by letter dated April 7, 2006, wherein he stated that the Plaintiff has not "unilaterally abandoned its legal representation of KRAFT with respect to New York City Department of Finance***matters***." Finally, this letter states that "your recent rejection of the first two alternative scenarios put forth to KRAFT in the email dated March 6, 2006 leads us to believe that you are instructing VSBI to immediately stop any further representation of Kraft at NYC DOF effective as of the date of this letter***."

Dilan states in his affidavit that the letter of April 7, 2006 "made it clear to me and my colleagues at KRAFT that VSBI was only offering us the three Options, none of which included continuing out the existing contract with the existing contract terms." On April 10, 2006, Verscaj responded to the letter from the attorney for the Plaintiff stating "(p)lease be advised that Violation Settlements Bureau, Inc. ("VSBI") is no longer authorized to represent Kraft Foods Global, Inc., individually, and as successor-in-interest to Nabisco, Inc., ("Kraft") with respect to New York City parking ticket or any other matters. The withdrawal of that authority is effective immediately."

The Defendant states that the Plaintiff's alleged refusal to continue performance under the contract unless either "Scenario A" or "Scenario B" was selected was a repudiation of the contractual agreement.

The Defendant then opted to retain the firm of Riccio & Beletsky, Esqs. to process and pay the traffic tickets issued to the vehicles owned by Kraft , the duties that Plaintiff had performed under the contractual agreement.

Despite the March 29, 2006 letter from Kraft's attorney wherein it was stated that Plaintiff had unilaterally terminated its representation of Kraft, Dilan alleges that "Kraft continued to pay VSBI invoices for the next several months." However, it is undisputed that Kraft sent Hittner a letter dated April 10, 2006 that withdrew the authority for Plaintiff to represent Kraft.

In opposition to Kraft's motion for summary judgment, Marc Hittner stated in an affidavit that the Defendant was in default under its obligations under the contract throughout 2005 and that Kraft 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 of those items. According to the Plaintiff, these and other failures to adhere to the agreement prevented the Plaintiff from effectively performing under the contract and that Plaintiff never unilaterally breached the contract with the Defendant.

Marsha Rosenstein, the office manager of the Plaintiff, also submitted an affidavit in opposition to the

motion of the Defendant for summary judgment wherein she stated 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 stated 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;***Art-Lloyd Metal Products Corp. v. Allied Equimet Corp.***, 56 A.D.2d 859, 392 N.Y.S.2d 341). 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 (***Grahm 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 herein and the conflicting statements of the persons involved with implementing the contract between Kraft and the Violations Settlement Bureau, Inc. present triable issues as to (1) whether the Plaintiff repudiated the contract by its actions and letters (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);(2) whether the Defendant was in breach of performance under the contract and if those breaches justified the response of the Plaintiff (see, ***Tokayer v. Seetin Design, Inc.***, 22 A.D.3d 226, 801 N.Y.S.2d 600); and (3) whether the Plaintiff was in breach of its obligations under the contract and if the alleged breaches and communications justified the Defendant's actions(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 concerning both the adequacy of the parties performance under the contract and the Plaintiff's alleged anticipatory breach, the Court adheres to its prior decision denying summary judgment.

Dated: 9/12/08

SANDRA L. SGROI, J. S. C.