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

PRESENT: Cahn PART 49

Index Number : 100065/2008

PGNT MANAGEMENT LLC

VS.

OMNICOM GROUP

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE . . . .

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 12/2/08

Hon. Cahn

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

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PGNT MANAGEMENT LLC,

Plaintiff,

-against-

Index No. 100065/08

OMNICOM GROUP INC.,

Defendant.

----------X

Herman Cahn, J.:

Defendant Omnicom Group Inc. moves for summary judgment[1] in its favor and dismissing the complaint with prejudice, CPLR 3212.

This action arises out of a right of first refusal to purchase common stock in nonparty Seneca Investments LLC, a Delaware limited liability company, accorded in the Seneca restated charter, dated March 31, 2004 (see Seneca Restated Charter § 16 [c]). Plaintiff PGNT Management LLC owns 60% of Seneca and Omnicom owns the remaining 40%. The Seneca restated charter grants a right of first refusal, pursuant to which any shareholder wishing to sell its shares must notify the other shareholders of the proposed sale. The other shareholders then have the right to purchase the stock. PGNT alleges that defendant's agreement to donate certain sums of money to a prominent Business School, the amount of which pledge was partially measured by distribution to be received by defendant from Seneca, amounted to a sale or transfer of the shares which triggered the right of first refusal.

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[1] This motion was originally filed by Omnicom as a CPLR 3211 (a) (7) pre-answer motion to dismiss. By interim order dated May 9, 2008, the Hon. Helen E. Freedman denied the motion and directed the parties to resubmit it as one for summary judgment, pursuant to CPLR 3211 (c).

By letter agreement dated March 31, 2004 (the pledge agreement), Omnicom made a charitable pledge to nonparty The Wharton School of the University of Pennsylvania (Wharton). Pursuant to the terms of the pledge agreement, Omnicom pledged to donate to Wharton an amount, in cash, equal to the amount of cash proceeds that Omnicom received as a result of its common stock investment in Seneca. Omnicom and Wharton also entered into a gift agreement dated June 28, 2004 (the gift agreement), that incorporates by reference the pledge agreement and obligates Omnicom to pay Wharton a minimum of $7.5 million, in increments of cash or readily marketable securities, on or before June 30, 2008. The gift agreement specifies that the funds are to be used to establish the "Omnicom Marketing Initiative" program at Wharton.

Omnicom alleges that, by 2007, it had not received any distributions from Seneca and, therefore, could not and did not make a cash payment to Wharton. By letter agreement dated June 7, 2007 (the June 2007 agreement), Omnicom amended the terms of the pledge and gift agreements, obligating it to make a one-time cash payment in the amount of $5.5 million to Wharton, bringing the total cash gift to $7.5 million, as required by the original terms of the agreements. On that date as well, Omnicom made a $5.5 million cash payment to Wharton.

There is no dispute that Omnicom did not advise PGNT of its agreements with Wharton and did not offer PGNT the opportunity to purchase its 40% interest in Seneca, prior to entering into the Wharton agreements. Omnicom advised PGNT of the existence of the pledge and gift agreements in November 2006.

PGNT commenced this action alleging that Omnicom's pledge to donate an amount equal to the amount of the Seneca cash distributions, constituted a clandestine and irrevocable transfer of Omnicom's financial interest in Seneca and, therefore, triggered the right of first refusal set

forth in the Seneca restated charter. In the complaint, PGNT asserts causes of action for breach of the express terms of the restated charter and breach of the implied covenant of good faith and fair dealing, and seeks to recover $34.4 million.

Omnicom now seeks summary judgment dismissing the claims asserted against it, on the ground that its cash pledge to Wharton did not trigger the right of first refusal.

In opposition, PGNT contends that numerous triable issues exist, that the motion is premature and further discovery is necessary and that the right-of-first-refusal provision is broadly worded and intended to encompass any transfer, either direct or indirect, of the right to receive Seneca financial distributions.

As a threshold matter, the Court notes that the law of Delaware, Seneca's state of incorporation, governs the interpretation of the Seneca restated charter (*see* Seneca Restated Org. & Operating Agr., § 3.2). "One of the abiding principles of the law of corporations is that the issue of corporate governance . . . is governed by the law of the State in which the corporation is chartered" (*Hart v General Motors Corp.*, 129 AD2d 179, 182 [1st Dept], *lv denied* 70 NY2d 608 [1987]). Under Delaware law as well, "[c]harter provisions which facilitate corporate action and to which a stockholder assents by becoming a stockholder are normally upheld by the court unless they contravene a principle implicit in statutory or settled decisional law governing corporate management" (*Frankel v Donovan*, 35 Del Ch 433, 442, 120 A2d 311 [1956]; *see* 8 Del Code § 102 [b] [1]).

The Court also notes that New York law governs the procedural issues raised in the action, and provides the standard for granting or denying summary judgment (*see Ground to Air Catering Inc. v Dobbs Intl. Serv. Inc.*, 285 AD2d 931, 932 [3d Dept 2001]; *Education Resources*

Inst., Inc. v Piazza, 17 AD3d 513, 516 [2d Dept 2005]).

Summary judgment in favor of Omnicom is granted on the claim for breach of § 16 of the Seneca restated charter and on the claim for breach of the implied covenants of good faith and fair dealing. Omnicom has established with evidentiary proof in admissible form that no ground exists to hold it liable for breach of the express or implied terms of the Seneca restated charter (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Further, PGNT has wholly failed to demonstrate the existence of a genuine triable issue of material fact sufficient to defeat the motion (*see Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1068 [1979]). "Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman*, 49 NY2d at 562).

The pledge, gift, and June 2007 agreements between Omnicom and Wharton do not evidence transfers prohibited by the Seneca restated charter and do not trigger the right of first refusal set forth in that charter. Under Delaware law, the elements of a breach of contract claim are the existence of a contract, the breach of an obligation imposed by the contract and damages (*Goodrich v E.F. Hutton Group, Inc.*, 542 A2d 1200, 1203-04 [Del Ch 1988]).

Pursuant to Delaware law, the Court's task in interpreting a contract is to give its clear and unambiguous provisions the effect intended by the contracting parties (*Seaford Golf & Country Club v E.I. duPont de Nemours & Co.*, 925 A2d 1255, 1261 [Del Supr 2007]; *Ed Fine Oldsmobile, Inc. v Diamond State Tel. Co.*, 494 A2d 636, 637-38 [Del Supr 1985]).

> However, if the terms are ambiguous, the court may look to extrinsic evidence to determine the intent of the parties. With that said, 'a contract is not rendered ambiguous simply because the parties do not agree upon its proper construction.' Rather, the settled test for ambiguity is whether 'the provisions in controversy are reasonably or

> fairly susceptible of different interpretations or may have two or more different meanings'

(*Minnesota Invco of RSA No. 7, Inc. v Midwest Wireless Holdings LLC*, 903 A2d 786, 794 [Del Ch 2006] [internal citations omitted]). It is not the function of the Court to rewrite the plain language of an otherwise valid and enforceable contract provision (*Seaford Golf & Country Club*, 925 A2d at 1261; *Ed Fine Oldsmobile, Inc.*, 494 A2d at 638).

Similarly, in New York, the well-established law of contract interpretation provides that:

> In interpreting a contract, the intent of the parties governs. A contract should be construed so as to give full meaning and effect to all of its provisions. Words and phrases are given their plain meaning. Rather than rewrite an unambiguous agreement, a court should enforce the plain meaning of that agreement.
>
> Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment. On the other hand, if it is necessary to refer to extrinsic facts, which may be in conflict, to determine the intent of the parties, there is a question of fact, and summary judgment should be denied

(*American Express Bank Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990], *lv denied* 77 NY2d 807 [1991] [internal citations omitted]). Further, "[w]hether or not a writing is ambiguous is a question of law to be resolved by the courts" (*W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

Here, the Seneca restated charter provisions relating to transfers of common stock, the right of first refusal to purchase common stock, and the terms of the three agreements between Omnicom and Wharton are clear, unequivocal, and unambiguous. Therefore, summary judgment is appropriate.

The Seneca restated charter restricts the transfer of common stock as follows:

> No holder of Common Stock shall Transfer, except to Permitted Transferees, all or any portion of the Common Stock now owned or hereinafter acquired by such holder except in compliance with Section 16 (c) below. For purposes of this Section 16, 'Transfer' means any direct or indirect offer, transfer, donation, sale, assignment, conveyance, encumbrance, mortgage, gift, pledge, hypothecation, grant of a security interest in or other disposal or attempted disposal of all or any portion of a security or of any rights connected thereto or interests therein, with or without consideration, whether voluntary or involuntary, including but not limited to, any Transfer by operation of law, by court order, by judicial process or by foreclosure, levy or attachment

(Seneca Restated Charter § 16 [a] [emphasis in original]).

Here, the terms of the pledge agreement, the gift agreement, and the June 2007 agreement clearly demonstrate that Omnicom did not promise to transfer, and did not transfer, to Wharton a right of any kind to its Seneca stock, but, instead, retained all its rights, benefits, and interests in Seneca.

The pledge agreement provides, in relevant part, that "[Omnicom] pledges to pay [Wharton] an amount in cash equal to the amount of cash proceeds received by Omnicom ('Proceeds') at any time as a distribution on or after March 31, 2004 in respect of its current ownership of common membership interests (its 'Investment') in Seneca" (Pledge Agr. at 1). Further, the pledge agreement provides that "Omnicom shall at all times retain full ownership and control of its Investment . . . Wharton shall at no time have any interest in the Investment, Seneca, or the proceeds" (*id.*). Significantly, the pledge agreement restricts Wharton's remedy for breach of the agreement by Omnicom to "simply a general unsecured claim against Omnicom for an amount of cash equal to the amount of Proceeds as calculated herein" (*id.*).

The gift agreement expressly incorporates the terms of the pledge agreement and similarly

provides that Omnicom will pay Seneca "[a]n amount in cash equal to the amount of cash proceeds received by Omnicom . . . as a distribution . . . in respect of its current ownership of common membership interests in Seneca" (Gift Agr., § 1 [b]). The gift agreement obligates Omnicom to make an initial payment of $1.25 million in June 2004, without reference to the Seneca distributions (*id.*, §§ 1 [a], [d]). Payments are then due each successive June, through 2009, although Omnicom may choose to accelerate the payments (*id.*, § 1). The gift agreement also provides that, in the event that the total amount of Seneca distributions received by Omnicom is less that $7.5 million, Omnicom will pay Wharton the difference in cash or marketable securities by June 30, 2008 (*id.*, § 1 [c]).

The June 2007 agreement sets forth the intent of Omnicom and Wharton to amend the pledge and gift agreements, inasmuch as it is unclear when Omnicom will receive any distributions from Seneca, and because Omnicom and Wharton desire to establish the Omnicom marketing initiative program (June 2007 Agr. at 1). The June 2007 agreement then voids the provisions of the pledge and gift agreements tying Omnicom's payment of the pledge to the amount of the Seneca distributions received by Omnicom and substitutes a provision requiring Omnicom to pay Wharton $5.5 million upon execution of the agreement, bringing Omnicom's total gift to $7.5 million (*id.*).

Thus, in the pledge, gift and June 2007 agreements, Omnicom and Wharton merely reference the Seneca distributions as a measurement of the total amount due Wharton in a particular year. Nothing in these agreements affects Omnicom's rights appurtenant to Seneca stock ownership, including the rights to vote, to a seat on the Seneca board of directors, or to directly receive distributions from Seneca. Nothing in the agreements requires Omnicom to

arrange to have the Seneca distributions paid directly to Wharton. Nothing in the agreements affects any right accorded to Omnicom as a 40% Seneca shareholder or accords Wharton any right at all in connection with the Seneca stock. Therefore, it is clear that no transfer, as defined by the Seneca restated charter, of Omnicom's interest, financial or otherwise, in Seneca occurred.

Furthermore, the terms of the pledge, gift, and June 2007 agreements quoted above amply demonstrate that Omnicom received no offer to purchase its Seneca common stock and did not pledge to transfer such stock. Therefore, the Seneca restated charter right-of-first-refusal provision has not been triggered.

The Seneca right-of-first-refusal provision provides, in relevant part, that

> Notice of Offer: Subject to Sections 16 (a), (b) and (d), if any holder of Common Stock receives a bona fide offer for any or all of the Common Stock then owned by such holder (the 'Selling Holder') that the Selling Holder intends to accept, the Selling Holder shall deliver a written notice (a 'Notice of Offer') to the other holders of Common Stock (the 'Remaining Holders') at least 30 days in advance of such proposed sale. The Notice of Offer shall describe in reasonable detail the shares of Common Stock being offered (the 'Subject Shares'), the purchase price for the sale of the Subject Shares (the 'Target Price') and all other material terms and conditions of the offer

(Seneca Restated Charter § 16 [c] [i] [emphasis in original]).

Delaware law provides that "a right of first refusal is an inchoate, textually-based contract right that ripens into an option upon the occurrence of the event specified in the underlying contract. The terms of the option are strictly construed in accordance with the contract provisions that created the right" (*Seidensticker v Gasparilla Inn, Inc.*, No. Civ. A 2555-CC, 2007 WL 1930428, at *5 [Del Ch June 19, 2007] [internal citation omitted]).

Here, by the provision's clear and unambiguous terms, the right is triggered only when an

offer is made to purchase Seneca stock and the stockholder intends to accept the offer. In such circumstance, the investor must then advise PGNT, the other Seneca investor, through a written notice of offer which identifies the shares offered for sale, the purchase price and any other material terms and conditions of the offer. As shown above, the terms of the pledge and gift agreements unequivocally disavow the existence of such offer or intent of the contracting parties. Moreover, in the June 2007 agreement, Omnicom and Wharton modify those agreements to omit all reference to Seneca and to set forth an unconditional promise to pay a total of $7.5 million.

For the foregoing reasons, summary judgment in favor of Omnicom on the claim for breach of §16 of the Seneca restated charter is granted and the claim is dismissed.

Summary judgment in favor of Omnicom is also granted on the claim for breach of the covenant of good faith and fair dealing implied in the Seneca restated charter. Delaware law provides that "where the subject at issue is expressly covered by the contract, or where the contract is intentionally silent as to that subject, the implied duty to perform in good faith does not come into play" (*Dave Greytak Enter., Inc. v Mazda Motors of Am.*, 622 A2d 14, 23 [Del Ch], *affd* 609 A2d 668 [Del Supr 1992]). Here, PGNT alleges that Omnicom breached the implied duty of good faith and fair dealing by breaching the express right-of-first-refusal provision. In view of the Court's decision above, the claim is dismissed.

Additional discovery is not warranted in the circumstances presented here. The record is devoid of any suggestion that currently unidentified agreements exist between Omnicom and Wharton evidencing the existence of a transfer in breach of the Seneca restated charter. In addition, the gift agreement provides that "[t]his is the final and entire Agreement between the parties with respect to this gift. Except as set forth herein, there are no promises, representations

or understandings between the parties of any kind with respect to this gift" (*id.*, § 5).

The Court has considered PGNT's remaining contentions and finds them to be without merit.

Accordingly, it is

ORDERED that the motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant Omnicom Group Inc. from plaintiff as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: December 2, 2008

ENTER:

J.S.C.