Galgano & Burke, LLP v Blue Ribbon Pet Prods., Inc.
2009 NY Slip Op 30288(U)
January 29, 2009
Supreme Court, Nassau County
Docket Number: 11382-07
Judge: Michele M. Woodard
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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GALGANO & BURKE, LLP f/k/a GALGANO & BURKE, THOMAS M. GALGANO and DANIEL P. BURKE,

Plaintiffs,

-against-

BLUE RIBBON PET PRODUCTS, INC.,

Defendant.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 14
Index No.:11382/07
Motion Seq. Nos.: 01 & 02

DECISION AND ORDER

Papers Read on this Motion:

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Motion (seq. No. 1) by the attorneys for the Defendant for an order pursuant to CPLR §3212 granting summary judgment dismissing the Plaintiffs' first cause of action; and cross-motion (seq. No. 2) by the attorneys for the Plaintiffs for an order pursuant to CPLR §3212 granting Plaintiffs summary judgment in favor of the Plaintiffs are both **denied**.

The Plaintiffs represented the Defendant in a lawsuit against Wal-Mart for copyright infringement. All parties herein concede that pursuant to the terms of the Settlement Agreement

between Wal-Mart and the Defendant, the copyright infringement litigation was settled for $7.3 million. Wal-Mart paid Defendant a lump sum of $1.8 million and the balance of $5.5 million in 44 monthly installments of $125,000 each. As legal fees in the trade infringement lawsuit brought by the Defendant herein against Wal-Mart, the Plaintiff received 40% of the $1.8 million dollar lump sum payment ($720,000) and 33 1/3% of the $5.5 million balance ($1,833,333) payable by Wal-Mart in 44 monthly installments ($41,666.16). In addition to the aforesaid $2,553,333 in legal fees paid by the Defendant to the Plaintiff for representation in the trade infringement litigation, the Retainer Agreement dated March 26, 1998 between the parties herein, also provided for additional compensation (royalties) to the Plaintiff firm from the Defendant based on a percentage of sales by the Defendant to Wal-Mart. The Retainer Agreement stated

> If you [Defendant] elect to accept sales orders for the Exotic Environments aquarium ornaments from Wal-Mart Stores, Inc. or other infringers, you [Defendant] agree to also remit to us [Plaintiff] a royalty fee based on the net sales of any such Exotic Environments aquarium ornaments to said party for the term guaranteed by such party. Said royalty shall be twelve-and-one-half percent (12 ½%) if such ornaments are sold at list price. This royalty will be reduced one-half percent (0.5%) for each one percent (1%) reduction in the sale price off said list price offered to said party. In no event shall the royalty be less than five percent (5%). Said royalty payments shall be paid to us [Plaintiff] promptly upon receipt of payment for said sales.

Defendant argues that although the Retainer Agreement between the Defendant and the Plaintiffs permits the Plaintiffs to recover a royalty fee for net sales to Wal-Mart of the Exotic Environments aquarium ornaments, the Defendant did not make any sales to Wal-Mart of Exotic Environments aquarium ornaments and is therefore not entitled to additional compensation (royalties).

Plaintiffs assert that the original Retainer Agreement was modified by a letter dated June 28,

2000 and signed by the Plaintiffs and Defendant (Exhibit D Cross-Motion). Plaintiffs argue that under the modification, the Plaintiffs are entitled to a percentage of "any additional royalties" based on the net sales of "aquarium ornaments" and not only Exotic Environmental aquarium ornaments.

Defendant contends that subsequent to the Settlement Agreement with Wal-Mart, Defendant developed a new line of ornaments called Aqua Culture Aquarium Ornaments. Exhibit 3 of the affirmation in support of the cross-motion contains portions of Blue Ribbon's catalogues for Exotic Environments aquarium ornaments sold between July 2000 and July 2004, along with photographs of the Exotic Environments aquarium ornament line. Exhibit 4 of the affirmation in support of the cross-motion contains portions of the Blue Ribbon catalogues for Aqua Culture aquarium ornaments that Defendant sold to Wal-Mart between July 2000 and July 2004. Plaintiffs argue that the Modification Agreement, by using the language "and any additional royalties" broadened the universe upon which royalty compensation would be based to include the Aqua Culture aquarium ornament line, in addition to the Exotic Environments aquarium ornaments. Defendant refers to a copy of contemporaneous notes and e-mails between the Defendant and Plaintiffs and alleges that it demonstrates the July 11, 2000 modification was limited to a restructuring of the fee arrangement and had nothing to do with broadening the universe of products beyond Exotic Environments aquarium ornaments that would be the basis for additional royalty compensation to the Plaintiffs.

In construing the terms of a contract, the judicial function is to give effect to the parties' intentions (*see generally Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569; *R/S Associates v New York Job Development Authority*, 98 NY2d 29, 32; *W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162. A contract should be read as a whole to determine its purpose and intent (*see W.W.W. Assocs. v Giancontieri*, 77 NY2d 157). "[I]n searching for the probable intent of the parties, lest form swallow

substance, our goal must be to accord the words of the contract their 'fair and reasonable meaning' " (*Sutton v East Riv. Sav. Bank*, 55 NY2d 550,555 quoting *Heller v Pope*, 250 NY 132, 135. "We have long been guided by the rule that 'every contract contains an implied obligation by each party to deal fairly with the other and to eschew actions which would deprive the other party of the fruits of the agreement' " (*Miller v Almquist*, 241 AD2d 181, 184; *Greenwich Village Associates v Salle*, 110 AD2d 111, 115; *Gross v Neuman*, 53 AD2d 2, 5; *see also Dalton v Educational Testing Service*, 87 NY2d 384). Moreover, " 'the provisions of the contract delineating the rights of the parties prevail over the allegations set forth in the complaint' " (*Sterling Fifth Associates v Carpentille Corp., Inc.*, 9 AD3d 261 quoting from *Ark Bryant Park v Bryant Park Restoration Corp.*, 285 AD2d 143,150). "It is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in unequivocal language employed" (*Breed v Insurance Co. of North America*, 46 NY2d 351, 355). Accordingly, "[w]hen sophisticated and counseled business persons" "set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms' " (*Reiss v Financial Performance corp.*, 97 NY2d 195, 198; *R/S Associates v New York Job Development Authority*, *supra*; *W.W.W. Assocs. v Giancontieri, supra*). Notably, " 'courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing' " (*Schmidt v Magnetic Head Corp.*, 97 AD2d 151, 157, quoting from *Morlee Sales Corp. v Manufacturers Trust Co.*, 9 NY2d 16, 19; *see also Reiss v Financial Performance Corp., supra*, at p. 199-200). Rather, "[e]ffect and meaning must be given to every term of the contract" (*Village of Hamburg v American Ref-Fuel Co. of Niagara, L.P.*, 284 AD2d 85, 89; *see County of Columbia v Continental Ins. Co.*, 83 NY2d 618, 628) and reasonable effort must be made to harmonize all of its terms (*Two Guys from Harrison-N.Y., Inc. v S.F.R. Realty Associates*,

63 NY2d 396; *National Conversion Corp. v Cedar Bldg. Corp.*, 23 NY2d 621, 625). The contract must be interpreted so as to give effect to, not nullify, its general or primary purpose (*Williams Press, Inc. v State*, 37 NY2d 434, 435). Of course, "parties are free to make their contract and courts do not serve as business arbiters between parties in approximately equal stances" (*Kaygreen Realty Co. v Goldman*, 231 AD2d 682, 684; *CBS, Inc. v P.A. Bldg. Co.*, 200 AD2d 527). Nor will judicial interpretation relieve a party of "what it may now regard as a burdensome bargain" (*Backer Mgmt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 218-219). A flexible standard is used by Courts in determining the "meeting of the minds" element within the context of specifics of the contract (*Express Indus. and Terminal Corp. v N.Y. State Department of Transportation*, 93 NY2d 584).

While the meaning of a contract is ordinarily a question of law, when a term or clause is ambiguous and the determination of the parties' intent depends upon the credibility of extrinsic evidence, or a choice among inferences to be drawn from extrinsic evidence, then the issue is one of fact (*Amusement Bus. Underwriters v American Intl. Group*, 66 NY2d 878, 880; *Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 172).

In the within action, discovery has not been completed. All the principals have not been deposed. The Plaintiffs object to the submission by a principal of the Defendant of his contemporaneous notes and e-mails relating to the settlement of the Wal-Mart lawsuit between June 27, 2000 and July 18, 2000 bearing bates number range BR3271-BR3287 without having the opportunity to probe their veracity and contents in a deposition.

Issue finding, rather than issue determination, is the key to summary judgment (*In re Cuttitto Family Trust*, 10 AD3d 656; *Greco v Posillico*, 290 AD2d 532). "As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must

affirmatively demonstrate the merit of its claim or defense" (*Fromme v Lamour*, 292 AD2d 417; *George Larkin Trucking Co. v Lisbon Tire Mart*, 185 AD2d 614).

The original retainer agreement provided that the Plaintiffs' legal fees would be 40% of all monies received (40% of $7.3 or $2.92 million). Pursuant to the modification agreement the Plaintiffs received reduced legal fees in the sum of $2,553,333.00. Plaintiffs contend they would not have assented to a reduction of legal fees without the *quid pro quo* that the Plaintiffs receive royalties from the sale of Exotic Environments and Aqua Culture aquarium ornaments. The circumstances surrounding the modification of the original Retainer Agreement and the language inserted in the modified letter agreement raise issues of fact as to whether the Plaintiffs are entitled to recover royalties for sale by Blue Ribbon to Wal-Mart of only Exotic Environments aquarium ornaments to the exclusion of sales by Blue Ribbon to Wal-Mart of Aqua Culture aquarium ornaments in accordance with the July 19, 2000 Settlement Agreement between Blue Ribbon and Wal-Mart Stores, Inc.

In the second cause of action the Plaintiffs allege they are entitled to recover in *quantum meruit* for the reasonable value of the services they performed for Blue Ribbon. However, Plaintiffs are seeking the same relief pursuant to the terms of the Retainer Agreement and the modification agreement. Neither party denies the existence of a Retainer Agreement and Modification Agreement. The valid and express agreement between the parties with respect to the same subject matter precludes the cause of action seeking recovery based on *quantum meruit*. *See R.I. Island House LLC v North Town Phase II Houses, Inc.*, 51 AD3d 890. In *Clark-Fitzpatrick Inc. v Long Island R. Co.*, 70 NY2d 382, 388-389, the Court of Appeals dismissed the cause of action sounding in *quantum meruit* opining that "[it] is impermissible, however, to seek damages in an action sounding in quasi contact where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and

the scope of which clearly covers the dispute between the parties." Compare *Nakamura v Fujii*,253 AD2d 387, 390, where there was a bona fide dispute as to the existence of the underlying contract.

Defendant's application to dismiss the second cause of action sounding in *quantum meruit* is **granted**. Defendant's motion for summary judgment as to the first cause of action is denied. Plaintiff's cross-motion for summary judgment is **denied**. The parties shall proceed forthwith on the first cause of action.

A Certification Conference shall be held before the undersigned on February 25, 2009 at 9:30 a.m., at which time counsel for each party familiar with the case must be present and certify to the Court that discovery has been completed, settlement discussions have been unsuccessful and the case is ready for trial. Failure to comply with the terms and conditions of this order may result in sanctions. Attorney for Plaintiff is to serve a copy of this order, with notice of entry, on all counsel.

This constitutes the Decision and Order of the Court.

DATED: January 29, 2009
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

H:\Galgano v Blue Ribbon2.wpd

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