

GRM Info. Mgt. v ABC, Inc.
2009 NY Slip Op 30576(U)
March 16, 2009
Supreme Court, New York County
Docket Number: 102277/08
Judge: Marilyn Shafer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Marilyn Shaper

PART 8

Index Number : 102277/2008
GRM INFORMATION MANAGEMENT
vs.
ABC
SEQUENCE NUMBER : 001
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 is decided in accord with the annexed memorandum.

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

FILED
MAR 18 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/16/09

MARILYN SHAPER
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

-----X
GRM INFORMATION MANAGEMENT,

Plaintiff,

-against-

Index № 102277/08

ABC, Inc.,

Defendant.

-----X
MARILYN SHAFER, J.:

This is a motion by defendant ABC, Inc. (ABC) for an order, pursuant to CPLR 3212, granting partial summary judgment on its counterclaims for breach of contract, conversion, and repleven. Plaintiff GRM Information Management Services (GRM) cross-moves for an order, pursuant to CPLR 3214 (b), lifting the statutorily imposed stay of discovery.¹

GRM is a storage and records management company located in Jersey City, New Jersey, and ABC is a New York corporation with executive offices and broadcast studios located in New York City. By written contract (original contract), dated February 1, 2000, and made retroactive to October 1999, the parties agreed that GRM would provide certain storage services for ABC's file videotapes, archival records, magnetic media, microfilm, optical disks, and the like (Sensitive Materials) in exchange for monthly payments to be made in accordance with the price structure set forth in GRM's "Schedule of Charges for ABC Inc.," dated October 12, 1999, which was annexed to the original contract. It is undisputed that ABC has consistently paid monthly storage fees.

Less than three years later, GRM determined that the existing price structure needed

¹The cross motion was granted in movant's favor by prior order of this court dated March 6, 2009.

(upward) revision. In addition to the change in pricing, GRM added a new and longer contract term: "10/01/02 - 9/30/11." According to GRM, negotiations related to the proposed revisions were held by and between GRM's Executive Vice-President Jerry Glatt (Glatt) and Chief Operative Officer, Avishay Levanovsky and ABC's then Director of Procurement James Richards (Richards). Thereafter, on or about November 5, 2002, Glatt sent Richards a letter stating in relevant part:

As per our conversation, this letter will confirm our agreement regarding your renewed contract term from October 1, 2002 through September 30, 2011. Enclosed you will find an Agreement along with a Schedule of Charges dated October 1, 2002, which reflects the new pricing for storage, services and transportation through September 30, 2011. Please sign the face of the Agreement, page 4 of the Additional Terms and Conditions, and the Schedule of Charges as indicated and return to me as soon as possible.

It is undisputed that neither Richards, nor anyone else at ABC, signed and returned GRM's proposed second contract.

Apparently, in or about 2007, ABC decided to change storage facilities, and by letter dated October 19, 2007 and addressed to Glatt, Doug Golubics, "Manager, Sourcing & Procurement ABC" (Golubics), notified plaintiff of defendant's intention to terminate their storage arrangement. Specifically, Golubics stated:

Please consider this letter 30 day formal notice to terminate all currents [sic] services you provide. Iron Mountain Information Management, Inc. will be ABC's new contracted supplier for these services. Please cooperatively work with them to transfer all ABC-owned assets and materials to them in a timely manner through this transition.

Glatt responded by letter, dated October 30, 2007, stating in relevant part:

As requested in your letter, GRM will honor its obligation to work cooperatively with ABC and Iron Mountain in transferring all ABC-owned assets and materials to Iron Mountain. Likewise, GRM expects that ABC will honor its obligation to

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pay GRM the sum of \$6,643,165.10, representing the aggregate amount due to GRM under the parties' Agreement. An invoice showing the breakdown of this amount is enclosed.

As soon as this payment is received, subject to collection, GRM will be pleased to work with ABC and Iron Mountain to effectuate the transfer. Until that time, rest assured that GRM will continue to service ABC's account in accordance with the Agreement.

The parties engaged in a series of oral and written discussions, which included an e-mail sent by GRM's counsel to ABC on November 27, 2007, in which he confirmed a prior discussion regarding the permanent removal (permout) and cost estimates associated with a 60, 90, or 120-day transfer, and asking ABC how it wished to proceed. By January 7, 2008, GRM had provided ABC with an invoice and a proposed schedule of fees for the permout. The proposal broke down the fees according to number of days in which ABC wanted the task completed, identifying an alternate proposal of a 102-day rate, an 81-day rate and a 51-day rate.

In a letter, dated February 4, 2008, ABC indicated its decision to "the permanent removal of all of its property from GRM's storage facilities by April 16, 2008, which is 51 business days from today," and enclosed two checks. The first, based upon ABC's reading of the fee schedule, invoice, and original contract, was issued in the amount of \$403,775.50, and purported to represent the full amount it owed to GRM to achieve permanent removal in the shortest amount of time. The second check, in the amount of \$112,500.00, represented GRM's overtime charges which it indicated it would incur in its effort to complete the permanent removal on the 51-day, expedited basis. GRM accepted the first check (\$403,775.50) but refused the second check (\$112,500.00), indicating, by letter dated February 8, 2008, that it viewed ABC's actions as a rejection of GRM's proposal to complete the transfer on an expedited basis, and indicated that it would therefore, proceed with the permout and transfer :

in accordance with the standard industry timeframe for a project of this magnitude . . . [with the expectation] that the total transfer will take approximately sixteen months to complete. . . . GRM specifically reserves all of its rights including its right to collect (i) the storage and associated access fees assessed during this transition time period; and (ii) all charges due through September 2011 under the parties' agreement. GRM still continues to bill ABC for these charges and expects prompt payment.

Although GRM and ABC do not dispute that ABC is the owner of the Sensitive Materials, or that both contracts provide for permanent removal, in whole or in part, of the Sensitive Materials from GRM's facility, the parties' increasingly contentious correspondence culminated in the commencement of this action by service of a summons and complaint on or about April 3, 2008. Issue was joined by service of ABC's answer, including its counterclaims for breach of contract, conversion, and replevin, on or about June 9, 2008. Following a preliminary conference, the instant motions were filed on or about October 15, 2008 and October 30, 2008.

As the proponent on a motion for summary judgment, ABC "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact" (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 [2005]). To establish entitlement to judgment on both aspects of its breach of contract counterclaim, ABC must demonstrate that GRM failed to handle the permanent removal of the Sensitive Materials in accordance with the terms of the contract, and that the permout and transfer s fees that ABC tendered were consistent with the terms of the contract and that GRM's were not. To establish its counterclaims for conversion and for the entitlement to the immediate release (replevin) of the Sensitive Materials, ABC must demonstrate that: (1) it is the owner of the property in GRM's possession; (2) it made a demand for the return of its property;

and (3) GRM refused to honor the demand and continues to maintain superior control over ABC's property (see *State of New York v Seventh Regiment Fund*, 98 NY2d 249 [2002]; *I.C.C. Metals, Inc. v Municipal Warehouse Company*, 50 NY2d 657, 662 - 664 [1980]; *Employers' Fire Ins. Co. v Cotten*, 245 NY 102, 105 [1927]).

To this end, ABC submits copies of correspondence, e-mails, and fee schedules, together with the sworn affidavit of its Director of Video Resources and Digital Archives for ABC, Joel Kanoff (Kanoff), as evidence that by failing and refusing to permout and transfer the Sensitive Materials (for which all monthly storage fees have been paid) in accordance with its February 4, 2008, demand for a 51-day permout and transfer, GRM breached their contract and wrongfully detained and converted ABC's property. Accordingly, ABC seeks an injunction, enjoining GRM from detaining its property, and an order directing the immediate release and delivery of the balance of the stored property on the grounds that the property at issue is unique, irreplaceable, and time-sensitive, and that GRM's wrongful conduct effectively denies ABC access to its property, causing irreparable harm to its broadcast functions, which cannot be compensated in money damages.

With respect to ABC's counterclaim for breach of contract, the parties dispute whether the second contract took effect, and if so, at what point it became binding. ABC relies on the language of the original contract, pointing out that its addendum states, at bullet-point 1, that "[t]he term of this agreement is five years. If the contract is extended for an additional five year period at ABC's option, the maximum percentage increase for storage, services and materials shall be 12%" (Thomashower Aff in Support, Exhibit A). Therefore, it is ABC's position that, after the original contract expired on February 1, 2005, the parties' relationship continued on a

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month to month to month basis, without issue, until the summer of 2007, when ABC requested that GRM, and others, bid on a new contract for storage services for ABC's Sensitive Materials. GRM, purportedly, submitted bid proposals, which notably did not mention ABC's obligations under a second contract. After ABC selected Iron Mountain and provided GRM with the 30-day termination notice, GRM raised, for the first time, the existence of a second contract with an extended the lease term until 2011.

ABC further argues that, based on GRM's proffered invoice and schedule of permout fees, the permanent removal and transfer of its approximately 57,774 cartons and 167,476 video tapes, could be accomplished in 51-days (by April 16, 2008) if ABC paid \$403,775.50 plus \$112,500.00 in overtime charges. ABC takes the position that it made a proper written demand for its Sensitive Materials, that it tendered the \$112,500.00 to expedite the permout, even though it was not contractually obligated to do so, and that GRM failed to honor the demand. Moreover, in violation of section 7 of both the original and second contract, GRM took affirmative steps to delay the permout and impede ABC's access to its own property.

Section 7 of both contracts provide:

[t]he Depositor [ABC], his authorized agents and employees shall have access to the Sensitive Media in the Company's depository on all regular business days during regular business hours as posted at the premises. Advance notice will not be necessary unless special facilities will be required. . . . Authority to have access shall be deemed to be authority to order any and all services for the Depositor's account on any disposition of the Sensitive Media, whether such order is given in person, by telephone or in writing.

According to GRM's letter of February 8, 2008, based on its decision to "release 700 boxes and 3,000 tapes per week . . . the total transfer will take approximately sixteen months complete," (Exhibit 6, Kanoff Aff). Finding sixteen months, or until September 2009, both too

long a period of time and not in compliance with its demand, ABC charges GRM with renegeing on the agreement to complete the permout and transfer in 51 days, and with breaching the original contract to provide ABC with access to its materials on a daily basis. GRM's unilateral decision to stall the permout and transfer has allegedly caused ABC to pay additional storage fees to GRM at the same time it is paying storage fees to Iron Mountain, causing damages, minimally, in the amount of \$1,034,000.00. Moreover, ABC asserts that the Sensitive Materials are unique to ABC and virtually irreplaceable," and that the manner and speed in which GRM is transferring the stored materials, has hindered and continues to hinder ABC's ability to access and utilize its archival footage and other Sensitive Materials when it needs to, and negatively impacts its daily production and broadcast of current events (Kanoff Aff, ¶ 14).

"Traditionally, specific performance has been held to be a proper remedy in actions . . . when the uniqueness of the goods in question makes calculation of money damages too difficult or uncertain" (*Cho v 401-403 57th Street Realty Corp.*, 300 AD2d 174, 175 [1st Dept 2002]). The decision whether or not to award specific performance is based on factors which include "the difficulty of proving damages with reasonable certainty and of procuring a suitable substitute performance with a damages award (*id.*). The court finds that the Sensitive Materials are sufficiently unique to meet the standard necessary for specific performance and GRM fails to submit evidence to support its assertion that discovery is needed for the court to make this assessment.

Furthermore, GRM fails to adequately explain how its decision not to comply with ABC's 51-day permout demand, let alone to comply with GRM's earlier proposal to complete the permout and transfer within 60, 90, or 120-days, does not constitute either an interference

with, or an unauthorized exercise of dominion and control, over ABC's Sensitive Materials.

New York has long recognized that "[b]y demand and refusal a possession otherwise lawful is turned into an unlawful one. Conversion is an unauthorized assumption and exercise of the right of ownership over good belonging to another to the exclusion of the owner's rights. . . . A very slight interference with the ownership is sufficient to constitute a conversion" (*Employers' Fire Ins. Co. v Cotten*, 245 NY 102, 105 [1927] [internal citations omitted] see *Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 44 [1995]).

GRM's attempt to justify its delay in releasing the Sensitive Materials based on ABC's alleged failure to tender permout fees in accordance with the invoices, fee schedules, and second contract, is without merit. Despite the large (approximately \$6 million) discrepancy between the amount tendered and the amount demanded, the disagreement over the fees GRM is entitled to charge to complete the permout and transfer, is a contract dispute for which money damages are readily calculable, and does not provide a basis for refusing to comply with ABC's demand for an expedited release of its stored property. A bailment relationship was created when ABC delivered and GRM accepted custody of the Sensitive Materials for storage (*Howard v Handler Bros. & Winell*, 279 App Div 72 [1st Dept 1951], *aff'd* 303 NY 909 [1952]). That relationship ended and GRM became a converter of ABC's Sensitive Materials, when it refused to honor ABC's demand to permout and transfer the Sensitive Materials in the shortest period offered by GRM and selected by ABC, and instead, imposed its own 16-month schedule, significantly stalling delivery time.

ABC has established its right to repleven, and this court's order immediately releasing the balance of the Sensitive Materials is not intended to effect the merits of either party's breach of

contract claims, including the ability of GRM to litigate its claims for additional permout costs, if any, or to litigate its entitlement to storage fees until 2011.

Accordingly, it is

ORDERED that the motion by ABC for an order granting partial summary judgment in its favor is granted to the extent that, upon service of a certified copy of this order with notice of entry, plaintiff GRM Information Management shall turn over to defendant ABC, Inc., or its designee, the balance of the Sensitive Materials chattels, as referenced in the parties' pleadings, within a period of not more than 51 days from plaintiff's receipt of a certified copy of this order; and it is further

ORDERED that the balance of the action shall continue.

Dated:

3/16/09

FILED

MAR 18 2009

COUNTY CLERKS OFFICE
NEW YORK

ENTER:

MARILYN SHAFER

J.S.C.