

CBS Outdoor Inc. v Union Telecard Alliance, LLC

2009 NY Slip Op 31724(U)

July 31, 2009

Supreme Court, New York County

Docket Number: 103091/06

Judge: Marcy S. Friedman

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

PRESENT: **MARCY S. FRIEDMAN**

PART 57

Justice

Index Number : 103091/2006

CBS OUTDOOR GROUP

vs.

UNION TELECARD ALLIANCE

SEQUENCE NUMBER : 002

PARTIAL SUMMARY JUDGMENT

INDEX NO. 103091/06

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

this motion is for Partial Summary Judgment

PAPERS NUMBERED

1, 1A

2

3

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 ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

FILED

AUG 04 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/31/09

Marcy Friedman

MARCY S. FRIEDMAN, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x
CBS OUTDOOR INC., a Delaware corporation,
formerly known as VIACOM OUTDOOR INC., a
Delaware corporation,

Index No.: 103091/06

Plaintiff,

DECISION/ORDER

- against -

UNION TELECARD ALLIANCE, LLC, a
Delaware limited liability company, dba UNION
TELECOM; UNION TELECARD ARIZONA,
LLC, a Nevada limited liability company, dba
UNION TELECOM; UNION TELECOM TEXAS
LLC, a Texas limited liability company, dba
UNION TELECOM; and ALEJANDRO
CORMACK, an individual,

Defendants.

_____ x

In this action, plaintiff CBS Outdoor Inc. (“CBS”) sues defendants Union Telecard Alliance, LLC, Union Telecard Arizona, LLC, Union Telecom Texas LLC, and Alejandro Cormack (collectively “defendants”) for breach of contract for failing to pay for transit shelter advertising space that CBS provided to defendants. CBS moves for partial summary judgment dismissing the counterclaims of Union Telecard Arizona, LLC (“Telecard”) for breach of contract and fraud.¹

¹Pursuant to the parties’ stipulation dated January 14, 2009, defendants’ cross-motion to amend the complaint is withdrawn and Telecard Arizona is substituted for Union Telecom Texas, LLC as the party asserting the counterclaims.

The facts are as follows. CBS and Telecard entered into a series of written contracts in which CBS agreed to provide advertising space to Telecard, a seller of calling cards, in bus shelters in Phoenix, Arizona and Denver, Colorado. By email dated June 24, 2004, Alejandro Cormack, a manager of Union Telecom Texas, LLC who negotiated the contracts on behalf of Telecard, informed CBS's representative, Shawn Paulsen, that Telecard was cancelling the contracts due to a budget realignment. (P.'s Motion, Ex. 11.) It is undisputed that, to date, Telecard has paid CBS \$11,000 of the amount claimed on all outstanding invoices. CBS filed a summons and complaint on March 7, 2006, seeking to recover the remaining balance. (Id., Ex. 1.) Telecard filed an amended answer and counterclaims dated November 25, 2008. (See Telecard's Op., Ex. N.)

According to Telecard, its advertising campaign was directed towards Hispanic consumers in Phoenix and Denver. Telecard's first counterclaim alleges that CBS fraudulently misrepresented that it had bus shelters in Hispanic neighborhoods in Denver and would place Telecard's ads in those areas, in order to induce Telecard to enter into the agreements. Telecard alleges that CBS did not have bus shelters in those neighborhoods and actually installed the ads in non-Hispanic areas. (Answer, ¶¶ 55-57.) Telecard's second counterclaim for fraud alleges that CBS knowingly omitted to state the time it would take to install an initial set of ads in the Phoenix bus shelters and replace them with a set of follow-up ads. (Id., ¶ 63.) Telecard's third counterclaim alleges that CBS failed to place the ads on the inside walls of the Phoenix bus shelters in breach of the agreements. (Id., ¶ 68.)

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a

matter of law in directing judgment.” (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment “the opposing party must ‘show facts sufficient to require a trial of any issue of fact’ (CPLR 3212, subd. [b]).” (Zuckerman, 49 NY2d at 562.)

In seeking dismissal of Telecard’s counterclaims for fraud, plaintiff relies on a merger clause contained in paragraph 17 of the Terms and Conditions of each of the agreements, which provides that the contract “contains the full agreement of the parties, and no prior representation or assurance, verbal or written not contained herein, shall affect or alter the obligation of either party hereto.” Defendants claim that they did not receive the Terms and Conditions page (page 2) of the agreements. However, each agreement specifically states, above the signature line on which defendants signed: “The contract is subject to the terms and conditions on page 2, which is attached and incorporated herein.” Defendants are accordingly bound by the Terms and Conditions, including the merger clause. (See American Utex Intl., Inc. v ICC Corp., 74 AD2d 747, 748 [1st Dept 1980], affd 52 NY2d 888 [1981] for reasons stated below [holding plaintiff bound to arbitration provision where its buyer signed a note agreement “just above the statement which called attention to the provisions on the reverse side of the note”]; Guerra v Astoria Generating Co., L.P., 8 AD3d 617 [2d Dept 2004]; Roger's Fence, Inc. v Abele Tractor and Equipment Co., Inc., 26 AD3d 788 [4th Dept 2006].)

However, it is well settled that a general merger clause is ineffective to defeat a claim of fraud in inducing the agreement. (See Danann Realty Corp. v Harris, 5 NY2d 317, 320 [1959]; Sabo v Delman, 3 NY2d 155, 162 [1957].) “[W]here the complaint states a cause of action for

fraud, the parol evidence rule is not a bar to showing the fraud - - either in the inducement or in the execution - - despite an omnibus statement that the written instrument embodies the whole agreement, or that no representations have been made.” (Danann Realty Corp., 5 NY2d at 320.) Unlike a general merger clause, a “specific disclaimer” that a plaintiff “is not relying on any representations as to the very matter as to which it now claims it was defrauded . . . destroys the allegations in plaintiff’s complaint that the agreement was executed in reliance upon these contrary . . . representations.” (Id. at 320-321. See Citibank, N.A. v Plapinger, 66 NY2d 90 [1985].)

The merger clause at issue is clearly a general merger clause. It does not bar defendants’ evidence that plaintiff induced it to enter into the agreement for advertising services in Denver by representing that the ads would be placed in Hispanic neighborhoods. Specifically, defendants submit the testimony of Alejandro Cormack, then vice president of business development for Union Telecom Texas, that plaintiff represented that the ads would be placed in Hispanic communities. (Cormack Dep. at 99-104.) This testimony is sufficient to raise a triable issue of fact on defendants’ first counterclaim of fraudulent inducement with respect to the Denver contract.

The court reaches a different conclusion as to defendants’ second counterclaim. Defendants fail to submit evidence to show that the plaintiff’s failure to inform them of the time it would take to replace the original ads with the ads for the second part of the campaign was a material omission on which they relied to their detriment. The conclusory assertions of Telecard Arizona’s president, Harris Lyall, and of Mr. Cormack, in their affidavits in opposition to the instant motion, are insufficient to raise a triable issue of fact in this regard.

Defendants’ third counterclaim for breach of contract, based on plaintiff’s alleged

agreement to place the ads inside the bus shelters, should also be dismissed. The contracts do not contain a provision requiring placement of the ads inside, rather than outside, the shelters.

Defendants' claim of breach is therefore barred by the merger clause.

Plaintiff's claims against defendant Alejandro Cormack in his individual capacity will also be dismissed without opposition.

Finally, plaintiff fails on this record to demonstrate as a matter of law that defendants will be unable to meet the elements of proof of their claim for lost profits. (See Kenford Co. v Dome Stadium, Inc. (67 NY2d 257 [1986].) Plaintiff's argument that lost profits were not foreseeable is raised and briefed for the first time on the reply and therefore will not be considered on this motion.

It is hereby accordingly ORDERED that the motion of plaintiff CBS Outdoor Inc. for summary judgment is granted to the extent of dismissing the second and third counterclaims of defendant Union Telecard Arizona, LLC in their entirety, and it is further


ORDERED that the complaint is dismissed against defendant Alejandro Cormack; and it is further

ORDERED that the Clerk shall enter judgment accordingly, and the remaining claims are severed and shall continue; and it is further

ORDERED that the parties shall appear for a pre-trial conference in Part of this Court on September 10, 2009 at 2:30 p.m.

This constitutes the decision and order of the court.

Dated: New York, New York
July 31, 2009


MARCY FRIEDMAN, J.S.C.

FILED
AUG 04 2009
COUNTY CLERK'S OFFICE
NEW YORK