

Hallmark Capital Corp. v Courtenay

2009 NY Slip Op 33000(U)

November 18, 2009

Supreme Court, New York County

Docket Number: 600897/01

Judge: Charles E. Ramos

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

Index Number : 600897/2001

PART _____

HALLMARK CAPITAL

vs.

COURTENAY, ADRIAN H. III

INDEX NO. _____

SEQUENCE NUMBER : 006

MOTION DATE _____

SUMMARY JUDGMENT

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion


FILED

DEC 01 2009

NEW YORK
COUNTY CLERK'S OFFICE

Is decided in accordance with
accompanying memorandum decision and order.

Dated: 11/18/09


CHARLES E. RAMOS *v.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:COMMERCIAL DIVISION

-----X
HALLMARK CAPITAL CORPORATION,

Plaintiff,

-against-

ADRIAN H. COURTENAY, III,
and MILL HOLLOW CORPORATION,

Defendants,

Index No.600897/01

FILED

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NEW YORK
COUNTY
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Charles Edward Ramos, J.S.C.:

In motion sequence 006, defendants, Adrian H. Courtenay, III, and Mill Hollow Corporation (collectively "Mill Hollow"), renew their prior motion for summary judgment insofar as the Appellate Division, First Department (First Department) remanded, in its decision dated June 10, 2008, one issue not addressed by this Court in its previous ruling. The sole remaining issue to be decided pertains to plaintiff, Hallmark Capital Corporation's (Hallmark) claim for monthly retainer fees purportedly owed by defendants under the second of three engagement agreements.

Background

A detailed factual background is discussed in this Court's April 12, 2004 decision and will not be repeated here.

Procedural History

In its affirmance of this Court's determination granting Mill Hollow's motion for summary judgment,¹ Mill Hollow argues that the First Department implicitly denied summary judgment on

¹ This Court ruled, and the First Department affirmed, the dismissal of Hallmark's complaint, notwithstanding the issue on remand pertaining to monthly retainer fees. *Hallmark v Courtenay*, 52 AD3d 277 (1st Dept 2008).

Hallmark's claim for "monthly retainer fees" in its June 10, 2008 decision. That assertion is clearly belied by the First Department's language in that decision which clearly stated the following:

"Nevertheless, the court's decision in this matter did not address the corporate defendant's contractual duty to pay such a monthly retainer fee. Since the complaint seeks not only a transaction fee but also recovery of the amount owed for unpaid retainer fees, this matter must be remanded for a determination of that question."
Emphasis supplied.

Summary Judgment

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact as to the claim or claims at issue. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Failure to make such a 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 the prima facie showing has been made, the party opposing a motion for summary judgment bears the burden of "produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact" *Amatulli v Delhi Constr. Corp.*, 77 NY2d 525 (1991).

Discussion

Hallmark seeks unpaid retainer fees in the amount of approximately \$110,500 pursuant to the Financial Advisory

Agreement (FAA) dated April 29, 1998. The FAA provides that Hallmark was to serve Mill Hollow:

"as its exclusive financial advisor in connection with possible private placement of any debt or equity, the acquisition or development of any business or properties, or the sale of the Company or any of its assets, business or equity, debt or other securities..."

The FAA further provides for the duration of services and the compensation due for those services. It states:

"...the term of this Agreement and the appointment provided herein shall extend for a minimum period of two years..."

"[i]n partial payment for its services hereunder, Hallmark shall receive from the Company [Mill Hollow] a monthly retainer of \$6,500..."

The "Performance of Services" section of the FAA provides that Hallmark will work with the Company and use its "best efforts" to perform the following services:

1. Advise and assist the Company in estimating the fair market value for the Company and identifying and screening potential investors, lenders, development projects or acquisition targets.
2. Discuss and evaluate with the Company various alternative marketing strategies and advise on how to structure and implement transactions designed to further the Company's stated objectives.
3. Assist the Company in preparing a confidential descriptive memorandum, as needed of the Company and its operations and finances, including a summary of the Company's development potential and a defined business plan, if appropriate, for use in discussions with potential acquisition targets.
4. Submit names of and/or ideas for potential investors, lenders, development projects or acquisition targets to the Company for the

- purpose of establishing with acceptable parties or projects should be approached or developed.
5. Contact or help develop acceptable acquisition targets and establish and attend exploratory meeting when appropriate.
 6. Develop judgments as to the relative values and financial implications to the Company of any Proposed Transactions and then, at the request of the Company to consult with the Company and the Company's legal, accounting, or tax advisors and advise the Company on appropriate negotiating strategies leading to a conclusion of the Proposed Transactions.

Mill Hollow argues that Hallmark is precluded as a matter of law from recovery above the \$167,000 it was already paid² because it materially breached two covenants of the FAA.

Threshold Issue

Mill Hollow, for the first time on this motion, argues that as a threshold issue, Hallmark is precluded from seeking retainer fees under the FAA because it was required to be registered with the Securities Exchange Commission (SEC) as a broker-dealer. See Letter from Hallmark to SEC, February 26, 2007; Letter from SEC to Hallmark, June 11, 2007 (collectively, the "Letters"). However, this argument is time-barred.

Section 29[b][2][B] of the Securities Exchange Act sets forth the following:

"no contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or for whom any broker or dealer sells, or from or for whom any broker or dealer purchases, a security in violation

² The total compensation paid to Hallmark from Mill Hollow for services rendered (over 11 months) under any and all agreements was \$167,000.

of any rule or regulation prescribed pursuant to paragraph (1) or (2) of subsection (c) of section 78(o) of this title, unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation" 15 USCS 78cc [b][2][B] (emphasis supplied).

Notwithstanding the fact that the FAA sets forth that "Hallmark Capital is not a broker-dealer," the defense is clearly time-barred because the FAA was signed in 1998 and Mill Hollow has never before raised the defense during this protracted litigation. Furthermore, Mill Hollow cannot credibly represent that it only recently learned of this alleged violation, as the Letters have been publically available since 2007. Moreover, it appears that Mill Hollow failed to perform its own due diligence by not inquiring about Hallmark's status from either the SEC or Hallmark itself.

Disclosure

Mill Hollow argues that Hallmark breached the "Disclosure"³ provision of the FAA by its principal, Patricia Hall, disseminating the following information on her personal promotional-based website under a page entitled "Success Stories":

"A \$15 million privately held direct marketing media company [that] was poorly managed, unfocused and unprepared to take

³ The "Disclosure" provision states in relevant part: "All non-public information provided by the Company to Hallmark will be considered confidential information and shall be maintained as such by Hallmark except as required by law, until the same becomes known to third parties or the public without release thereof by Hallmark." Section V, Page 6, FAA.

advantage of strategic opportunities. Hallmark Capital provided interim COO services for eight months, overhauling a weak and ineffective corporate infrastructure and creating a strong, dynamic operating environment."

This Court does not agree. The statement does not contain any specific, identifying language that a member of the viewing public could reasonably identify or associate Mill Hollow to what Hallmark describes as a "\$15 million privately held direct marketing media company." Otherwise, Mill Hollow does not establish that such an anonymous disclosure is materially violative of the FAA.

Hallmark's statement could reasonably refer to any number of privately held direct marketing media companies that are in existence throughout the world, all with various, non-public financial worth. Similar to a defamation claim, where an aggrieved party is not expressly identified in an actionable statement, it is that party's burden to establish that the public could reasonably conclude that the statement refers them. See *Chicherchia v Cleary*, 207 AD2d 855, 855-856 (2nd Dept 1994). Here, Mill Hollow falls well short of meeting this burden. Therefore, Mill Hollow's argument that Hallmark's anonymous disclosure was in violation of the FAA is rejected.

Mill Hollow further argues that Hallmark breached the disclosure clause in the FAA by Hall's divulgence of privileged information to opposing counsel in an ongoing sexual harassment lawsuit against Mill Hollow and its principal, Adrian H.

Courtenay, III, by a former employee.⁴ Hall allegedly disclosed privileged information that she overheard during a social lunch attended by Mill Hollow's attorney, Courtenay, and Hall.⁵ Hall allegedly divulged the communication, characterized by Mill Hollow as a "legal assessment," nearly two years after the FAA was purportedly breached by Mill Hollow (and months after the FAA's initial two year term would have lapsed). It is axiomatic that one party's repudiation of a contract, as Mill Hollow purportedly did here, discharges the other party's obligations thereunder. *Marks v Smith*, 885 NYS2d 463 (1st Dept 2009). Therefore, Mill Hollow fails to make a prima facie showing of entitlement to judgment as a matter of law.

Best Efforts

The "Performance of Services" section of the FAA provides that Hallmark will work with the Company using its "best efforts" in performing the enumerated services listed above. Mill Hollow argues that Hallmark's performance was woefully inadequate and that Hallmark failed to use its best efforts to create work products required by the FAA's terms, such as the "confidential descriptive memorandum."

Hallmark asserts that it performed a multitude of tasks under the FAA including identifying twelve possible acquirers of

⁴ The sexual harassment lawsuit was entitled *Iris Rivera v Mill Hollow Corp. and Courtenay*, 96 Civ. 8150 (TPG).

⁵ Mill Hollow's attorney allegedly made the following privileged communication to Courtenay in Hall's presence: "Well, just because you [Courtenay] had sex with her [Rivera] does not make that sexual harassment."

Mill Hollow, including meeting with its competitor, Penton Media, to discuss its interest in purchasing Mill Hollow.⁶

Further, Hallmark argues that it, along with Scott DeGarmo,⁷ assisted Mill Hollow in developing an e-commerce publication called *iMarketing News*. Hallmark claims it developed strategies for publicizing the internet property in an effort to help increase Mill Hollow's value in the media world.⁸

Lastly, Hallmark argues it was not required to create a confidential descriptive memorandum, but only to update it "as needed." Hallmark asserts that it never performed an update to the memorandum because it was never asked to do so, as expressly implied by the FAA, and further, that prior unsigned versions of the FAA support this intent of the parties when the FAA was executed.

Hallmark has sufficiently raised triable issues of fact as to the extent that Hallmark employed its best efforts to satisfy the terms of the FAA. It has been held that one's "best efforts" require a pursuit of all reasonable methods to satisfy an obligation, and whether such obligation has been fulfilled will almost invariably involve a question of fact. *Kroboth v Brent*,

⁶ Despite Hallmark's alleged efforts, Mill Hollow was not acquired.

⁷ Scott DeGarmo, another advisor for Mill Hollow, was the former publisher of *Success* magazine, a publication focused on entrepreneurial advancement.

⁸ Notably, in the year 2000, Hallmark alleges that *iMarketing News* generated advertising revenue exceeding \$6 million.

215 AD2d 813 (3rd Dept 1995). This case is no exception. Summary judgment is denied in its entirety and the case to proceed to trial immediately.

Accordingly, it is

ORDERED that Mill Hollow's motion for summary judgment is denied; and it is further

ORDERED that the parties shall contact Part 53 to schedule a trial date.

Dated: November 18, 2009



CHARLES E. RAMOS

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