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6/10/10

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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

BMF MEDIA GROUP LLC,
Plaintiff,

- v -

AGLOW STUDIOS INC, JUNIA HISSA NEIVA AND GUSTAVO NEIVA DE MEDEIROS,
Defendants.

INDEX NO. 109733/09

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion by defendant Aglow Studios to dismiss plaintiff's first cause of action.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits (Memo)	3

Cross-Motion: ☐ Yes ■ No

Defendant Aglow Studios ("Aglow"), a company controlled by defendants Hissa Neiva ("Neiva") and Gustaveo Neiva de Madeiros ("Madeiros"), moves pursuant to CPLR 3211, for an order dismissing the sole cause of action, breach of contract, of plaintiff BMF Media ("BMF").

Background

Coty, Inc. ("Coty"), is the manufacturer of fragrances sold under the brand name Calvin Klein Inc. ("Calvin Klein"). Plaintiff BMF was retained by Coty, to plan and organize a promotional event for the launch of a new Calvin Klein fragrance ("the Event").

Plaintiff BMF contacted defendant Aglow Studios, pursuant to a listing for a rental penthouse apartment, located at 421 Broome Street , 5th Floor, New York, New York 10013,"(the penthouse"). The penthouse is owned by defendant Neiva, in a building that is managed and owned in majority by Red Tulip LLC.("Red Tulip").

Plaintiff BMF's President and CEO Brian Feit ("Feit"), had a meeting with defendant Madeiros in order to view the penthouse and negotiate the rental terms. Subsequently, a written agreement was entered into with defendant Aglow to rent and hold the Event at the penthouse ("the contract").

On the day of the Event, Red Tulip's attorney and representative arrived at the penthouse and presented a Court Order dated March 6, 2006, which provided in part:

> 1. . . . . Ms. Neiva will terminate the listing of the Penthouse with Sotheby's International Realty, Inc. and will not maintain any such listing except with the prior knowledge and consent of Red Tulip, LLC and its manager, 419 Broome Street, LLC.
>
> 4. If any future inquiry is made regarding the possible use of the Penthouse for film purposes or for other commercial purposes, 419 Broome Street, LLC, as the Manager of RedTulip, LLC, will be immediately notified of such inquiry. Ms. Neiva shall not have the right to give consents on behalf of Red Tulip, LLC or to negotiate terms on its behalf, and no person other than Ms. Neiva shall have the right to give consents on behalf of Ms. Neiva or to negotiate terms on her behalf.

Red Tulip informed plaintiff that if they attempted to hold the Event, the police would be called and the Event would be "shut down" (Plaintiff's complaint page 6, paragraph 26). Thus, plaintiff was not permitted to hold the Event in the penthouse.

Defendant Aglow's Motion to Dismiss

In support of its motion, defendant Aglow submits, *inter alia*, a settlement agreement between Coty and plaintiff BMF. The settlement agreement provides in part:

> WHEREAS , in connection with the Secret Obsession Event , BMF, on behalf of Coty and its licensor " Calvin Klein Fragrance (sic)", entered into an Event Contract dated March 28, 2008, aith Aglow Studios, Inc.,(" the Event Contract") for the use of 421 Broome Street , 5th Floor and Penthouse, New York, NY ()"the Event Space") . . .
>
> 2. Assignment of Causes. In exchange for consideration . . . Coty hereby assigns any existing causes of action it holds against Aglow Studios Inc., Gustava Neiva de Madeiros ("collectively the Aglow Parties"), that arise from the cancellation of the Secret Obsession Event . . .

Defendant Aglow argues that the assignment from Coty to plaintiff BMF is void. Defendant Aglow claims that the contract contained a clause which prohibits assignment without Aglow's written consent. Defendant Aglow claims that it never consented to an

assignment. Defendant Aglow also claims that since Coty was not mentioned in the contract, Coty was not a contracting party and had nothing to assign to plaintiff BMF. Accordingly, plaintiff BMF is not a real party in interest.

Defendant Aglow argues that plaintiff's claim, pursuant to the indemnity clause of the contract, is erroneous. Defendant Aglow claims that plaintiff has not stated a claim for indemnification from defendant Aglow. Defendant Aglow claims that it had no duty to provide the penthouse to a third party. Thus, the indemnity clause of the contract, is inapplicable.

Plaintiff's Opposition

Plaintiff argues that BMF is a party in interest to the contract. Plaintiff claims that defendant Aglow erred when reducing the agreement to writing, by including Calvin Klein in the contract instead of BMF. Plaintiff claims that defendant Aglow was aware that BMF's President and CEO Feit, who signed the contract, was an agent of BMF, not Calvin Klein. Plaintiff claims that the agreement and all payment arrangements and negotiations were conducted between plaintiff and defendant Aglow.

Plaintiff argues that defendant Aglow is liable to plaintiff BMF for consequential damages. Plaintiff claims that defendant Aglow knew that contracting to hold the Event at the penthouse, without Red Tulip's permission, was prohibited by a court order. Thus, defendant Aglow fraudulently induced plaintiff to enter into the contract.

Plaintiff claims that defendant Aglow was aware that plaintiff intended to spend a considerable sum of money to organize the Event. Plaintiff claims that due to the short notice of the Event's cancellation, on the day of the event, it was unable to obtain an alternate location. As a result, plaintiff incurred lost profits and expenses and was unable to fulfill its obligation to third-parties Calvin Klein and Coty. Thus, defendant Aglow is liable to plaintiff pursuant to the indemnity clause of the contract and for all reasonable and foreseeable losses that plaintiff suffered.

Defendant Aglow's Reply

Defendant Aglow claims that plaintiff's allegations are insufficient to support a cause of action for reformation based upon mutual mistake, in the drafting of the contract. Defendant Aglow claims that Calvin Klein was the party that was hosting the Event and as such Calvin Klein was named in the contract. Defendant Aglow claims that if Feit intended for plaintiff BMF to be included in the contract, he could have insisted before signing his name, as the contracting party, on the line above the name "Calvin Klein".

DISCUSSION

CPLR 3211

> CPLR 3211 [a][1] provides:
> (a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
> [1]. a defense is founded upon documentary evidence; . . .

Pursuant to CPLR 3211 (a) (1) in order to "prevail on a motion to dismiss based on documentary evidence, the documents relied upon must definitively dispose of plaintiff's claim" (*Bronxville Knolls v Webster Town Ctr. Pshp.*, 221 AD2d 248 (1 Dept 1995); *Juliano v McEntee*, 150 AD2d 524 [2d Dept 1989]; *Demas v 325 W. End Ave. Corp.*, 127 AD2d 476, [1Dept 1986]). A CPLR 3211 (a)(1) a "motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v. Mut. Life Ins. Co.*, 98 NY2d 314, 326-327 [2002]).

"The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *Polonetsky v Better Homes Depot*, 97 NY2d 46, [2001], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, [1977]). "In furtherance of this task, we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd*

Owners Corp. v. Jennifer Realty Co., supra; *Leon v Martinez*, 84 NY2d 83, 87, [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, [2001]; *Wieder v Skala*, 80 NY2d 628,[1992]). "We also accord plaintiffs the benefit of every possible favorable inference" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, supra; *Sokoloff v Harriman Estates Dev. Corp*, supra).

Defendant Aglow was contacted by plaintiff regarding the penthouse. Defendant Aglow had a meeting with plaintiff, to negotiate the rental terms of the contract. Defendant Aglow received payment from plaintiff. The Event contract, submitted by defendant, provided the terms and conditions of the agreement, which included the name of Calvin Klein as the licensee and defendant Aglow as the licensor. However, by defendant Aglow's own acknowledgment, the contract is signed by Brian Feit, the President and CEO of plaintiff BMF. Thus, plaintiff BMF media is a contracting party. Accordingly, the documentary evidence submitted by defendant Aglow does not "utterly refute[] plaintiff's factual allegations, conclusively establishing a defense as a matter of law"(*Goshen v. Mut. Life Ins. Co.*, supra). Additionally, defendants argument that plaintiff does not have a real party in interest, is without merit (see *Sosnow, Kranz & Simcoe v. Storatti Corp.*, 269 A. D. 122 [1 Dept 1945] ; *Skinner v. Klein*, 24 AD2d 433, [1 Dept 1965] ; *Faraino v. Centennial Ins. Co.*, 103 AD2d 790 [2 Dept 1984]).

Upon the foregoing papers, it is,

ORDERED that defendant Aglow's motion to dismiss is hereby denied; and it is further,

ORDERED that defendant Aglow, shall serve a copy of this order with notice of entry upon all parties.

This constitutes the Decision and Order of the Court.

Dated: 6/2/2010

Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**