

**United Mgt. Admin. & Mktg. Servs., Inc. v Interstate
Natl. Dealer Servs., Inc.**

2011 NY Slip Op 32425(U)

September 6, 2011

Supreme Court, Nassau County

Docket Number: 0127442009

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 7

**UNITED MANAGEMENT ADMINISTRATION
& MARKETING SERVICES, INC.,**

Plaintiff,

INDEX NO.: 0127442009
MOTION DATE: 7/6/2011
SEQUENCE NO.: 01, 02

- against -

**INTERSTATE NATIONAL DEALER
SERVICES, INC.,**

Defendant.

The following documents were read on this Motion:

- Motion by Plaintiff for Summary Judgment pursuant to CPLR § 3212 1.
- Cross-motion by Defendant for Summary Judgment 2.
- Defendant's Statement of Undisputed Facts pursuant to Rule 19(a) 3.
- Memorandum of Law in Support of Cross-motion 4.
- Affirmation in Support of Cross-motion and Opposition to Motion 5.
- Affidavit of Michael G. Gannon on behalf of Defendant 6.
- Reply Affirmation of Robert N. Cohen, Esq. in Further Support of Motion 7.
- Reply Affirmation of Jeffrey L. Kingsley, Esq. in Further Support of
Cross-motion 8.
- Reply Memorandum of Law in Further Support of Cross-motion 9.

PRELIMINARY STATEMENT

Plaintiff and defendant were parties to a July 1, 2003 Program Agreement, and subsequent modifications, whereby plaintiff was to sell vehicle service contracts (VSC's) for vehicles with less than 150,000 miles. Plaintiff was the marketer of the contracts, and

defendant was the administrator. This agreement was modified on or about May 13, 2005. On or about May 10, 2004, the parties executed a Profit Sharing Supplemental Agreement. Plaintiff contends that pursuant to the terms of the Agreements, they are entitled to 90% of the profits, amounting to \$2,355,010.20. Defendants disagree with the interpretation of the agreements, claim that plaintiff has received \$1,900,000 for the period of time for which claim is now made, and that they are not entitled to any further reimbursement.

BACKGROUND

The Complaint

Plaintiff alleges in the complaint that the parties executed a Program Agreement, Exh. "A" to Exh. "1" attached to Motion Sequence 1. According to that agreement, they assert that the 5-year term of the VSC's for 2003 and 2004 have expired, and under the Profit Sharing Supplemental Agreement, dated August 7, 2006 (Exh. "B" to Exh. "1"), they are entitled to the sum \$959,760.77, constituting 90% of the reserve deposits on hand. They assert that they are also entitled to 90% of the reserves on hand in the future, as calculated upon the expiration of VCS's as they expire.

The Program Agreement

Under the terms of this agreement, plaintiff ("Marketer") was to engage in the sales of service contracts under the name Ultra Protection Plan, or any other name upon which the parties agreed. Marketer was responsible for its own operating expenses. They were to transmit to defendant ("the Company") 100% of the service contract business it developed. The Company managed the plan, providing identification cards for purchasers, operating a claims service, establishing a reserve account for claims, and provided insurance to underwrite the payment of claims.

The Company charged the Marketer a reserve amount for each Service Contract sold, according to the Schedule annexed to the Agreement as Exh. "B". These fees were subject to change by the Company as required to assure the actuarial soundness of the reserves. The combination of the scheduled rates, reserve payments and Marketer's fees

are known as the Net Producer Cost, which must be remitted by the Marketer in order to make the Company responsible for any Service Contract issued by Marketer or a Producer. The term of the Agreement was 36 months, contingent upon Marketer selling in excess of 100 Service Contracts per month. An Addendum to the Program Agreement prohibited the Company from administering or insuring a program for a third party for varying periods of time if Marketer's sales exceeded certain amounts per month.

Profit Sharing Supplemental Agreement

This document, dated August 7, 2006, was intended to attach to and become a part of the Program Agreement of July 1, 2003. The purpose of the document was "to supplement said Agreement in order to share certain returns arising out of the Service Contract business developed under the Agreement". The Company agreed to "establish[ed] a Reserve Account to receive that portion of the Met Marketer Cost of Service Contracts submitted by Marketer which has been established by Company as constituting the Reserve for Claims ("Reserves") under schedules provided to Marketer from time to time by Company and as permitted under the Agreement".

The Reserve Account was to be increased only by further deposits, and be reduced only by payment of claims, either directly to third parties, or as reimbursement to the Company for payments already made, claims adjustment expenses, refunds on cancellations and for distribution as described in ¶ 3.

That paragraph provides as follows:

When it is determined by the Company on a quarterly basis that the claims experience (loss ratio) of the Marketer's Service Contract business from inception is less than 80% the Company will calculate the reserve deposited on behalf of expired contracts, less all claims, claims adjustment and expenses paid out on behalf of such contracts. If the result is a positive number then Company will distribute to Marketer that amount, less any prior distributions, in the following manner based on the Marketer Service Contract production for the previous twelve months net of cancellations:

Production	Marketer Share	Company Share
0 — 1,200 VCS's	0%	100%
1,201 and above	90%	10%

Plaintiff takes the position that the appropriate calculation of whether or not Marketer has produced more than 1,201 VCSs runs from the inception of the July 1, 2003 Agreement, and not from the expiration of the contracts, which would be five years from inception. They claim that, under the 2003 Agreement, if they produced more than 1,201 contracts during the period commencing July 1, 2003 and ending June 30, 2004, and for each 12-month period thereafter, they were entitled to 100% of the earned reserves, less claims, and claims adjustment expenses paid out on such contracts. They contend that for the first 12-month period they produced 3,313 VSCs, for the second period they produced 3,972 VSCs, and for the third, 2,288, exceeding the 1,201 figure in each of those years.

Plaintiff then refers to the Standard Actuarials produced by the Company which reflect all of the VSCs from inception through the accounting period January 2011. Plaintiff acknowledges that sales of VSCs commencing July 1, 2006 never exceeded the 1,201 annual figure, and they make no claim for the 90% share of reserves thereafter.

They claim that, according to the Standard Actuarials, they are entitled to \$2,355,010.20, less the sum of \$52,532.20, previously made as "advances of profit sharing payments" in three payments of \$20,486.20 in April 2005, \$9,130.00 in September 2006, and \$22,916 in November 2006. Plaintiff asserts that these payments constitute an acknowledgment by the Company of their obligations to make distributions of the Reserves.

Defendant Company, however, points to the last phrase of ¶ 3, which provides that the payment is ". . . based on the Marketer Service Contract production for the previous twelve months net of cancellations. Thus, they contend, when the first 2003 contracts expired in 2008, whether or not Marketer was entitled to payment from reserves was dependent on his selling more than 1,201 VSC's during the previous 12-month period. Plaintiff does not dispute the fact that for the period commencing July 1, 2007, and ending

on June 30, 2008, they did not sell 1,201 VSCs. Defendant therefore contends that they are not entitled to a share of the Reserves.

Plaintiff responds that pursuant to Gen. Ob. Law § 5-903, the automatic renewal clause in ¶ 12 of the Program Agreement was ineffective unless Company sent a notice to Marketer by certified mail, not less than 15, nor more 30 days prior to the 3-year expiration date of June 30, 2006. Defendant did not send such notice and the contract therefore automatically expired on June 30, 2006 and, for all relevant periods during which the contract was in effect, they sold more than 1,201 VCSs. They claim entitlement to 90% of the reserves as provided for in ¶ 3 of the Profit Sharing Supplemental Agreement.

DISCUSSION

Both parties claim entitlement to summary judgment under the “plain language” of the agreements. When presented with a motion for summary judgment, the function of a court is “not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact.” (*Quinn v. Krumland*, 179 A.D.2d 448, 449 — 450 [1st Dept. 1992]); See also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. (*Stillman v. Twentieth Century-Fox Corp.*, 3 N.Y.2d 395, 404 [1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. (*Moskowitz v. Garlock*, 23 A.D.2d 94 [3d Dept. 1965]); (*Crowley's Milk Co. v. Klein*, 24 A.D.2d 920 [3d Dept. 1965]). However, where a party is otherwise entitled to judgment as a matter of law, an opposing party may not simply raise a feigned issue of fact to defeat the claim. To be “material issue of fact” it “must be genuine, bona fide and substantial to require a trial”. (*Leumi Financial Corp. v. Richter*, 24 A.D.2d 855 [1st Dept. 1965]).

The evidence will be considered in a light most favorable to the opposing party.

(*Weill v. Garfield*, 21 A.D.2d 156 [3d Dept. 1964]). The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party. (*Tortorello v. Carlin*, 260 A.D.2d 201, 206 [1st Dept. 2003]). On a motion to dismiss, the court must “ ‘ accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory’ ”. (*Braddock v. Braddock*, 2009 WL 23307 [N.Y.A.D. 1st Dept. 2009]), (citing *Leon v. Martinez*, 84 N.Y.2d 83, 87 — 88 [1994]). But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney’s affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

The crux of the issue presented is the meaning of the language of ¶ 3 of the Profit Sharing Supplemental Agreement which provides that the payment to Marketer is contingent upon “ . . . Marketer Service Contract production for the previous twelve months net of cancellations: . . .”. Plaintiff contends that the reference to the “previous twelve months” refers back to the inception of the Profit Sharing Agreement, or, is at least ambiguous, and must be construed against its author, defendant, under the doctrine of *contra preferendum*.

The Court determines that a fair reading of the language does not relate to the inception of the Agreement, or the inception of any contract sold by plaintiff under the terms of the Agreement. Rather, the provision for the distribution of earned reserves is premised upon the condition that plaintiff must have sold a minimum of 1,201 contracts during the 12 months preceding the determination of whether or not there were reserves available for distribution. Plaintiff acknowledges that it did not reach that level of sales in 2008, when the earliest of the five-year contracts expired, or for any 12-month period thereafter. Plaintiff is not entitled to share in the earned reserves.

Plaintiff's motion for summary judgment is denied. Defendant's motion to dismiss the complaint is granted.

Submit Judgment.

This constitutes the Decision and Order of the Court.

Dated: September 6, 2011


J.S.C.

ENTERED
SEP 15 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE