

Fisher v Facecake Mktg. Tech., Inc.

2011 NY Slip Op 34011(U)

October 12, 2011

Sup Ct, New York County

Docket Number: 650396/11

Judge: Melvin L. Schweitzer

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

Index Number : 650396/2011
FISHER, MARK B.
vs.
FACECAKE MARKETING
SEQUENCE NUMBER : 002
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion *is by defendant to dismiss the Complaint is GRANTED per the attached Decision and Order.*

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

Dated: October 12, 2011

Melvin L. Schweitzer
MELVIN L. SCHWEITZER
J.S.C.

- 1. CHECK ONE: CASE-DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

provides that the fair market value of the stock is to be determined by the Board of Directors from all available facts. The Warrant expires on November 30, 2011.

In December 2006, Mr. Fisher and Facecake also entered into a Shareholder's Agreement with the stated purpose of controlling Facecake's management for their mutual best interests.

Paragraph 8 of the Agreement, the subject of contention in the instant action, states:

"If Shareholder owns at least 100,000 Shares, upon written request to the Secretary of the [Facecake], [Facecake] will furnished (sic) to Shareholder, within one hundred twenty (120) days after the end of its fiscal year, [Facecake's] annual audited financial statements on a confidential basis (except that, until [Facecake] has annual revenues of more than \$5,000,000 per year, such annual Financial statements need only be reviewed)."

In anticipation of the expiration date of the Warrant in November 2011, Mr. Fisher made a demand around the summer, 2010¹ to view Facecake's financial statements for the years 2006 through 2009. In response, Facecake forwarded to Mr. Fisher a document which included financial information for the period 2006 through 2008 that included Total Revenue, Gross Profit, and other information, but which did not constitute an audited or reviewed financial statement for those years.

Mr. Fisher asserts that he needs certified or reviewed financial information in order to make a determination of Facecake's financial strength and to determine the fair market value as defined in the Warrant. Mr. Fisher alleges that the information provided by Facecake thus far is not adequate for the purpose of making an educated decision regarding whether to exercise the Warrant. Mr. Fisher contends that pursuant to Paragraph 8 of the Agreement, he is entitled to be

¹ While the complaint alleges the demand was made in the summer 2010, the plaintiff's reply memorandum and supporting affidavit state the demand date as August 2009. However, New York law holds that when considering motions to dismiss, the facts alleged in the complaint are taken as true. *Breytman v Olinville Realty, LLC*, 54 App Div 3d 703, 703-704 (2d Dept 2008). Accordingly, the court will consider the date stated in the complaint as accurate.

furnished with audited or reviewed financial statements and Facecake's failure to provide them for the years 2006 through 2009 constitutes a breach of the Agreement. Accordingly, Mr. Fisher seeks to enforce his asserted right to these documents by specific performance. Mr. Fisher also seeks attorney's fees.

Facecake argues that Mr. Fisher has misinterpreted the language of Paragraph 8 of the Agreement and, in fact, is not entitled to Facecake's financial statements for the years 2006 through 2009, and Facecake thus moves to dismiss pursuant to CPLR 3211(a)(7).

Discussion

CPLR § 3211 (a) (1) provides that "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that a defense is founded upon documentary evidence." A motion to dismiss pursuant to CPLR § 3211 (a) (1) "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. of N.Y.*, 98 NY2d 314, 326 (2002). Documentary evidence includes "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable' . . . [T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity." *Fontanetta v Doe*, 73 AD3d 78, 84-86 (2d Dept 2010) (citations omitted).

Under CPLR § 3211 (a) (7), "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the pleading fails to state a cause of action." "In the context of a motion to dismiss pursuant to CPLR § 3211, the court is required to afford the pleadings a liberal construction, take the allegations of the complaint as true and

provide plaintiff the benefit of every possible inference. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.” *EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 (2005) (citations omitted). Allegations made upon information and belief “are to be considered true for the purposes of a motion to dismiss pursuant to CPLR § 3211 (a) (7).” *Roldan v Allstate Ins. Co.*, 149 AD2d 20, 40 (2d Dept 1989) (citations omitted). However, “factual allegations which fail to state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or unequivocally contradicted by documentary evidence, are not entitled to such consideration.” *Leder v Spiegel*, 31 AD3d 266, 267 (1st Dept 2006), *affd*, NY3d 836 (2007) (citations omitted).

Facecake argues that Mr. Fisher fails to state a cause of action because there has been no breach of the Agreement. Facecake contends that the language in Paragraph 8 of the Agreement does not entitle Mr. Fisher to financial statements for years previous to the year in which the request was made. Facecake asserts that because Mr. Fisher never made a request for financial information prior to 2010, these financial statements never were prepared for the years 2006 through 2009. Mr. Fisher’s request for this information was made in 2010, and Facecake has provided appropriate financial statements to Mr. Fisher for the 2010 fiscal year only.

Unambiguous terms of a contract must be interpreted in accordance with their plain meaning. *Greenfield v Philles Records*, 98 NY2d 562, 569 (2002). A contract is unambiguous if on its face it is reasonably susceptible to only one meaning. *Id.* at 570. In determining the plain meaning of the terms, courts must construe the contract so as to avoid an interpretation that would leave contractual clauses meaningless. *150 Broadway NY Assoc. v Bodner*, 14 AD3d 1, 6 (1st Dept 2004). Here, the terms of the Agreement are unambiguous and susceptible to only one

interpretation. The plain meaning of Paragraph 8 of the Agreement obligates Facecake to provide financial statements for the year in which the request was made and to deliver this information within 120 days of the end of the fiscal year.

The court concludes the plain meaning of the Agreement does not obligate Facecake to produce annual financial statements or to produce them retroactively for years during which Mr. Fisher made no initial request. As Mr. Fisher's request was made in 2010 and Facecake has duly provided financial statements for the 2010 fiscal year, Facecake's obligations under the Agreement are met. There has been no breach of contract for which the plaintiff can state a claim.

Conclusion

For the above reasons, the court is of the opinion that the plaintiff has failed to state a cause of action for breach of contract.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) is granted.

Dated: October 12, 2011

ENTER:


J.S.C.

MELVIN L. SCHWEITZER
J.S.C.