SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

----------X

OLSENHAUS PURE VEGAN, LLC,

Plaintiff,

-against-

ELECTRIC WONDERLAND, INC., d/b/a SHOWROOM SEVEN,

Defendant.

----------X

DECISION AND ORDER AFTER TRIAL

Index No. 651448/2010

HON. ANIL C. SINGH, J.:

This case was tried before the undersigned without a jury on January 8, 10, and 15, 2013. The suit was brought by Olsenhaus Pure Vegan, LLC ("Olsenhaus") against defendant Electric Wonderland, Inc. d/b/a Showroom Seven ("Showroom Seven") for breach of a written contract dated November 15, 2009. Defendant denies breaching the contract and seeks attorney's fees as prevailing party.

Olsenhaus is the inspiration of a designer, Elizabeth Olsen, and was founded in 2008. Its business model is "eco-fashion," the design and manufacture of vegan women's shoes. Olsen testified that she began receiving orders for her shoes immediately.

In order to increase sales, Olsen contacted Showroom Seven. Olsen testified that defendant represented to her that it anticipated yearly gross sales of $1,000,000

based on two fashion seasons per year. Showroom Seven demanded a 12% commission and a showroom fee of $2,000 per month. She agreed to the terms.

The parties entered into a sales agreement dated November 15, 2009, for the sale of women's shoes designed by plaintiff. There is a dispute as to the terms of the agreement – specifically, whether an addendum was part of the contract.

Olsenhaus contends that pursuant to the addendum to the agreement, Showroom Seven as the sole and exclusive sales agent agreed to represent and promote the product "in every possible way." Olsenhaus asserts further that defendant was responsible for specifically stated sales projections.

Olsen testified that defendant failed to generate any sales except for some orders from Olsenhaus' existing customers. She had e-mail correspondence with Jean-Marc Flack, a principal of Showroom Seven, as well as several meetings in April 2010 regarding sales. Showroom Seven was paid $17,000, but nothing was done by defendant. As a result, she removed her product from the showroom at the end of April 2010.

Olsen stated that after she terminated the sales agreement with Showroom Seven, she contacted her existing accounts and was able to generate gross sales of $469,000 in the remaining months of 2010.

Aalyah El-Amin, a financial consultant, was called by plaintiff on the

damages sustained by it. El-Amin opined that the revenue lost by Olsenhaus over a five-year period – assuming that the contract was renewed annually – was between six and ten million dollars. El-Amin reached this conclusion based on a sales analysis of comparable brands selling vegan products and the expectation that Olsenhaus would have sales of at least one million dollars a year.

Showroom Seven disputes breaching the contract and contends that under the agreement, it was merely required to show Olsenhaus shoes. It made efforts to sell the shoes through publicity and traffic in the showroom. Unfortunately, the shoes did not sell. Defendant maintains that five months was not sufficient time to develop the brand.

Jean-Marc Flack testified that Showroom Seven is a sales and public relations agent. Flack stated that he signed the sales agreement but never agreed to the addendum, which does not contain his signature. The Olsenhaus shoes were positioned on the first floor and shown to multiple buyers. He testified that plaintiff's product was treated like that of other customers and that it was hard to say why no sales were generated. The merchandise was loaned to the fashion press to generate publicity. Flack acknowledged discussing sales goals with Olsen – specifically, that $500,000 per fashion season was a reasonable goal.

Steven Glicksman, a sales executive who was responsible for the sale of

footwear at Showroom Seven, testified that the Olsenhaus shoes were displayed prominently in the showroom on the first floor. He sent an e-mail blast to his customers regarding the shoes. Many customers visited the showroom and were shown Olsenhaus shoes, especially during "market week."

Additionally, Glicksman stated that he made visits to retailers, including Walmart, Bloomingdale's, Nordstrom's, Macy's and Lord & Taylor, to market the shoes. Macy's and Walmart expressed interest in the shoes. However, Walmart's price point was less than the $220 price point for Olsenhaus shoes.

Glicksman testified that he had six to twelve meetings with Olsen. The two visited Walmart together. However, the relationship fell apart. In April 2010, she came to the showroom, bagged her samples and ran out. He considered calling the police as the samples were "robbed" by Olsen but never followed through.

I. The Sales Agreement and Addendum

Three versions of the agreement were introduced into evidence (plaintiff's 2 and 3 in evidence and defendant's B in evidence). The addendum is attached in plaintiff's 3 and defendant's B. However, significantly, all three agreements state in paragraph 25 that "S7 [Showroom Seven] agrees to the terms of Addendum provided by Designer- page attached." Flack's assertion that he never agreed to the terms of the addendum because it is unsigned misses the mark. By signing the sales

agreement which included paragraph 25, he bound Showroom Seven to the addendum. A party who signs a contract is bound by its terms (Da Silva v. Musso, 53 NY2d 543 [1981]). The manifestation of intent is determined objectively – here, based on the terms of the contract. A party's real or secret intent is not determinative (Brown Bros. Elec. Contrs. v. Beam Constr. Corp., 41 NY2d 398 [1977]). Accordingly, defendant is bound by the addendum.

It is axiomatic that a contract is "read as a whole to determine its purpose and intent" (W.W.W. Assoc. v. Giancontieri, 77 NY2d 157, 162 [1990]). Showroom Seven agreed to serve as "the sole and exclusive sales representative" for Olsenhaus (Agreement, paragraph 1) for a commission on 12% of net sales. The commission rate for existing Olsenhaus customers was one-half the regular commission (Addendum, paragraph 4).

Contrary to plaintiff's position, the sales agreement and addendum does not make defendant responsible for specifically stated sales projections. There is no promise that Showroom Seven would make a minimum amount of sales. In fact, there was no promise to make even a single sale. Accordingly, the fact there were no sales from accounts other than plaintiff's house accounts is not a breach of the sales agreement.

Showroom Seven agreed "to represent, promote in every way possible and

take orders for Designer, to reach growth in sales as discussed" (Addendum, paragraph 1). Showroom Seven was required to do more than treat plaintiff's product like that of other customers. It agreed to use its best efforts to represent and promote Olsenhaus shoes. Flack's testimony that the shoes were loaned to the fashion press to generate publicity is conclusory. There is no evidence as to which publications received the shoes and whether the shoes appeared in any publications as a result of the efforts, if any, taken by Showroom Seven to create publicity.

According to Glicksman, twenty-five to thirty customers came to the showroom during market week. At other times, only one or two customers came in. Therefore, more needed to be done than simply relying on customer traffic in the showroom. Glicksman's e-mail blast to promote the shoes is an ineffectual marketing tool by a professional sales agent to increase orders.

The court finds that defendant breached the Sales Agreement and Addendum by failing to use its best efforts to promote Olsenhaus shoes.

II. Damages

Plaintiff maintains that it is entitled to lost profits based on defendant's breach of the sales agreement. Common sense dictates that lost profits were foreseeable and within the contemplation of the parties because the purpose of the agreement was to generate sales. Olsenhaus contends that its lost profits can be

calculated with reasonable certainty based on the testimony of its expert witness Aalyah El-Amin.

Defendant contends that even if the agreement was breached, there are no actual damages. There was no promise in the agreement that $1,000,000 would be grossed yearly or an agreement to make a minimum sale. The lost profits sought by plaintiff were not in contemplation of the parties at the time they entered into the contract. Furthermore, defendant maintains that lost profits, as testified to by plaintiff's expert, are speculative. Olsenhaus was a new business when it entered into the sales agreement with Showroom Seven, and defendant asserts that damages cannot be established with reasonable certainty.

In order to recover lost profits, plaintiff must meet a three-prong test: 1) the loss was actually caused by the breach; 2) the amount of the loss can be established with reasonable certainty; and 3) lost profits were fairly within the contemplation of the parties at the time they entered into the sales agreement. (Kenford Co. v. County of Erie, 67 NY2d 257, 261 [1986]). Where plaintiff is a new business, it is held to a more rigorous standard in proving lost profits (Kenford Co. v. County of Erie, 73 NY2d 312 [1989]).

Here, plaintiff seeks lost profits over a five-year period. Even assuming lost profits may be awarded, the sales agreement is for the term of one year with

automatic extensions of one year (Sales Agreement, Paragraph 2). However, upon expiration of the initial term, either party can terminate the agreement on thirty days' prior written notice (Sales Agreement, Paragraph 3).

Since the agreement is terminable at will, plaintiff's attempt to seek lost profits over a five-year period is entirely speculative. It cannot be established with reasonable certainty that the parties would have continued their relationship after expiration of the one-year term.

The damages plaintiff seeks based on defendant's breach of the agreement in 2010 is lost profits of $1,000,000. Olsenhaus' loss was caused by Showroom Seven's breach of its promise to use its best efforts to market the shoes. Defendant failed to get even one new order during the five months it was showing plaintiff's shoes. After terminating the contract, plaintiff was able to procure orders in the sum of $469,000 between April and December 2010.

However, the lost profits plaintiff seeks cannot be established with reasonable certainty. Plaintiff's assertion that it would have grossed $1,000,000 for the term of the contract is fraught with speculation. Olsenhaus had been in business for approximately fifteen months prior to entering the sales agreement with defendant. Between August and December of 2008, Olsenhaus had gross sales of $60,000. Olsenhaus grossed $225,000 through November 2009. Nor do plaintiff's

earnings after the contract was terminated justify gross lost profits of $1,000,000. Plaintiff's gross profits in 2010 were $469,000. In 2011, Olsenhaus had gross profits of $233,000. The following year, her gross profits equaled $318,000. There is no sales history that remotely justifies future lost profits of $1,000,000 (Awards.com, LLC v. Kinko's Inc., 42 AD3d 178 [1st Dept., 2007] a'ffd 14 NY3d 791 [2010]).

Nor can plaintiff establish lost profits by making a comparison to other similar businesses. Given plaintiff's status as a new business, it is speculative to look at earnings of established businesses with an eco-friendly shoe line (O'Neill v. Warburg, Pincus & Co., 833 A.D.3d 281, 283 [1st Dept., 2007] ; see also 36 N.Y.Jur.2d Damages section 106).

Furthermore, lost profits were not in the contemplation of the parties at the time they entered the sales agreement. While the purpose of the contract was to generate sales, the agreement did not require defendant to place a minimum number of orders. If no orders were placed, no commission would be received. Flack's discussion of sales goals of $500,000 per fashion season was hope or expectation and is not compensable as lost profit where that goal is not met (Blinds to Go (U.S.), Inc. v. Times Plaza Development, L.P., 88 A.D.3d 838 [2d Dept., 2011]; Maimis-Knox Group, Ltd. v. Grand Central Zocalo, LLC, 5 A.D.3d 129 [1st Dept.,

2004]; Zink v. Mark Goodson Productions, Inc., 261 A.D.2d 105 [1st Dept., 1999]).

While Olsenhaus has not met its burden to establish lost profits, plaintiff is entitled to those contract damages that would put it in the same position had defendant performed (Brushton-Moira Cent. School Dist. v. Fred H. Thomas Associates, P.C., 91 NY2d 256 [1998]). Here, Showroom Seven received $17,000 as rent for showing the shoes (Sales Agreement, paragraph 8), yet failed to perform by representing and promoting Olsenhaus shoes "in every way possible." Accordingly, Olsenhaus sustained damages in the sum of $17,000.

ORDERED that the Clerk of the Court enter judgment in favor of Olsenhaus Pure Vegan, LLC against defendant Electric Wonderland, Inc. d/b/a Showroom Seven in the sum of $17,000 with interest at the statutory rate from May 1, 2010, together with costs and disbursements as taxed by the Clerk.

Date: February 11, 2013
New York, New York

Anil C. Singh
HON. ANIL C. SINGH
SUPREME COURT JUSTICE