Michael Leibman & Assoc., Inc. v Ultimate Combustion Co., Inc.
2015 NY Slip Op 30136(U)
January 29, 2015
Supreme Court, New York County
Docket Number: 653420/2012
Judge: Shirley Werner Kornreich

SHIRLEY WERNER KORNREICH J.S.C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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MICHAEL LEIBMAN & ASSOCIATES, INC.
a/k/a LEIBMAN & ASSOCIATES, INC.,

Index No.: 653420/2012

DECISION & ORDER

Plaintiff,

-against-

ULTIMATE COMBUSTION CO., INC. t/a
UCC TECHNOLOGY and NAUM STAROSELSKY,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Defendants Ultimate Combustion Co., Inc. (UCC Inc.) and Naum Staroselsky move, pursuant to CPLR 3212, for summary judgment against plaintiff Michael Leibman & Associates, Inc. (plaintiff or MLA). Defendants' motion is denied for the reasons that follow.

I. Factual Background & Procedural History

The following facts are undisputed.

MLA is a New York corporation. MLA's principal, Michael Leibman (Leibman), lives and works in New York. In 2008, Leibman began working with UCC Inc. and its principal, Staroselsky. UCC Inc. is a Florida corporation, and Staroselsky lives and works in Florida. At the time, UCC Inc. was "developing technology to improve gas mileage in diesel trucks, essentially a device which caused the fuel to be more completely and efficiently aerosolized for greater energy upon combustion." *See* Dkt. 54 at 1. Staroselsky asked Leibman, a mechanical engineer, to help him develop and market the device. In a written agreement dated August 18, 2008 (the 2008 Agreement), UCC Inc. agreed to allow MLA (referred to as a "BROKER") to "SOLICIT OFFERS FOR THE SALE" of UCC Inc., for a period of 15 weeks, to non-party

Milea Truck Sales Corp. (Milea), a trucking company that was interested in purchasing UCC Inc.'s device. *See* Dkt. 43 at 2 (capitalization in original). The agreement provided that if one of the following three conditions occurred, MLA was entitled to 10% of the purchase price and 5% of UCC Inc.'s shares: (1) MLA procured an offer from a ready, willing, and able purchaser; (2) UCC Inc. reneged on a written agreement to sell the company; or (3) UCC Inc. was sold to anyone referred to it by MLA within one year of the contract's termination. Staroselsky, who signed the 2008 Contract on behalf of UCC Inc., provided contractual warranties regarding his ownership of UCC Inc. The 2008 Contract contained a limited forum selection clause that required disputes over these warranties to be litigated in Miami-Dade County, Florida. The 2008 Contract did not contain a choice of law provision. The 2008 Agreement did contain a merger clause and prohibited oral modifications. Finally, Staroselsky personally guaranteed UCC Inc.'s performance of the 2008 Contract.

Staroselsky shipped the device to a facility owned by Milea, located in Bronx, New York. Over the next year, at that facility, Leibman performed extensive work developing the device, including installing it on trucks and conducting road testing. *See* Dkt. 55 (road test results). During the following summer, in June 2009, it became clear that a sale to Milea was not going to occur. Nonetheless, according to Leibman, the parties wished to continue working together in the hope the company could be sold to someone else. Therefore, on June 18, 2009, at 9:07 AM, Leibman sent Staroselsky an email, which attached a new proposed contract governing their relationship. *See* Dkt. 57. The email instructed Staroselsky to sign the contract and either return it by fax or email. *See id.* at 1. The following day, on June 19, 2009, at approximately 9:14

AM,[1] Staroselsky faxed a signed copy of a new agreement to Leibman, dated June 6, 2009 (the 2009 Contract). *See* Dkt. 56 at 2. The 2009 Contract refers to MLA's counterparty as "UCC Technology". Staroselsky, whose signature appears on the contract in handwriting virtually identical to that on the 2008 Contract [compare Dkt. 43 at 2, with Dkt. 56 at 2], denies signing the 2009 Contract or knowing what UCC Technology is, claiming that UCC Technology has nothing to do with defendant UCC Inc. Leibman avers that the parties colloquially referred to UCC Inc. as "UCC Technology", which is why it is denoted as such in the 2009 Contract. These, of course, are questions of facts that cannot be resolved on a summary judgment motion.

The 2009 Contract is significantly broader than the 2008 Contract, both in scope and duration. The 2009 Contract provides that Leibman will attempt to sell the company in exchange for the same amount of compensation (10% of the sale and 5% of the stock), it does not specify a particular purchaser, nor does it have a defined term. Additionally, paragraph B of the 2009 Contract provides that MLA is entitled to compensation if the company is sold to anyone during "the Period", regardless if MLA procured the buyer or had anything to do with the sale. "The Period" is not defined. In paragraph C, the 2009 Contract also makes reference to "the Sole and Exclusive period", which, also, is undefined. Additionally, paragraph E provides for a commission in the event of a sale procured by MLA, but only within 5 years of the 2009 Agreement's termination. The 2009 Contract, which was not drafted by lawyers, does not

[1] The fax appears to have been received at approximately 9:14 AM (based on the headers, the period of transmission may have been between 9:13:37 AM and 9:15 AM), was clearly sent by Staroselsky from his fax number of 305-705-0220 (305 is a Miami area code) to Leibman at his fax number of 212-916-9262. *See* Dkt. 56 at 1-2. Based on this information, and even though Leibman does not affirmatively move for summary judgment, Staroselsky's claim that he never signed the 2009 Contract and that Leibman forged his signature appears somewhat specious.

indicate how it can be terminated. These provisions, unsurprisingly, have resulted in the parties claiming that the 2009 Contract is ambiguous. Questions of fact as to the parties' intent exist.

Moreover, like the 2008 Contract, Staroselsky made representations about his ownership of UCC Inc. This time, the contract's limited forum selection clause requires litigation to be brought in "the county in which [MLA's] office is located" (i.e., New York instead of Florida). The 2009 Contract has no choice of law clause. Finally, as with the 2008 Contract, Staroselsky personally guarantees the 2009 Contract.

On January 21, 2010, at 4:12 PM, Staroselsky emailed an individual named Abhi Kothari, the President of non-party Elite Monk Media LLC, regarding a prospective sale of UCC Inc., stating: "As to our relation with Leibman & Associates, this email will confirm that UCC has a Broker's Agreement with [MLA] dated June 6, 2009 and during the ensuing 48 months they are to find a buyer or potential strategic partner to UCC. During this time please contact Michael Leibman directly with all your inquiries." *See* Dkt. 58. Approximately three hours later, at 7:11 PM, Kothari forwarded this email to Leibman along with his contact information. *See id.* Leibman avers that, while the time period referred to in the 2009 Agreement may be ambiguous, this email clearly evidences the parties' understanding that Leibman was entitled to a fee if UCC Inc. was sold within 48 months. In 2009 and 2010, Leibman continued to extensively market UCC Inc.'s device to private equity firms and governments across the world, including in Canada, the United Kingdom, South Africa, and Russia.

At some point in 2009, Leibman identified a private equity firm, non-party DAS Equity Advisors (DAS), as a potential buyer. For reasons not entirely clear to the court, at Staroselsky's direction, Leibman formed a company called Smart Fuel Technology (SFT). If DAS decided to

buy UCC Inc.'s device, SFT would first buy it from UCC Inc. and then sell the device to DAS. This proposed transaction is memorialized in an Asset Purchase Agreement between UCC Inc. and SFT, dated September 15, 2009. *See* Dkt. 45. The sale to DAS, however, never materialized. Ultimately, on March 7, 2011, UCC Inc. agreed to sell its technology to a firm called IG-Fuel Tecnologica Ltd. for $9.6 million. *See* Dkt. 60. Defendants, however, refused to pay Leibman a fee.

MLA commenced this action on September 28, 2012. The complaint (Dkt. 2), which has never been amended, asserts six causes of action, alleging breaches of defendants' payment obligations under the 2009 Contract. Defendants moved to dismiss on January 18, 2013, including on jurisdictional grounds, but withdrew the motion. They then filed an answer on February 21, 2013, which does not assert jurisdictional defenses. *See* Dkt. 22. A preliminary conference was held on April 4, 2013, and discovery ensued. MLA filed a Note of Issue on April 25, 2014. The instant summary judgment motion followed. During oral argument on October 7, 2014 [*see* Dkt. 68 (10/7/14 Tr.)], the parties were directed to submit supplemental briefs as to which law applied, which they filed on November 14, 2014. *See* Dkt. 66 & 67.

II. Discussion

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v*

Gervasio, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

A. Choice of Law

The threshold issue in this case is whether New York or Florida law applies. The 2009 Contract does not contain a choice of law clause. "The first step in any case presenting a potential choice of law issue is to determine whether there is any actual conflict between the laws of the jurisdictions involved." *Matter of Allstate Ins. Co.*, 81 NY2d 219, 223 (1993). In the event of a conflict, the "'center of gravity' or 'grouping of contacts' [is] the appropriate analytical approach to choice of law questions in contract cases." *In re Liquidation of Midland Ins. Co.*, 16 NY3d 536, 543 (2011), quoting *Zurich Ins. Co. v Shearson Lehman Hutton, Inc.*, 84 NY2d 309, 317 (1994). This approach requires "[t]he court [to] consider significant contacts such as the place of contracting, the place of negotiation and performance, the location of the subject matter of the contract, and the domicile or place of business of the contracting parties." *Jimenez v Monadnock Const., Inc.*, 109 AD3d 514, 516 (2d Dept 2013), citing *Allstate*, 81 NY2d at 227.

Leibman performed work on the device in New York and marketed it globally. UCC Inc. is a Florida corporation, Staroselsky lives in Florida, and, according to Staroselsky, the parties engaged in dealings in Florida. Both parties rely on New York's law of contractual interpretation, but defendants argue that the 2009 contract is unenforceable under Chapter 475 of the Florida Statutes (FS). In the absence of a conflict, the court will apply New York law to interpret the alleged contract. *See TBA Global, LLC v Proscenium Events, LLC*, 114 AD3d 571, 572 (1st Dept 2014) (New York law should be applied where no conflict exists). That being said, a further inquiry into the possible application of Chapter 475 of the FS must be made.

The court does not reach the issue of whether such statute applies because, even if it does, the 2009 Contract does not violate it. FS § 475.41 provides that "[n]o contract for a commission or compensation for any act or service enumerated in [§] 475.01(3) is valid unless the broker or sales associate has complied with this chapter in regard to issuance and renewal of the license at the time the act or service was performed."[2] "Such contracts are 'entirely void as a matter of public policy, and [Florida] courts have ruled that recovery may not be had either under the contract or under the theory of quantum meruit.'" *Halstead Prop. LLC v Thor Urban Investments LLC*, 2014 WL 4926337, at *2 (Sup Ct, NY County 2014) (Schweitzer, J.), quoting *Paris v Hilton*, 352 So2d 534, 535 (Fla App, 1st Dist 1977).

While Chapter 475, on its face, appears only to apply to real estate brokers, one Florida court has interpreted the statute as governing brokers of all business opportunities, including the sale of a business. *See Meteor Motors, Inc. v Thompson Halbach & Assocs.*, 914 So2d 479, 482-83 (Fla App, 4th Dist 2005). Other courts have disagreed. *See Ledecky v Source Interlink Cos.*,

[2] It is undisputed that Leibman has no such license.

2007 WL 396997, at *6 (DDC 2007) ("This Court is not bound by the holding in *Meteor Motors*, nor is it persuaded by its rationale"), citing *Kipin Indus., Inc. v Van Deilen Int'l, Inc.*, 182 F3d 490, 495 (6th Cir 1999) ("On occasion, the parties may choose a law that would declare the contract invalid. In such situations, the chosen law will not be applied by reason of the parties' choice. To do so would defeat the expectations of the parties [because] [t]he parties can be assumed to have intended that the provisions of the contract would be binding upon them. If the parties have chosen a law that would invalidate the contract, it can be assumed that they did so by mistake"), quoting Restatement (Second) of Conflict of Laws § 187, Comment e (1989); *see also Eli Lilly Do Brasil, Ltda. v Fed. Express Corp.*, 502 F3d 78, 82 (2d Cir 2007) (collecting cases on interpreting contracts when determining whether the contract is illegal).

This court takes no position on the scope of Chapter 475 because, even under *Meteor Motors*, the 2009 Contract is not illegal. In *Meteor Motors*, the issue was whether Chapter 475 was violated when a broker, who performed his services exclusively in Arizona (he corresponded with purchasers by phone and email), negotiated the sale of an automobile dealership in Florida. *See id.* at 481. The *Meteor Motors* court answered that question in the affirmative. However, in relying on well settled Florida law, the court made clear that the applicability of Chapter 475 was predicated on the fact that the real estate was in Florida and was being sold to a Florida purchaser. *See id.* at 482 ("Chapter 475 applies to a foreign broker who provides brokerage services or conducts brokerage activity in Florida"). In other words, the transaction at issue was a Florida transaction, warranting the application of Florida law. The *Meteor Motors* court cited to *Previews, Inc. v Murff*, 503 So2d 1317, 1318 (Fla App, 1st Dist 1987), which held Chapter 475 was applicable to "a Georgia real estate broker who solicited a Florida buyer to purchase

Florida real property." *Meteor Motors*, 914 So2d at 483 ("the 'foreign broker's activities were directed toward the solicitation of a purchaser in Florida' such that he had '**engaged in brokerage activities' in Florida without a license.**") (emphasis added); *see also Excel Realty Advisors, L.P. v SCP Capital, Inc.*, 101 AD3d 669, 670 (2d Dept 2012) (holding Florida and Texas brokerage licensing laws apply to plaintiff's claim "to recover a commission for its alleged efforts **in procuring the sale of properties in Florida and Texas**") (emphasis added).

Here, in contrast, though UCC Inc. is a Florida corporation, the property being sold is not real estate physically located in Florida. Indeed, the product is not located anywhere. Though the product (and its attendant trade secret and intellectual property rights) is owned by a Florida corporation, such fact has no legal relevance under the case law, nor would such relevance make sense. Under the 2008 and 2009 Contracts, the product was further developed by Leibman in New York and marketed across the world. Such efforts cannot be fairly described as a "Florida transaction". No court has held that Chapter 475 applies to all business activity relating to a product owned by a Florida corporation, regardless of where it is located and developed. Rather, and for good reason, the relevant inquiry under Florida law is whether the nature of the transaction is Floridian, a finding which would warrant invoking the protections of Florida law. Here, however, there is nothing Floridian about this case other than defendants' residence and place of business. The parties' contractual agreement is an international business arrangement, affecting Florida no more than any other impacted jurisdiction. For these reasons, even if Chapter 475 applies to the 2009 Contract, such statute does not invalidate the contract on the ground of illegality.

B. Interpreting the 2009 Contract

Turning now to the merits of the parties' contractual dispute, it is clear that the meaning of the contract cannot be resolved on a summary judgment motion.

It is well established that contracts "are construed in accord with the parties' intent." *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 (2002). "The best evidence of what parties to a written agreement intend is what they say in their writing. Therefore, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Id.* (citations omitted). "A contract is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion." *Id.*, quoting *Breed v Ins. Co. of N. Am.*, 46 NY2d 351, 355 (1978). "Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity." *Greenfield*, 98 NY2d at 569-70.

The issue of whether a contract is ambiguous "is a question of law to be resolved by the courts." *W.W.W. Assocs., Inc. v Giancontieri*, 77 NY2d 157, 162 (1990). If the court finds the contact ambiguous, the court may "consider extrinsic evidence outside the four corners of the contract." *Kolbe v Tibbetts*, 22 NY3d 344, 355 (2013); *see Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 (2013) ("Parol evidence – evidence outside the four corners of the document – is admissible only if a court finds an ambiguity in the contract."). When the extrinsic evidence is inconclusive, the parties' intent is a question of fact and summary judgment should be denied. *American Exp. Bank Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 (1st Dept 1990).

For the reasons set forth earlier, the 2009 Contract's duration is ambiguous. Questions of fact exist as to the parties' intent with respect to the contract's duration. Defendants argue the 2009 Contract's ambiguity as to the applicable duration renders it without an essential term and, thereby, unenforceable. Defendants are wrong.

It is well settled that "[i]n the absence of an express term fixing the duration of a contract, the courts may inquire into the intent of the parties and supply the missing term if a duration may be fairly and reasonably fixed by the surrounding circumstances and the parties' intent." *Haines v City of New York*, 41 NY2d 769, 772 (1977). When a contract, such as a "Commission Agreement," does not contain a "definite term of duration," the contact is "terminable at will." *Better Living Now, Inc. v Image Too, Inc.*, 67 AD3d 940, 941 (2d Dept 2009), citing *Double Fortune Prop. Investors Corp. v Gordon*, 55 AD3d 406, 407 (1st Dept 2008) ("The escrow agreement contained no definite term and therefore was terminable at will"), citing *Interweb, Inc. v iPayment, Inc.*, 12 AD3d 164, 165 (1st Dept 2004) ("The agreement between the parties solely concerned the limited service of processing plaintiff's customers' credit card transactions and failed to contain a term certain for its duration. Thus, the agreement was terminable at will"); *see also Ashland Mgmt. Inc. v Altair Investments NA*, 59 AD3d 97, 104 (1st Dept 2008) (even confidentially agreements (restrictive covenants subject to extra enforceability limitations) "not limited in duration [are] not necessarily [] ipso facto unenforceable.") In other words, based on the parties' intent, a contract without a definitive term will either be deemed to be at will or, if a term can reasonably be ascertained, such a term will be applied. Contrary to defendants' contentions, a missing term as to duration does not render the 2009 Contract unenforceable.[3]

[3] Defendants' reliance on the principle that "agreements to agree" are unenforceable is

Finally, defendants' arguments that the 2009 Contract is unconscionable or that the prospective SFT transaction makes it a nullity are unavailing. Paying MLA a 10% commission plus 5% of UCC Inc.'s stock is not remotely unreasonable in light of Leibman's extensive efforts to develop and market the product. This compensation does not rise to the level of "delusional"; hence, it is not unconscionable. *See B.D. Estate Planning Corp. v Trachtenberg*, 114 AD3d 477, 478 (1st Dept 2014).[4] There is no showing of procedural unfairness in the creation of the contract or lack of meaningful choice on the part of Staroselsky. Additionally, the proposed SFT transaction, which did not lead to a sale to DAS, does not impact MLA's compensation rights under the 2009 Contract, nor do defendants provide a coherent explanation for why that is the case. Accordingly, it is

ORDERED that the motion by defendants Ultimate Combustion Co., Inc. and Naum Staroselsky for summary judgment against plaintiff Michael Leibman & Associates, Inc. is denied; and it is further

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misplaced. *See Joseph Martin, Jr., Delicatessen, Inc. v Schumacher*, 52 NY2d 105, 109 (1981) ("a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable."). That doctrine presumes that the parties required further negations – that is, no meeting of the minds had been reached, and hence no contract exists. *See Cobble Hill Nursing Home, Inc. v Henry & Warren Corp.*, 74 NY2d 475, 482 (1989) ("If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract."). Here, in contrast, nothing in the 2009 Contract suggests that future negotiations would occur or that there had not been a meeting of the minds regarding material terms.

[4] *Aff'g* 2013 WL 839779, at *4 (Sup Ct, NY County 2013) (""It is well settled that '[a] determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made-i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. The procedural element of unconscionability requires an examination of the contract formation process and the alleged lack of meaningful choice.'"), quoting *Lawrence v Miller*, 48 AD3d 1, 5 (1st Dept 2007), quoting *Gillman v Chase Manhattan Bank, N.A.*, 73 NY2d 1 (1988).

ORDERED that a pre-trial conference will be held on February 19, 2015 at 11:30 am, unless an appeal is noticed beforehand, in which case the parties shall jointly call the court to adjourn the pre-trial conference.

Dated: January 29, 2015

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C