

Threadstone Advisors, LLC v Success Apparel Inc.
2015 NY Slip Op 31003(U)
June 11, 2015
Supreme Court, New York County
Docket Number: 654320/2013
Judge: Shirley Werner Kornreich
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SHIRLEY WERNER KORNREICH
J.S.C.

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

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THREADSTONE ADVISORS, LLC,

Index No.: 654320/2013

Plaintiff,

DECISION & ORDER

-against-

SUCCESS APPAREL INC.,

Defendant.

-----X
SHIRLEY WERNER KORNREICH, J.:

Plaintiff Threadstone Advisors, LLC (Threadstone) moves, pursuant to CPLR 3212, for summary judgment against defendant Success Apparel Inc. (Success). Success opposes and cross-moves for summary judgment. The motion and cross-motion are granted in part and denied in part for the reasons that follow.

I. Procedural History & Factual Background

The material facts are not in dispute.

Threadstone provides advisory services to companies to assist them with mergers and sales of their businesses. Until its sale to non-party Americo Group, Inc. (Americo) on August 30, 2013, Success was a children’s apparel merchant and wholesaler. In this action, Threadstone seeks a \$250,000 fee for the services it provided Success in connection with its sale to Americo. Americo purchased Success for \$2.25 million.

In January 2013, Gila Goodman, Success’ owner and CEO, contacted William Susman, a Managing Director at Threadstone, to discuss the possible retention of Threadstone to advise Success on a possible sale of its business. After numerous meetings, Goodman decided to hire Threadstone. She did so by executing a letter agreement, dated January 18, 2013, on behalf of

Success, which governs the terms of Threadstone's engagement (the Agreement).¹ *See* Dkt. 21.

The Agreement sets forth the scope of Threadstone's services, which included familiarizing itself with Success' operations, assisting Success in negotiating a potential sale, and preparing marketing materials and a formal confidential information memorandum (the CIM). Most pertinent to this case, section 1(d) provides that Threadstone shall:

With the assistance of [Success], identify, update and review with Success on an ongoing basis a list (the "List") of parties that Threadstone and [Success], in their reasonable business judgment, believe are prospective buyers of [Success].

See Dkt. 21 at 1.

Section 2(a) of the Agreement sets forth Threadstone's compensation:

In the event of a Sale Transaction (i) with any party during the term of Threadstone's engagement, or (ii) with any party named on the target List at any time during the 6 months following the effective date of [Success'] termination of Threadstone's engagement, then [Success] would pay Threadstone a fee.

See id. at 2. The fee was 2.5% of the sale price up to \$15 million and 4% of all amounts in excess of \$15 million. *Id.* The minimum fee was \$250,000. *Id.* Section 2(b) provides:

In addition to the fees payable to Threadstone, [Success] agrees to reimburse Threadstone upon request for its reasonable out of pocket expenses incurred with respect to the engagement, which may include but shall not be limited to, legal, travel, meals and lodging, photocopying, telephone, facsimile and courier expenses.

See id.

¹ Though not addressed by the parties, section 13 provides that the Agreement is governed by Delaware law (though the Agreement does have a New York forum selection clause). Since the parties do not argue that the applicable Delaware contract law differs from New York law, the court applies New York law. It also bears mentioning that Success' counsel did not cite to a single source of legal authority to support its arguments. The record is devoid of any attorney argument on behalf of Success, whose counsel did not file a memorandum of law or attorneys' affirmation. Success merely submitted affidavits from Goodman.

Section 4 provides that the term of the Agreement is 6 months. Hence, if Success was sold between January 18, 2013 and July 18, 2013, Threadstone would get a fee, no matter the identity of the buyer or the level of Threadstone's involvement in the sale. If Success was sold between July 19, 2013 and January 18, 2014, Threadstone would be entitled to a fee only if the buyer was on the target List. If Success was sold after January 18, 2014, Threadstone would get nothing.

During Threadstone's retention, it performed pursuant to the Agreement. Success does not argue otherwise. In April 2013, during Threadstone's engagement, Americo offered to purchase Success. Threadstone provided Americo with the CIM and an NDA, and Americo's offer is noted in Threadstone's May 2013 presentation to Success, titled "Overview of Process and Buyers." *See* Dkt. 23. Success, nonetheless, seeks to avoid paying Threadstone's fee based on Threadstone's supposed failure to place the eventual buyer, Americo, on the List. Yet, Americo was, indeed, on a list Threadstone kept of potential buyers (*see* Dkt. 25),² and for good reason. It is undisputed that Americo was a potential buyer whose offer was evaluated by Threadstone. As discussed below, the fact that Success did not approve of Americo's placement on the List has no legal relevance since the Agreement contains no such requirement.

After the sale to Americo on August 30, 2013, Threadstone demanded that Success pay its \$250,000 fee. Success refused. Consequently, Threadstone commenced this action on December 16, 2013. Threadstone's complaint, which has never been amended, asserts three causes of action: (1) breach contract (to collect its fee); (2) breach of contract (to recover its legal expenses under section 2(b)); and (3) an accounting to ensure that it is only entitled to the

² Success' insinuation that the List was generated for the purpose of litigation is an argument the court will not consider. If Success wanted to prove that the List (a spreadsheet, likely saved as an Excel or Word file) was created after-the-fact, it could have and should have sought the metadata for the file containing the list.

minimum fee of \$250,000. Success filed an answer on January 28, 2014. *See* Dkt. 4. A preliminary conference was held on March 27, 2014. *See* Dkt. 10. After the parties completed discovery, Threadstone filed a Note of Issue on October 10, 2014. Threadstone moved for summary judgment on November 10, 2014, and Success cross-moved on December 5, 2014. Oral argument was held on April 21, 2015. *See* Dkt. 49 (4/21/15 Tr.).

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).

Success' argument – that a prospective purchaser is not considered to be on the List without Success' prior approval – is predicated on a fallacy. The Agreement contains no such requirement. Rather, the obligation to maintain the List, pursuant section 1(d), is Threadstone's. Threadstone was to create the List “[w]ith the assistance of [Success]” and “identify, update and review [the List] with Success.” The Agreement, however, does not contain a formal procedure for determining how or when a prospective purchaser may be placed on this List. Instead, the List may contain whoever “Threadstone and [Success], in their reasonable business judgment, believe are prospective buyers of [Success].” There is no question of fact that both Threadstone and Success believed Americo was a prospective purchaser. This is reflected in Threadstone's and Success' correspondence, the May 2013 presentation, and the List itself.

Moreover, the amount of work Threadstone performed to aid Success with the Americo sale is not relevant to whether Threadstone is entitled to a fee under the Agreement. The Agreement merely requires that Americo be on the List. No reasonable finder of fact could determine that Americo's placement on the List was not an exercise of Threadstone's “reasonable business judgment.” Americo was clearly a legitimate contender to purchase Success and, therefore, Americo's placement on the List cannot reasonably be disputed.

Success' argument that a \$250,000 minimum fee is inequitable is of no moment because the parties, who are sophisticated businesspeople, expressly agreed to a minimum fee in the Agreement. Success does not cite any legal authority for the proposition that a minimum fee may be considered inequitable even though the parties expressly agreed to it. On the contrary, “a court is not free to alter the contract to reflect its personal notions of fairness and equity.”

Greenfield v Philles Records, Inc., 98 NY2d 562, 569 (2002). Summary judgment, therefore, is granted to Threadstone on its claim for a \$250,000 minimum fee.

That being said, Threadstone is not entitled to recover its attorneys' fees. Section 2(b) merely entitles Threadstone to its costs incurred during the engagement. And even if section 2(b) arguably could be read as providing for attorneys' fees in this action, such ambiguity precludes an award of fees. It is well settled that prevailing party attorneys' fees will not be awarded by virtue of a contractual agreement unless such agreement makes the parties' intent "unmistakably clear." See *Gotham Partners, L.P. v High River Ltd. Partnership*, 76 AD3d 203, 204-09 (1st Dept 2010) ("The *Hooper* standard requires more than merely an arguable inference of what the parties must have meant; the intention to authorize an award of fees to the prevailing party in such circumstances must be virtually inescapable"), accord *Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487 (1989).

Finally, calculating the total amount of Threadstone's fee is somewhat complicated by the fact that Success may continue to receive payments from Americo until early 2018. The Asset Purchase Agreement between Success and Americo, dated August 30, 2013 (the APA), provides that Success is entitled to a "Purchase Price" of \$2.25 million plus an "Earn Out", "a sum equal to [1.5%] of the Net Sales on a quarterly basis for the calendar years 2014, 2015, 2016 and 2017."³ See Dkt. 26 at 4. Under the Agreement, the Earn Out is part of the "Transaction Value" used to compute Threadstone's fee, because Transaction Value is defined to mean "total consideration" received by Success. See Dkt. 21 at 2. The Agreement specifically includes an "earn-out or contingent payment" as a form of total consideration. See *id.*

³ The payments are due 30 days after the end of each calendar quarter, making the last payment due and the end of January 2018.

It is unclear from the record how much Success has received in earn-out payments to date and impossible to know the total Earn-Out payments Success will receive through the end of 2017. Yet, Success' receipt of the Earn-Out does not necessarily mean Threadstone is entitled to a fee in excess of \$250,000. \$250,000 is approximately 11% of the \$2.25 million purchase price. A \$250,000 fee would be a 2.5% commission on a \$10 million purchase price. Hence, in order for Threadstone to be entitled to more than the minimum \$250,000 fee, Success' total Earn-Out payments would have to exceed \$7.75 million. This seems unlikely. In the event this occurs, the relief set forth below will ensure Threadstone is informed of the quarterly Earn-Out payments, so if Success receives more than \$7.75 million, Threadstone may collect the appropriate additional fee: $(2.5\% * (\$2.25 \text{ million} + \text{total Earn-Out payments})) - \$250,000$.⁴ Accordingly, it is

ORDERED that the parties' summary judgment motions are decided as follows: (1) Threadstone is granted summary judgment on its first cause of action for the \$250,000 minimum fee under the Agreement; (2) summary judgment is granted to Success on Threadstone's second cause of action for attorneys' fees, which is dismissed; and (3) summary judgment is granted to Threadstone on its third cause of action for an accounting to the extent set forth below; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff Threadstone Advisors, LLC and against defendant Success Apparel Inc. in the amount of \$250,000 plus 9% statutory pre-judgment interest from September 1, 2013 to the date judgment is entered; and it is further

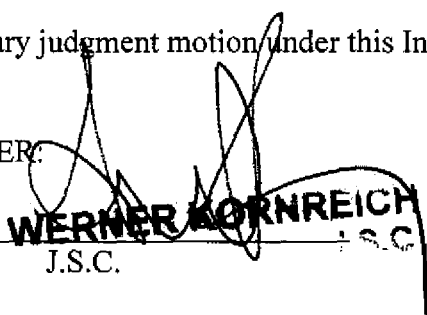
⁴ If the Earn-Out renders the total consideration to be in excess of \$15 million, the court assumes the parties can do the appropriate arithmetic to compute the 4% of the amount in excess of \$15 million Threadstone would be entitled to.

ORDERED that within 14 days of entry of this order on the NYSCEF system, Success shall provide Threadstone with a record of all Earn-Out payments received under section 1.6.3 of the APA; and it is further

ORDERED that for each calendar quarter from now until the end of 2017, within 60 days after the end of each calendar quarter (i.e., 30 days after each quarterly Earn-Out payment is due), Success must provide Threadstone with a record of its quarterly Earn-Out payment; and it is further

ORDERED that if Success' total Earn-Out payments exceed \$7.75 million, Success shall be liable to Threadstone in the amount discussed in this decision and, if Success does not remit payment, Threadstone's claim for such amounts is severed from the judgment entered in this action and may be sought by the filing of a summary judgment motion under this Index Number.

Dated: June 11, 2015

ENTER: 
SHIRLEY WERNER KORNREICH
J.S.C.