Rivera v Cumulus Media, Inc.
2016 NY Slip Op 30870(U)
May 9, 2016
Supreme Court, New York County
Docket Number: 654121/2015
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 45

----------X

GERALDO RIVERA and MARAVILLA PRODUCTION COMPANY, INC.,

Plaintiffs,

-against-

CUMULUS MEDIA, INC. and RADIO NETWORKS, LLC,

Defendants.

----------X

DECISION AND ORDER

Index No. 654121/2015

HON. ANIL C. SINGH, J.S.C.:

Defendants Cumulus Media, Inc. ("Cumulus") and Radio Networks, LLC ("Radio Networks") move pursuant to CPLR 3211 to dismiss the complaint in this commercial contract action. Plaintiffs oppose the motion.

BACKGROUND

On August 13, 2012, Cumulus's affiliate, Radio Networks, and defendant Maravilla Production Company, Inc. ("Maravilla"), the production company that represents plaintiff Geraldo Rivera ("Rivera"), executed a letter agreement under which Rivera would host a radio program for Radio Networks (the "Rivera contract"). *See* notice of motion, Bloom affirmation, ¶ 5; exhibit B. The relevant portions of the Rivera contract provide as follows:

> 1. Nature and Use of Services
>
> (a) [Maravilla] agrees to furnish the services of [Rivera], which services are of the essence of this Agreement, to render artistic and professional services as host of a 4-hour syndicated radio program which will be broadcast live Monday-Friday between the hours of 9:00 a.m. and 1:00 p.m. Eastern Time and 'best of' programs which may be distributed by [Radio Network] on weekends and other times when [Rivera] is unavailable to provide his services ('the Programs'). . . .

***

3. Term, Right of First Negotiation/First Refusal and Termination

(a) The term of this Agreement ('Term') shall be for a period commencing on August 13, 2012 and expiring on December 31, 2015, unless sooner terminated as hereinafter provided. . . .

***

17. Miscellaneous Provisions

(a) This is a 'pay-or-play' Agreement and nothing herein shall be construed to require [Radio Network] to utilize [Maravilla]'s or [Rivera]'s services. . . .

(b) This Agreement does not constitute a commitment of [Radio Network] with regard to [Maravilla]'s engagement, express or implied, other than to the extent expressly provided for herein. In the event that [Maravilla]'s engagement continues for any period of time following the stated expiration date of this Agreement, unless and until agreed to in an new subscribed written document, such engagement or any continuation thereof is 'at will,' and may be terminated without obligation at any time by either party's giving notice to the other, and all terms and conditions set forth in this Agreement shall continue to remain in full force and effect and shall be binding on both [Maravilla] and [Radio Networks] until such time as such engagement is terminated.

Id.; exhibit B.

Plaintiffs acknowledge that the Rivera contract expired on December 31, 2015, but allege that in October of that year, Cumulus's executive vice president, John Dickey (Dickey), orally proposed an extension of the Rivera contract on terms that varied from the original. *See* notice of motion, exhibit A (complaint), ¶¶ 15-30. Plaintiffs also assert that Dickey later reneged on the 2016 agreement, and refused to reduce it to writing or deliver it to them. *Id.* Defendants dispute that any such agreement ever existed. *Id.*; Bloom affirmation, ¶¶ 9-11, 15-19.

Plaintiffs commenced the instant action by filing a summons and complaint on December 9, 2015, alleging causes of action for: 1) anticipatory breach of contract; and 2) promissory

estoppel. *See* notice of motion, exhibit A. Defendants' motion to dismiss is now before the Court.

DISCUSSION

When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211(a), the test "'is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained.'" *Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d 168, 176 (1st Dept 1998), quoting *Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46, 48 (1st Dept 1990). To this end, the court must accept all of the facts alleged in the complaint as true, and determine whether they fit within any "cognizable legal theory." *See e.g. Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 303 (2001). It has been held, however, that where the documentary evidence submitted flatly contradicts the plaintiff's factual claims, the entitlement to the presumption of truth and the favorable inferences are both rebutted. *Scott v Bell Atlantic Corp.*, 282 AD2d 180, 183 (1st Dept 2001), *affd as mod Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 (2002), citing *Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 (1st Dept 1994). Here, defendants argue that both of plaintiffs' causes of action should be dismissed, as a matter of law, because their respective allegations are belied by the documentary evidence.

Plaintiffs' first cause of action alleges anticipatory breach of contract. Pursuant to New York law, a complaint fails to state a cause of action for repudiation/anticipatory breach of contract where "it contains no allegation of a definite and final communication by defendant . . . of its intention to forgo its obligations under the [contract]." *See Jacobs Private Equity, LLC v*

450 Park LLC, 22 AD3d 347, 347 (1st Dept 2005). Here, the relevant portion of the complaint states as follows:

> 32. The 2016 Agreement constituted a valid oral agreement for personal services: Cumulus agreed that it would pay $600,000.00 to [Rivera] on a 'pay or play' basis, as the parties had previously agreed in the 2012 Agreement. In return, [Rivera] agreed to host a daily talk news radio series on Cumulus's radio station, WABC. Under this agreement, [Rivera] agreed to provide services as a regular radio broadcast host exclusively to Cumulus beginning on or about January 1, 2016 for a period of not more than one year.
>
> 33. On or about October 20, 2015, prior to the time for performance, Cumulus repudiated the 2016 Agreement by wrongfully claiming no such agreement existed. In doing so, Cumulus declared their intention not to fulfill their contractual duty to pay [Rivera] as required under the 2016 Agreement.

See notice of motion, exhibit A, ¶¶ 32-33.

Defendants assert that "the 2016 agreement" that plaintiffs base their cause of action on was not a valid contract because the parties never agreed to be bound by its terms, and also that, in any event, such an oral agreement was barred by paragraph 17 (b) of the Rivera contract. *See* defendants' memorandum of law at 7-13. Plaintiffs respond that defendants had waived the limitation on oral agreements set forth in the Rivera contract by their conduct in "performing under oral modifications." *See* plaintiffs' memorandum of law at 9-13. Defendants reply that "plaintiffs falsely argue that the [Rivera contract] is silent on the parties' ability to enter into a new oral agreement . . . [however] this argument . . . is contradicted by the explicit terms of [that] agreement." *See* defendants' reply memorandum at 7-9.

After considering the pleadings carefully in the light most favorable to plaintiffs, the court nevertheless finds for defendants. It is clear that the Rivera contract both contemplated that the parties might continue plaintiffs' employment relationship after the contract expired, and also

provided that any agreement to formalize that continued employment relationship would have to be reduced to writing and signed in order to be enforceable. *See* notice of motion, exhibit B, ¶ 17.

Plaintiffs' argument that the parties' continuation of their employment relationship on allegedly modified terms somehow constitutes a waiver of the Rivera contract is unpersuasive. That contract also plainly provides that such behavior would give a party the right to deem the agreement terminated, and provides for a procedure for an aggrieved party to follow in that event. Plaintiffs have made no such claim. Instead, they merely claim that, after the Rivera contract expired on December 31, 2015, they continued their "pay or play" relationship with defendants as they had before. As a result, they are now "at will" employees, as the Rivera contract provides, until or unless they execute a new written agreement with defendants. The alleged 2016 oral contract did not change this, and cannot serve as the basis for plaintiffs' anticipatory repudiation claim, as a matter of law, because it does not constitute an "allegation of a definite and final communication by defendant . . . of its intention to forgo its obligations under the" Rivera contract, under which any such purported change would be invalid unless it was in writing and executed. *Jacobs Private Equity, LLC v 450 Park LLC*, 22 AD3d at 347. Therefore, the Court finds that plaintiffs' first cause of action should be dismissed.

Plaintiffs' second cause of action invokes the doctrine of promissory estoppel. Pursuant to New York law, "[t]he elements of promissory estoppel are: a clear and unambiguous promise; a reasonable and foreseeable reliance by the party to whom the promise is made; and an injury sustained by the party asserting the estoppel by reason of his reliance." *Ripple's of Clearview v Le Havre Assoc.*, 88 AD2d 120, 122 (2d[1] Dept 1982), citing *King & Son v De Santis Constr. No.*

2 Corp., 97 Misc 2d 1063 (Sup Ct, NY County 1977). Here, the relevant portion of the complaint states as follows:

> 36. On or about July 30, 2015, Dickey, on behalf of Cumulus, clearly and unambiguously promised to retain [Rivera] as a radio broadcaster on an exclusive basis for a period of not more than one year commencing on January 1, 2016 in return for $600,000.00 on a 'pay or play' basis, as the parties had previously agreed under the 2012 Agreement.
>
> 37. As Executive Vice President of Cumulus, Dickey had both the actual and apparent authority to make such a promise on Cumulus's behalf.
>
> 38. In reliance on Dickey's statements to his agent on July 30, 2015 and Cumulus's subsequent statements, [Rivera] refrained from seeking out alternative employment as a radio news broadcaster in 2016. [Rivera] has been damaged by his reliance on Cumulus's promise, including by having lost the opportunity to seek alternative employment between July and November 2015, which is when radio stations would have sought to hire additional broadcasters and correspondents to cover the 2016 presidential primaries and national election.
>
> 39. [Rivera]'s reliance was both reasonable and foreseeable by Cumulus because it was the natural result of Dickey's promise to hire [Rivera] on an exclusive, 'pay or play' basis. Additionally, [Rivera]'s reliance was reasonable and foreseeable based on the custom and practice of the radio broadcasting industry and the parties' prior course of dealing.

See notice of motion, exhibit A, ¶¶ 36-39. Defendants argue that this claim, too, fails, as a matter of law, because plaintiffs cannot prove "reasonable reliance" on the alleged oral 2016 agreement in view of the Rivera contract's "no oral modification" clause. *See* defendants' memorandum of law at 14-18. Plaintiffs respond that "defendants had a documented history of proposing, accepting and performing according to orally agreed terms." *See* plaintiffs' memorandum of law at 17. Defendants' reply papers restate their original argument, and also note that "an untenable situation would result if, notwithstanding the existence of a written, enforceable contract, a party could sue for promissory estoppel based on contradictory promises that it allegedly relied on."

See defendants' reply memorandum at 16-18.

After reviewing the controlling law, the Court finds for defendants again. The First Department has long acknowledged that the existence of a valid contract containing a "no-oral-modification clause" precludes an aggrieved party from proving the "reasonable reliance" element of a promissory estoppel claim. *See e.g. Provident Loan Socy. of N.Y. v 190 E. 72nd St. Corp.*, 78 AD3d 501, 503 (1st Dept 2010), citing *Hollinger Digital v LookSmart, Ltd.*, 267 AD2d 77 (1st Dept 1999). Here, the Rivera contract plainly contains such a clause. As a result, plaintiffs cannot prove "reasonable reliance" on the alleged 2016 oral agreement, as a matter of law. Therefore, the Court finds that plaintiffs' second cause of action must also be dismissed.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted, and the complaint is dismissed, with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendants.

Dated: New York, New York
May 9, 2016

ENTER:

Hon. Anil C. Singh, J.S.C.