AGE Group, Ltd. v Martha Stewart Living Omnimedia, Inc.
2017 NY Slip Op 31639(U)
August 3, 2017
Supreme Court, New York County
Docket Number: 653408/2013
Judge: Shirley Werner Kornreich

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

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AGE GROUP, LTD., Index No.: 653408/2013

Plaintiff, **DECISION & ORDER**

-against-

MARTHA STEWART LIVING OMNIMEDIA, INC.,

Defendant.

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SHIRLEY WERNER KORNREICH, J.:

Defendant Martha Stewart Living Omnimedia, Inc. (MSLO) moves, pursuant to CPLR 3212, for summary judgment against plaintiff Age Group, Ltd. (AGE). AGE opposes the motion. For the reasons that follow, MSLO's motion is granted in part and denied in part.

I. Factual Background & Procedural History

Unless otherwise indicated, the following facts are undisputed.[1] As stated in the court's April 14, 2014 decision:

> MSLO is a media and merchandising company that controls and licenses the rights to Martha Stewart brand products. [AGE] manufactures and licenses products for distribution online and in department stores. On July 9, 2009, [AGE] and MSLO entered into a 4 year Licensing Agreement (the MSLO Agreement), under which MSLO granted [AGE] an exclusive license to market, manufacture, and sell Martha Steward brand pet products (the Pet Products) to pre-approved distributors, who would then sell the products to the public. The MSLO Agreement is governed by New York law and expired on December 31, 2013.
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> On October 16, 2009, [AGE] entered into a contract (the PetSmart Contract) with non-party PetSmart, Inc. (PetSmart), under which PetSmart agreed to purchase a certain amount of Pet Products over a four year period, coinciding with the four year term of the MSLO Agreement ... [which] obligated PetSmart to make annual minimum Pet Product purchases. The more Pet Products purchased by PetSmart, the more money Age Group and [AGE] would make. It is undisputed that if

[1] *See* Dkt. 99 (joint statement of material undisputed facts). References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing (NYSCEF) system.

MSLO chose not to extend [AGE's] license at the end of 2013, [AGE]would no longer be able to sell Pet Products to PetSmart or other distributors.

[AGE] alleges that shortly after it contracted with PetSmart, MSLO realized that it grossly undervalued the profit potential of its Pet Products. The Complaint alleges that, as a result, MSLO interfered with [AGE's] ability to timely produce Pet Products so that PetSmart would grow frustrated with [AGE] and ultimately wish to contract directly with MSLO when the PetSmart Contract terminated. This, according to [AGE], defeated the purpose of the MSLO Agreement -- maximizing revenue in the first four years and developing a long term profitable relationship. Specifically, [AGE] alleges that MSLO unreasonably withheld approval of Pet Products, disparaged [AGE's] performance by lying to PetSmart, and generally engaged in an interference campaign, detailed in the Complaint, leading to the breakdown of [AGE's] relationship with PetSmart.

MSLO denies these allegations. MSLO contends that [AGE] was putting out unacceptable product and that MSLO's refusal to approve designs was based on the need to protect the Martha Stewart brand. [AGE] avers that MSLO's objections were unreasonable.

...

In addition to refusing to approve the Pet Products designed by [AGE], MSLO also allegedly interjected itself into [AGE's] creative process, thereby complicating and interfering with [AGE's] ability to do its job. For instance, [AGE] alleges, MSLO insisted on having an active role in designing and pricing Pet Products, when such matters were supposed to be delegated to [AGE]. This micromanaging, according to [AGE], was intended to frustrate [AGE's] performance. MSLO [allegedly] intentionally designed overpriced, inferior products and then blamed [AGE]. MSLO did this to make it appear that [AGE] lacked the capacity to deliver quality, low price Pet Products, using this outcome to convince PetSmart that it should cut [AGE] out of the process before the expiration of the MSLO Agreement. This led to MSLO's ultimate goal of ridding itself of [AGE] and making more money on its Pet Products.

Moreover, [AGE] contends that throughout this process, MSLO sent PetSmart numerous disparaging emails about [AGE's] supposed failings, claiming that "[AGE is] not following up, sending [] inferior samples, not hitting target prices and letting things slip through the cracks." [AGE] further alleges that MSLO violated the MSLO Agreement's confidentially provision by disclosing the terms and duration of the MSLO Agreement to PetSmart. MSLO refused to extend a license to [AGE] beyond 2013, and allegedly began working directly with PetSmart months before the MSLO Agreement expired.

Dkt. 31 (the MTD Decision) at 1-4 (internal citations omitted).

AGE's complaint, filed on November 5, 2013 (Dkt. 8), which has never been amended, "asserts four causes of action: (1) breach of contract; (2) breach of the duty of good faith and fair dealing; (3) tortious interference with prospective economic advantage; and (4) injurious falsehood." MTD Decision at 4. In the MTD Decision, the court dismissed the third and fourth causes of action and ruled that AGE's "damages are limited to lost profits during the period the MSLO Agreement was in effect." *Id.* at 10.

AGE's remaining breach of contract claims are based on section 6(a) of the MSLO Agreement, which provides:

> MSLO agrees to exercise its rights of approval reasonably and promptly ... in a spirit of cooperation, it being acknowledged that any decision made by MSLO based on concerns about the MSLO Brand **shall not be deemed unreasonable if made in good faith**. [AGE] further acknowledges that MSLO's approval decisions regarding the [Pet Products] **may be base[d] solely on MSLO's subjective standards**, including its aesthetic judgment regarding design, marketing, advertising and exploitation of the MSLO Brand ... In the event of any objection ... MSLO shall strive to reasonably describe the objection or reason for disapproval, *provided that* [Age Group] acknowledges that MSLO may not be able to express with specificity such objection and/or the reason.

Id. at 3, quoting Dkt. 20 at 8 (italics in original; bold added for emphasis).

MSLO filed an answer to the complaint on April 25, 2014. *See* Dkt. 34. Fact and expert discovery have been completed, and AGE filed a Note of Issue on May 20, 2016. MSLO filed the instant motion for summary judgment on December 8, 2016,[2] and the court reserved on the motion after oral argument. *See* Dkt. 245 (5/9/17 Tr.).

[2] The motions were actually fully briefed between August 12 and October 24, 2016, but were not publicly filed until December 2016, after the court had the opportunity to rule on the parties' motions for leave to seal some of the sensitive financial information in the record. *See* Dkt. 126 (ruling on motion to seal).

At this juncture, MSLO is accused of depriving AGE of the benefits of the MSLO Agreement due to unreasonable rejections of AGE's proposed Pet Products and MSLO's refusal to permit AGE to sell Pet Products to contractually approved retailers other than PetSmart, despite the MSLO Agreement permitting AGE to do so. AGE claims that MSLO set AGE up to fail in the eyes of PetSmart by unilaterally promising designs to PetSmart that MSLO knew could not realistically be executed at a reasonable price point. AGE explains:

> As part of its effort to usurp [AGE's] role in the business, MSLO itself initiated designs and insisted that [AGE] source and manufacture products that were impossible to achieve at price points that would be acceptable and successful in the retail market. This conduct by MSLO was nowhere permitted by the [MSLO Agreement], and conflicted with the express interests of PetSmart, Age Group's retail customer, which operates in the high-volume retail market for pet products. MSLO was intimately familiar with PetSmart's business, its price points, and its overall business model, having vetted PetSmart as a potential licensing partner in early 2009 when PetSmart attempted to obtain a direct-to-retail license, and when it expressly approved [AGE's] sale of MS Pet Products to PetSmart. PetSmart repeatedly stressed the importance of timely product delivery and low cost, **yet MSLO knowingly demanded designs that would cost two or three times more than PetSmart's target, often showing those designs to PetSmart without first discussing with [AGE] to see if the product was feasible, which most of the time it was not.**[3] As Ms. Gerard of [AGE] explained:
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> > AGE did not see all of the [MSLO] presentation before it was shown to PetSmart -- and we had no chance to even remotely price out or indicate issues before it was shown. It is another set up for failure **as PetSmart is looking at shiny, expensive things and will either be disappointed by cost, or all of the changes we would need to make before we could realistically manufacture**.

Dkt. 162 at 14-15 (internal citations omitted). AGE relies on this and other evidence to demonstrate that "MSLO's design and production demands were objectively unreasonable." *Id.* at 15.

[3] MSLO has not submitted any evidence that proves this assertion to be false.

MSLO's positon is that its rejections of AGE's proposed Pet Products were made in good faith and that the MSLO Agreement was not renewed due to pervasive problems with AGE's performance. While AGE submitted evidence to the contrary, one need look no further than Martha Stewart's conflicting deposition testimony on AGE's performance to raise material questions of fact as to MLSO's good faith. *Compare* Dkt. 167 at 38 (Dep. Tr. at 152) (Q: Now, once the Martha Stewart Pets line was launched at PetSmart, there was a very positive response in the marketplace, correct? A: Oh, people rushed there. We sold out of a lot of good things. Q: And that success went across the product lines, correct? ... A: I don't -- I don't know the exact sales numbers of each of the different products, but it was a nice success."), *with id.* at 46 (Dep. Tr. at 181) (testifying that she heard about AGE's "poor performance").[4]

The parties also dispute whether AGE can prove a breach of the MSLO Agreement based on MSLO's statement that it would not approve Pet Products for retailers other than PetSmart. AGE takes the position that it would have been futile to attempt to do so after being told, effectively, that AGE would be wasting its time because its proposed Pet Products would be rejected. AGE states:

> In the Spring of 2010, [AGE] began developing an MS Pets program for Macy's for sale during the winter holiday season, which [AGE] worked on with MSLO. In December 2010, after its launch in Macy's stores, PetSmart became aware of the Macy's holiday line and was very upset. Mr. McAdam, PetSmart's SVP of Merchandising, complained directly to MSLO -- without including [AGE] -- that [AGE] should not be working with other retailers on these products, and that MSLO should keep "[AGE] focused on us [PetSmart] and not Macy's." A few days later, when Mr. McAdam asked his PetSmart colleague Laurie Taylor if MSLO had "anything to say about [MSLO] pet products in [Macy's]?," Ms. Taylor confirmed that she had had a conversation with MSLO's Executive Vice President of Merchandising, Tod Morehead: "He gets it and will talk to [AGE]."

[4] The court has reviewed the deposition transcripts submitted on this motion and finds sharp disputes regarding the supposed good faith nature of MSLO's conduct.

> After PetSmart privately told MSLO that it needed to keep [AGE] "focused" on PetSmart rather than other retailers, **[AGE] was "told by Robin Marino" of MSLO to cease projects involving retailers other than PetSmart: "don't bother coming to us with products for approval around this, we hold the right to approval."** Mr. Adjmi testified that [AGE] "...didn't even get to talk to other retailers ... **because Robin Marino told us in many words 'we hold the approval process, you don't**...." From that point forward, [AGE] did not sell any MS Pet Products to any retailer other than PetSmart.

Dkt. 162 at 10-11 (internal citations omitted; emphasis added).

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).

MSLO's summary judgment motion is, with one exception, denied. Its arguments implicate genuine material questions of fact that cannot be resolved without a trial.

First, MSLO contends that it did not breach the MSLO Agreement.[5] The record does not indisputably prove that contention. At a minimum, AGE has raised a question of fact about whether MSLO's statement that, despite the MSLO Agreement permitting AGE to design and sell Pet Products to certain retailers other than PetSmart, MSLO breached its implied covenant of good faith and fair dealing by declaring that it would not approve Pet Products for retailers other than PetSmart. *See 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 (2002) (covenant of good faith and fair dealing is implied in every contract and "embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'") (citation and quotation marks omitted). To the extent the parties dispute whether AGE would have sold Pet Products to other retailers but for MSLO's insistence to the contrary, the parties conflicting accounts, the truth of which cannot be gleaned from the record, is a question of fact for trial. *Compare* Dkt. 162 at 18 ("The record is replete with evidence that [AGE] planned to market [] Pet Products to other retailers") (citing examples), with Dkt. 129 at 9 n.2 (noting that AGE did not sell Pet Products to Approved Retailers). Moreover, even without a record evidencing such proposed sales, AGE persuasively contends that it would have been commercially unreasonable for it to devote

[5] As an initial matter, while this court, in the MTD Decision, explained why AGE pleaded a reasonable inference of MSLO's motive to engage in the alleged bad faith [*see* MTD Decision at 6], scienter is not an element of AGE's contract claims. AGE is not alleging fraud. Hence, whether MSLO acted rationally is of no moment; all that matters is whether it acted in good faith. While MSLO devotes substantial attention to its theory about why AGE's claims are premised on MSLO acting irrationally (which, to be sure, appears to implicate the entirely unclear issue of how much money it was rational for MSLO to forgo during the term of the MSLO Agreement to lock in a deal with PetSmart and eliminate AGE as the middleman), that is not an issue appropriate for summary judgment.

resources to developing Pet Products when that would have been a futile endeavor given MSLO's alleged statement to it that all such proposals would be rejected. Although, at trial, MSLO may challenge the reasonableness of AGE's conduct on this issue, on this motion for summary judgment, where the facts must be construed in a light most favorable to AGE [*see Stonehill Capital Mgmt., LLC v Bank of the W.*, 28 NY3d 439, 448 (2016)], the issue is a question of fact best left to the jury.

MSLO also wrongly contends that this case may be dismissed if AGE cannot prove, without resort to impermissible speculation, that it suffered damages proximately caused by MSLO's breach. It is well settled that nominal damages may be awarded on a breach of contract claim. *Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 143 (2017), citing *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 95 (1993) ("Nominal damages **are always available** in breach of contract actions.") (emphasis added); *see Greenman-Pedersen, Inc. v Berryman & Henigar, Inc.*, 130 AD3d 514, 517 (1st Dept 2015) (holding that "trial court erred in dismissing plaintiffs' cause of action for breach of contract" because plaintiffs could have proven "nominal damages on their contract claim"). Therefore, summary dismissal is not appropriate.

That said, AGE has developed a record on which it might be capable of proving damages in the form of the profits it would have earned on Pet Product sales had MSLO not breached. It is the law of the case that AGE may seek such damages. *See* MTD Decision at 10. Indeed, the only damages AGE could have suffered from MSLO's breach are the profits it lost the opportunity to make on the MSLO Agreement. Contrary to MSLO's contentions, where, as here, the lost profits "are the direct and immediate fruits of the contract," and not purely related to collateral business dealings, such lost profits are recoverable as general (as opposed to

consequential) damages. *See Biotronik A.G. v Conor Medsystems Ireland, Ltd.*, 22 NY3d 799, 805-06 (2014). Even if AGE's lost profits were considered collateral to the contact because they involved sales to another retailer, they could still be recoverable if "(1) it is demonstrated with certainty that the damages have been caused by the breach, (2) the extent of the loss is capable of proof with reasonable certainty, and (3) it is established that the damages were fairly within the contemplation of the parties." *Id.* at 806. These factors are issues for trial and not amenable to resolution on this summary judgment motion. At trial, AGE may seek to recover lost profits if it can establish they were "the natural and probable consequence of defendant's breach." *See id.*

To be sure, MSLO raises issues regarding the analysis of AGE's damages expert, such as the data on which he based his projections. These issues go to the weight of the expert's testimony and his credibility, not admissibility. *See Mazella v Beals*, 27 NY3d 694, 708 (2016), citing *People v Negron*, 91 NY2d 788, 792 (1998) ("a jury is entitled to assess the credibility of witnesses and determine, for itself, what portion of their testimony to accept and the weight such testimony should be given.").

Summary judgment, however, is granted to MSLO on the portion of AGE's breach of contract claim predicated on MSLO's breach of its confidentiality obligations. As noted by MSLO, "AGE does not proffer any evidence supporting its claim that MSLO breached the [MSLO] Agreement's confidentiality provision by telling PetSmart that AGE did not have a unilateral right to renew the [MSLO] Agreement. AGE does not contest that PetSmart did not produce a copy of the Agreement in response to AGE's subpoena, and that every PetSmart witness deposed in this action testified that they had never seen the Agreement and were unaware of its terms." Dkt. 236 at 13 MSLO was entitled to negotiate to contract directly with

PetSmart during the contract period to ensure a smooth transition once AGE's contract expired. Insisting otherwise is commercially unreasonable.[6] On the other hand, MSLO was not entitled to cut AGE out during the contract period, thereby depriving AGE of the opportunity to benefit from the contract during its entire term, an issue encompassed in AGE's bad faith and implied covenant claims. Since AGE's confidentiality claim is not based on proof that any contractually prohibited information was disclosed to PetSmart (and, it should be noted, does not appear to give rise to a separate claim for damages), it is dismissed. Accordingly, it is

ORDERED that MSLO's motion for summary judgment is granted in part only to the extent that AGE's confidentially claim is dismissed, and MSLO's motion is otherwise denied; and it is further

ORDERED that the parties shall jointly call the court within three weeks of the entry of this order on NYSCEF to discuss the scheduling of a pre-trial conference.

Dated: August 3, 2017

ENTER:

SO ORDERED

SHIRLEY WERNER KORNREICH
J.S.C.

[6] It is undisputed that MSLO had no obligation to renew the MSLO Agreement.