Tanner v DKC Trading LLC
2017 NY Slip Op 32382(U)
November 9, 2017
Supreme Court, New York County
Docket Number: 653595/2015
Judge: Charles E. Ramos

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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KEN TANNER, WENDI TANNER AND JJAMZ, INC.,

Plaintiffs,

Index No.
653595/2015

- against -

DKC TRADING LLC, NEW AXIOM PARTNERS, INC. and PUNCH FASHION, LLC

Defendants.

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Hon. C. E. Ramos, J.S.C.

In motion sequence 005, the plaintiffs Ken Tanner ("Mr. Tanner") and Wendi Tanner ("Ms. Tanner") (collectively, the "Tanners"), and Jjamz Inc. ("Jjamz") move for partial summary judgment on their first and second causes of action for breach of contract against the defendant Punch Fashion LLC ("Punch"). For the reasons set forth below, the plaintiff's motion for partial summary is denied in its entirety.

Background

This action arises out of Punch's purchase of a majority interest in Jjamz, a jewelry and fashion business. In 1995, the Tanners had formed Jjamz. In 2011, the Tanners met David Cleary, the sole owner of the defendant DKC Trading LLC, ("DKC") an investor in Punch. Eventually, Jjamz and DKC formed a business relationship, which ultimately led to Punch purchasing a majority interest in Jjamz in December 2014 (the "Purchase Transaction").

The Complaint alleges that numerous disputes arose between DKC and Jjamz stemming from their business relationship prior to

the purchase by Punch, but that history is not relevant to subject of the instant motion, which relates to the Purchase Transaction (Complaint, ¶¶ 11-40).

In connection with the Purchase Transaction, Punch, the Tanners, and Jjamz executed a membership purchase agreement (the "Purchase Agreement") for Punch's purchase of a 90% interest in Jjamz and designating Punch as the new operating entity for the new business (Cleary Aff., Ex. 36)

In connection with the Purchase Transaction, Punch also retained the Tanners as consultants pursuant to the terms of the a consulting agreement, wherein the Tanners agreed to provide advisory services in exchange for an annual consulting fee (the "Consulting Agreement") (*Id.* at Ex. 2).

In addition, the Tanners executed a restrictive covenant (the "Restrictive Covenant") agreeing to various restrictions on their ability to compete against or assist competitors of Punch, solicit employees and contractors, and interfere with vendor and customer relations (the "Restrictive Covenant")(*Id.* at Ex 3).

On February 6, 2015, Punch sent an email directing the Tanners not to respond to any client communications and instead to forward them directly to Punch management (*Id.* at Ex. 22). On September 16, 2015, Mr. Tanner responded to an email (the "XSJ Email") from a representative of a Punch vendor, Cindy Mao ("Ms.

Mao") of Qingdao Xin Sam Jim Jewelry Co., Ltd. ("XSJ"). Mr. Tanner stated that:

> I am sorry to hear that Punch is not resolving the old payment issue timely as committed to both XSJ and us. I have included John Higgins on this email since we no longer have any involvement in Punch and I believe he needs to know how urgent your situation is. Please know that the assumption of the old payables such as XSJ was very clearly delineated in the Contribution and Assignment Agreement in the sale of our company (*Id.* at Ex. 21).

On October 14, 2015, Punch sent a letter terminating the Consulting Agreement with the Tanners on the basis that the Tanners breached paragraphs 7(c)(I), (iv), (v), and (vi) of the Consulting Agreement by responding directly to XSJ and ignoring "explicit instruction from [Punch] that the [Tanners] should not respond to any communications from anyone unless instructed by [Punch]"(the "Termination Letter") (*Id.* at Ex. 24).

In addition, the Termination Letter states that Mr. Tanner's email in response to XSJ "adversely impacted [Punch's] reputation and its business relationship with XSJ" and amounted to interference with Punch's business relations in violation of the Section 1(E) Restrictive Covenant (*Id.* at p. 3).

Moreover, the Tanners agreed to place certain funds (the "Collateral") in escrow pursuant to Section 5.1 of the Purchase Agreement (the Escrow Provision) as security for obligations under a discount factoring agreement (the Factor Agreement)

between Punch and Merchant Factors Corp. (Merchant Factors)(Cleary Aff., Ex. 37).

On October 29, 2015, the Tanners commenced this action against the defendants alleging that Punch improperly terminated the Consulting Agreement, breached the Purchase Agreement by withholding certain funds and refusing to release the Collateral.

Discussion

To obtain summary judgment, the movant shall sufficiently establish the cause of action or defense to warrant the court as a matter of law in directing judgment (CPLR 3212[b]). Once a showing has been made, the burden then shifts to the opposing party, who must present admissible evidence sufficient to raise a triable material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

The plaintiffs' first cause of action alleges that Punch breached the Consulting Agreement by improperly terminating the Consulting Agreement on the basis of the XSJ Email and by withholding $93,000 owed under the Consulting Agreement.

The relevant portion of the Consulting Agreement provides that:

> Notwithstanding anything to the contrary herein, [Punch] shall have the right terminate the Consulting Period for "cause" immediately upon written notice to the Consultant in the event that [Mr. Tanner or Mrs. Tanner]:
>
> (i) engages in willful misconduct, dishonesty or acts in bad faith in the performance of the

duties hereunder to the detriment of the Company

(iv) engages in activity which has a material adverse effect on the Company's business relationships or reputation;

(v) breaches any material term of this Agreement, and such breach (if capable of being cured) is not cured within 30 days after written notice thereof to the Consultant;

(vi) breaches any of the restrictive covenants set forth in paragraph 6 hereof…

(*Id.* at Ex. 2, 7 [c] [I], [iv], [v], [vi]).

Paragraph 6 of the Consulting Agreement provides that:

> At all times during and after the Consulting Period, [the Tanners] shall not, directly or directly make (or cause to be made) to any person any disparaging, derogatory or other negative or false statement about the [Punch] (including its products, services, employees, policies, practices, operations, agents, officers, members, or managers)
>
> (*Id.* at 6 [c]).

Section 1(E) of the Restrictive Covenant, provides, in relevant part:

> The [Tanners] will not directly or indirectly: induce or encourage any vendor, supplier, licensor, contractor, or strategic partner of the Applicable Companies to terminate or reduce its relationship with [Punch], or otherwise interfere with the relationship between any such vendor, supplier, licensor, contractor or strategic partner and [Punch]
>
> (Cleary Aff., Ex. 3).

The Tanners allege that the XSJ Email could not be a violation of the Consulting Agreement and thus, the defendants have improperly terminated the Consulting Agreement, as a matter of law.

Punch contends that termination of the Consulting Agreement was justified because of the Tanners' pattern of making disparaging or negative comments to its vendors resulting in damages to its reputation and business relationships.

In opposition to the plaintiffs' motion for summary judgment, the defendants submit an email between Mrs. Tanner to Li Cao, a creditor of Punch, on February 24, 2015 (the "February Email"), after the Tanners received explicit instructions to not respond to any communications on behalf of Punch. In the February Email, Mrs. Tanner states that she is "frustrated with [Punch]" and that Punch "has not honored [their] agreement and I just can't get them to pay your small amount" (*Id.* at Ex. 26).

The February Email standing alone is insufficient to establish that the Tanners breached the Consulting Agreement or the Restrictive Covenant. In addition, the instruction not to respond to any communications is not warranted pursuant to the restrictive covenant. However, the February Email does raise a triable issue of fact as to whether or not there was a pattern of disparagement or misrepresentations in the Tanners' communications with Punch's vendors or clients, which may have harmed its business relationships.

Based on the record before this Court, it is unclear whether Mrs. Tanner was accurate and whether those statements resulted in damage to Punch's reputation and business relationships. Punch

also contends that the Tanners's alleged pattern of misconduct, when taken together, form a valid basis for the termination of the Consulting Agreement.

Similarly, the plaintiffs fail to establish that Punch is improperly withholding $93,000 owed to the Tanners under the Consulting Agreement as a matter of law based on the evidentiary record before this Court.

Furthermore, the parties have not completed discovery and no depositions of the parties have occurred. Therefore, when considering these factors, the denial of summary judgment as to the first cause of action is appropriate at this juncture.

The second cause of action alleges that the Punch breached the Escrow Provisions of the Purchase Agreement by failing to release the Collateral after the first anniversary of the Purchase Agreement.

The Escrow Provision provides that the escrow account will remain in effect until the earlier of:

> I: such time as Merchant Factors agrees to terminate such escrow without reducing the amounts available under or otherwise adversely affecting the terms of (Punch's) [Factoring Agreement] with (Defendant), or (ii) the first anniversary of the date of this agreement (Purchase Agreement)(subject to any rights of Merchant Factors with respect to the release of such [Collateral] on such first anniversary or any other time).
>
> (*Id.* at Ex. 36, § 5.1).

Punch contends that Merchant Factors has not requested Punch's consent to release the Collateral. In addition, Punch argues that Merchant Factors will not release the Collateral until Punch has satisfied its obligations under the Factoring Agreement, which is something Punch contends it cannot do at this time. The plaintiffs do not provide any evidence contrary to Punch's contentions.

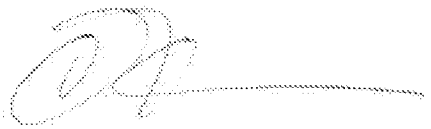
Furthermore, the Escrow Provision unambiguously provides that the release of the Collateral is subject to any rights of Merchant Factors to continue holding the Collateral as security for obligations owed to it under the Factoring Agreement. The Tanners fail to establish that Punch's lack of consent is the reason that the Collateral has not been released or that Merchant Factors no longer has a security interest in the Collateral under the Factoring Agreement.

In light of the triable issues raised, this Court must deny the plaintiffs' motion for summary judgment on their second cause of action.

Accordingly, it is

ORDERED that the plaintiffs motion for summary judgment is denied in its entirety.

DATED: November 9, 2017



J.S.C.