Hatkoff v The Tussauds Group LLC
2019 NY Slip Op 31525(U)
May 24, 2019
Supreme Court, New York County
Docket Number: 653822/2018
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREA MASLEY** **PART** **IAS MOTION 48EFM**

Justice

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CRAIG HATKOFF, VALENTINE WILDOVE & CO., INC, TURTLE POND PUBLICATIONS LLC,

Plaintiffs,

- v -

THE TUSSAUDS GROUP LLC F/K/A THE TUSSAUDS GROUP LTD., MERLIN ENTERTAINMENT PLC,

Defendants.

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INDEX NO. 653822/2018

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 25, 34

were read on this motion to/for DISMISS.

Masley, J.:

In motion sequence number 001, The Tussauds Group LLC (Tussauds) and Merlin Entertainment PLC (Merlin) move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the breach of contract claim brought by Craig M. Hatkoff, Valentine Wildove & Co. (VWC), and Turtle Pond Publications LLC (Turtle Pond). In the alternative, defendants move, pursuant to CPLR 3211 (a) (3), to dismiss VWC and Turtle Pond for lack of standing to sue.

Background

In 1993, The Tussauds Group Ltd. (currently Tussauds) entered into an agreement with Victor Capital Group, L.P. (VCG), the predecessor of VWC (1993 Agreement) (NYSCEF Doc. No. [Doc.], ¶10). Hatkoff was the principal and co-president of VWC (*id.*). VCG, and later VWC, provided The Tussauds Group Ltd. with financial advisory services for the leasing, construction, and development of an exhibition in New York at One Times Square, New York, New York (Exhibition) (*id.* at ¶10). The 1993

Agreement specifically provided that Hatkoff was to be, at all times, one of the senior staff members on the project (Doc. 10 at ¶ II). In addition to agreeing to the rendering of professional services, the parties also agreed to a compensation scheme for VCG's services (*id.,* at ¶ III.) Paragraph IV(b) of the 1993 Agreement provided the terms by which the Agreement could be terminated. Specifically, paragraph IV(b) provides, in relevant part,

> "Upon or after the occurrence of Substantial Performance, Tussauds may only terminate this Agreement "for cause" provided, however, that at any time from and after two years after the date hereof, Tussauds may terminate this Agreement with or without cause, and with or without Substantial Performance except that upon a termination pursuant to this proviso Tussauds' obligation to pay VCG Compensation here under shall survive with respect to such compensation, if any, earned pursuant to this agreement as of the date of such termination but not yet payable. For purposes of this Agreement "for cause" shall mean: (a) gross or habitual neglect of the Professional Services by VCG. (b) prolonged absence from performance of the Professional Services by VCG (c) material breach by VCG of any of its agreements or covenants contained in this Agreement (d) willful misconduct by VCG or any employee or agent thereof, (e) the death of Craig M. Hatkoff, (f) the termination of Craig M. Hatkoff's employment or professional relationship with VCG or (g) the physical or mental incapacity of Craig M. Hatkoff"

(*id.* at ¶ IV). The 1993 Agreement was signed by Hatkoff, on behalf of VCG, on October 15, 1993 (Doc. 10; *see also* Doc. 15 at ¶ 3).

On June 16, 1995, Andrew Tansley, Tussauds' executive director at the time, sent a letter to Hatkoff, expressing Tussauds' intent to invite Hatkoff to be a "Non Executive Director or Consultant" for $25,000 per year (1995 Letter) (Doc. 20 at ¶ 22). The 1995 Letter states that "Craig Hatkoff will be invited to become either a Non Executive Director or a Consultant to the entity formed by The Tussauds Group in New York to operate the exhibition for a fee of $25,000 (twenty five thousand dollars) per annum" (Doc. 18 at ¶ 4). Hatkoff alleges that, because he was involved in opening a successful Tussauds exhibit in Times Square, in partial consideration for this success,

for consulting services, and for VCG agreeing to a cap on other fees provided for in the 1993 Agreement, Tussauds sent him the 1995 Letter to engage his personal services (Doc. 1 at ¶¶ 23-24). In the 1995 Letter, Tansley also states that he "was writing this to outline the basis of our agreement" and that "we will need to draft this into a more formal agreement" (Doc. 11).

On July 23, 1996, Tussauds sent another letter to VCG (1996 Letter). The 1996 Letter references the 1993 Agreement "as supplemented by the [1995 Letter]" (Doc. 12). The 1996 Letter states that "[t]he parties desire to evidence their further agreements and understandings and to modify the Agreement as provided herein modified the 1993 Agreement and 1995 Letter" (*id.*). The 1996 Letter acknowledges that the parties were no longer negotiating occupancy at One Times Square and were instead negotiating lease space at "Site 8 in the 42nd Street Redevelopment Project Area" (*id.* at ¶ 1). The 1996 Letter also acknowledges that Substantial Performance had been achieved and "VCG may be terminated solely for cause as provided in paragraph IV of the [1993] Agreement" (*id.* at ¶ 4). The 1996 Letter further states that the 1993 Agreement was to remain in full force and effect, except as otherwise provided in the 1996 Letter, and the 1995 Letter was superseded except for paragraph 4 relating to Hatkoff becoming a non-executive director or consultant (*id.* at ¶ 5).

The Tussauds exhibit opened in 2001, and for 18 years, Tussauds paid Hatkoff, or his designee Turtle Pond, $25,000 per year for Hatkoff's consulting services (Doc. 1 at ¶ 28). Prior to this litigation, Merlin became the owner of Tussauds (*id.* at ¶ 29). On February 26, 2018, Merlin terminated Hatkoff's consulting services, claiming in its termination notice that there was no consulting agreement (*id.* at ¶¶ 31-32). Plaintiffs brought this action for breach of contract, seeking damages in the amount of $500,000

(*id.* at ¶ 37). Plaintiffs do not allege in the complaint that VCG/VWC is owed money under the Agreement or that Tussauds breached any agreement as it pertains to VCG/VWC.

Discussion

On a motion to dismiss under CPLR 3211, "the pleading is afforded a liberal construction. [The court] accept[s] the facts as alleged in the complaint as true, accord[s] plaintiffs the benefit of every possible favorable inference, and determine[s] only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Dismissal under CPLR 3211 (a) (1) is appropriate "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*id.* at 88 [citations omitted]).

Here, defendants submit the 1993 Agreement, the 1995 Letter, and the 1996 Letter in support of their motion to dismiss. Defendants argue that plaintiffs fail to allege how defendants breached the provision inviting Hatkoff to be a consultant contained in the 1995 Letter. They further argue that the 1993 Agreement, 1995 Letter, and 1996 Letter do not provide any terms of the consultancy regarding performance and termination, and thus, his termination was not a breach. In opposition, plaintiffs assert that the 1993 Agreement and 1995 and 1996 Letters refer to and incorporate each other, and therefore, must be read together. Plaintiffs further argue that, if read together, Tussauds is obligated to pay Hatkoff a consulting fee during the operation of the exhibition and this obligation can only be terminated for cause.

"[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*,

98 NY2d 562, 569 [2002] [citation 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. 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" (*id.* at 569-570 [internal quotation marks and citations omitted]).

It is clear from the plain language of the 1996 Letter that it contains modifications to the original 1993 Agreement (Doc. 12 ["The parties desire to evidence their further agreements and understandings and to modify the Agreement as provided herein."]). The 1996 Letter, signed by Tussauds and VCG, modifies the 1993 Agreement by: (1) providing for the negotiation of a lease at a new site and (2) modifying VCG's compensation scheme. Paragraph 4 of the 1996 Letter acknowledges that Substantial Performance, as defined in the 1993 Agreement, was achieved and reiterates that VCG "may be terminated solely for cause as provided in paragraph IV of the 1993 Agreement" (Doc. 12 at ¶ 4). It also declares that the 1993 Agreement otherwise remains in full force and effect and that the 1996 Letter superseded the 1995 Letter except for the paragraph relating to Hatkoff becoming a non-executive director or consultant and the related compensation which was to remain in effect (*id.* at ¶ 5).

Even if the court reads the 1993 Agreement and the 1995 and 1996 Letters together and incorporates them as one, the plain language of paragraph IV of the 1993 Agreement does not provide that Tussauds must only terminate Hatkoff with cause. While the parties agreed in the 1996 Letter that Substantial Performance was achieved, any termination was still governed by paragraph IV of the 1993 Agreement which was not modified by either Letter. Specifically, the 1996 Letter states that "VCG may be

terminated solely for cause *as provided in paragraph IV of the [1993] Agreement*" (*id.* at ¶ 5 [emphasis added]).

Paragraph IV of 1993 Agreement is very clear that upon or after Substantial Performance, which was declared in the 1996 Letter, Tussauds "may only terminate this Agreement 'for cause,'" which was reiterated in the 1996 Letter. However, reading the portion of paragraph IV which applies to "for cause" termination after Substantial Performance, it clearly provides that, "[u]pon or after the occurrence of Substantial Performance, Tussauds may only terminate this Agreement 'for cause' *provided, however, that at any time from and after two years after the date hereof, Tussauds may terminate this Agreement with or without cause and with or without Substantial Performance* . . ." (Doc. 10 at ¶ 4 [emphasis added]). Tussauds terminated Hatkoff in 2018, long after the two-year termination for cause window expired. Thus, there is no claim for breach of contract.

The issue of standing need not be addressed.

Accordingly, it is

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

5/24/19
DATE

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE