

Estate of Marilyn Monroe LLC v Weeplay Kids LLC

2021 NY Slip Op 30457(U)

February 16, 2021

Supreme Court, New York County

Docket Number: 653260/2018

Judge: Laurence L. Love

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LAURENCE L. LOVE PART IAS MOTION 63M

Justice

-----X

THE ESTATE OF MARILYN MONROE LLC, MUHAMMAD
ALI ENTERPRISES, LLC

Plaintiff,

- v -

WEEPLAY KIDS LLC,

Defendant.

-----X

INDEX NO. 653260/2018

MOTION DATE 02/03/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, the motion is decided as follows:

Plaintiff commenced the instant action by filing a Summons and Complaint on June 28, 2018. Defendant interposed an answer on August 3, 2018. Plaintiff’s complaint asserts six causes of action arising out of the alleged breach of two contracts.

Plaintiffs are subsidiaries of Authentic Brands Group. The Estate of Marilyn Monroe, LLC, owns and controls rights to certain pending and registered "Marilyn Monroe" trademarks, and Muhammad Ali Enterprises, LLC, which owns and controls rights to certain pending and registered "Muhammad Ali" trademarks. The Estate of Marilyn Monroe LLC (“Monroe”) and defendant, Weeplay Kids, LLC (“Weeplay”) entered into a "License Agreement" dated July 1, 2016 under which plaintiff granted defendant a license to use certain "Marilyn Monroe" trademarks owned by plaintiff. Muhammad Ali Enterprises, LLC (“Ali”) and defendant Weeplay entered into a "License Agreement" dated March 1, 2016 under which plaintiff granted defendant a license to use certain "Muhammad Ali" trademarks owned by plaintiff. Both License Agreements

require Weeplay to make certain quarterly payments, which plaintiffs allege were not paid, in breach of the contracts. Plaintiffs now move for summary judgment.

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980). The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d 331, 479 N.Y.S.2d 35 (1st Dept., 1984) *aff'd* 65 N.Y.2d 732, 429 N.Y.S.2d 29 (1985). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dep't 1989). Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

In support of its motion for summary judgment, plaintiffs submit the affidavit of Kevin Clarke, the Chief Financial Officer of plaintiffs, Monroe and Ali, together with the relevant contracts, Notices of Breach and Notices of Termination, which establish as follows: Monroe granted Weeplay a license to use certain "Marilyn Monroe" intellectual property rights in connection with the manufacture and sale of apparel products during a term from July 1, 2016 to December 31, 2018. Monroe is entitled to royalties defined as seven percent (7%) of "Net Sales"

with a Guaranteed Minimum Royalty (“GMR”) of \$14,000.00 per year. In addition, Weeplay was required to pay Monroe 1% of net sales each year as its contribution to the "Common Marketing Fund" (“CMF”) for the licensed trademark, with a minimum payment of \$2,000.00 per year. Said payments were to be computed by Weeplay and paid quarterly, and if any payment was not made when due, interest would be charged at the rate of 1% per month. The Agreement grants Monroe the right to terminate the agreement because of defendant's failure to make any required payment, if the breach is not cured within 5 days after service of a notice to cure further provides that in the event of a breach by defendant, "[a]ny and all unpaid fees, including but not limited to any Guaranteed Minimum Royalties and Minimum CMF for the then-current-Term and any and all Advertising Commitment, CMF and Royalties payable hereunder and/or any other payments due to Licensor pursuant hereto in the event of expiration or termination by Licensor, shall be immediately due and payable to Licensor (and shall be paid not later than (i) twenty-one (21) days from the expiration of the Term or upon such earlier date as may be set forth in the Summary of Commercial Terms or (ii) five (5) days from the earlier termination of this Agreement for any reason)." Weeplay breached the Agreement by failing to pay the required GMR payment (\$3,500) and minimum CMF payment (\$500), both due on April 1, 2018. On April 19, 2018, Monroe sent Weeplay a Notice of Breach based on its failure to make the GMR and CMF payments due, which Weeplay failed to cure. On May 2, 2018, Monroe sent and delivered to defendant a Notice of Termination of the Monroe Agreement. On May 2, 2018, Monroe demanded that the parties submit the matter to mediation before a JAMS mediator in New York. Weeplay did not respond to said demand. As such, Monroe has established a prima facie entitlement to summary judgment.

Ali granted Weeplay a license to use certain "Muhammad Ali" intellectual property rights in connection with the manufacture and sale of apparel products during a term from March 1, 2016

to December 31, 2019. Ali is entitled to royalties defined as seven percent (7%) of "Net Sales" with a Guaranteed Minimum Royalty ("GMR") of \$24,000 for Contract Year 1, \$50,000 for Contract Year 2, and \$85,000 for Contract Year 3. In addition, Weeplay was required to pay Ali 1% of net sales each year as its contribution to the "Common Marketing Fund" ("CMF") for the licensed trademark, with a minimum payment of \$3,000 for Contract Year 1, \$5,000 for Contract Year 2, and \$10,000 for Contract Year 3. Said payments were to be computed by Weeplay and paid quarterly, and if any payment was not made when due, interest would be charged at the rate of 1% per month. The Agreement grants Ali the right to terminate the agreement because of defendant's failure to make any required payment, if the breach is not cured within 5 days after service of a notice to cure further provides that in the event of a breach by defendant, "[a]ny and all unpaid fees, including but not limited to any Guaranteed Minimum Royalties and Minimum CMF for the then-current-Term and any and all Advertising Commitment, CMF and Royalties payable hereunder and/or any other payments due to Licensor pursuant hereto in the event of expiration or termination by Licensor, shall be immediately due and payable to Licensor (and shall be paid not later than (i) twenty-one (21) days from the expiration of the Term or upon such earlier date as may be set forth in the Summary of Commercial Terms or (ii) five (5) days from the earlier termination of this Agreement for any reason)." Weeplay breached the Agreement by failing to pay the required GMR payment (\$12,500) and minimum CMF payment (\$1,250)), both due on January 1, 2018. On February 1, 2018, Monroe sent Weeplay a Notice of Breach based on its failure to make the GMR and CMF payments due, which Weeplay failed to cure. On May 2, 2018, Monroe sent and delivered to defendant a Notice of Termination of the Monroe Agreement. On May 2, 2018, Monroe demanded that the parties submit the matter to mediation before a JAMS

mediator in New York. Weeplay did not respond to said demand. As such, Ali has established a prima facie entitlement to summary judgment.

In opposition, Weeplay submits the affirmation of Alan Maleh, the President of Weeplay, which does not dispute any of the facts established by plaintiffs. Defendant's affidavit argues solely that due to a plethora of authorized and unauthorized Monroe and Ali products on the market that defendant was unable to sell sufficient products to make payment under the instant contracts. Weeplay further argues that plaintiffs failed to inform defendant of the market conditions. Defendant submits no proof of any misrepresentation or fraud on the part of plaintiffs, functionally arguing that Weeplay should be relieved of its obligations under the contract based upon their failure to perform due diligence before entering into the contract. As such, defendant has failed to establish an issue of fact precluding summary judgment.

ORDERED that the plaintiff's motion for summary judgment is granted in its entirety in favor of plaintiff and against defendant as follows; and it is further

ORDERED that the Clerk shall enter judgment in favor of plaintiff, The Estate of Marilyn Monroe, LLC and against defendant on plaintiff's first and second causes of action in the amount of \$12,000.00, together with interest at the rate of 12% per annum from the date of April 1, 2018, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk; and it is further

ORDERED that the Clerk shall enter judgment in favor of plaintiff, Muhammad Ali Enterprises, LLC and against defendant on plaintiff's fourth and fifth causes of action in the amount of \$136,250.00, together with interest at the rate of 12% per annum from the date of January 1, 2018, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk; and it is further

ORDERED that an assessment of damages against defendant is directed on the issue of plaintiff's third and sixth causes of action seeking attorney's fees pursuant to the contracts, and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is directed, upon the filing of a note of issue and a certificate of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

2/16/2021
DATE



LAURENCE L. LOVE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE