SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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3B ASSOCIATES LLC,3B GROUP, INC,

Plaintiff,

- v -

ECOMMISSION SOLUTIONS, LLC,

Defendant.

INDEX NO. 657537/2017

MOTION DATE N/A, N/A

MOTION SEQ. NO. 007 008

DECISION + ORDER ON MOTION

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 234, 236, 237, 238, 239, 240, 248, 249, 250, 251, 252
were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 235, 241, 242, 243, 244, 245, 246, 247
were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents and for the reasons set forth on the record (4.4.22), 3B Associates LLC and 3B Group, Inc.'s motion for partial summary judgment (mtn. seq. no. 007) must be granted to the extent that (i) the defense based on lack of consideration to the agreement (2nd affirmative defense), (ii) prior material breach (6th affirmative defense), (iii) the agreement was terminated (9th affirmative defense), (iv) the statute of limitations has run (11th affirmative defense), (v) the plaintiffs lack capacity to sue must all be dismissed. Simply put, there is simply no evidence in the record that any contemporaneous written communication was sent to the plaintiffs evidencing any breach during the term of the agreement or termination. The fact that the agreement uses the word "cancellation" under the circumstances does not create an ambiguity that for termination of the agreement no writing was required. Nor is there any evidence beyond the conclusory affidavit of Paul Hoffman that the plaintiff failed to perform

under the agreement. It is now clear on the record before the court that 3B Associates LLC is the successor-in-interest to 3B Group, Inc. and payments to 3B Associates LLC by the defendant (NYSCEF Doc. No. 22) is evidence of the defendant's consent to the same. The plaintiffs have capacity to sue and the defendants can not now whisk away their obligation to the plaintiffs arguing "gotcha," the technical party to the agreement filed a certificate of dissolution years ago pursuant to a tax reorganization and that entity after filing the certificate of dissolution no longer provided services and the successor-in-interest also is not entitled to the money due either. The plaintiffs are also entitled to summary judgment for defendant's failure to pay net profits per the agreement for 2014, 2015, and 2016. For 2014, plaintiffs are entitled to $19,316, for 2015, $58,221, and for 2016, $904,918.20. For 2016, the plaintiffs have adduced sufficient evidence that the $7,387,500 settlement payment (the **Settlement Payment**) is properly included in net profits as defined by the Agreement. In the Agreement, net profits means net income as understood for GAAP purposes. The tax return submitted shows "business income" and a loss of $855,181. Separately, capital gain is listed for $7,387,500. Both the business income and the capital gains are listed on Paul Hoffman's 1040 tax return on the first page in a section titled "Income" (NYSCEF Doc. No. 80). The defendant filed its tax return as a part of Mr. Hoffman's tax return, because Mr. Hoffman is the sole proprietor of the defendant. While Mr. Hoffman listed the Settlement Payment under his name, rather than the defendant's, his previous testimony demonstrates that the payment was made for the defendant and not for an unrelated business(tr. at 85, lines 19-23; NYSCEF Doc. No. 212). Mr. Hoffman's self-serving decision to list the Settlement Payment under his own name does not create a triable issue of fact as to whether the Settlement Payment was income to the company, particularly where he previously testified that it was. Additionally, the court notes that the parties did not agree that payment due

under the Agreement was for ordinary income only. Pursuant to Section 2 of the Agreement, the parties agreed that in the event of a sale of control of the defendant, the plaintiff would be entitled to part of the compensation paid. For the avoidance of doubt, the defendant's motion for summary judgment (mtn seq. no. 8) must be denied.

The Relevant Facts and Circumstances

Reference is made to (i) an Agreement, dated March 20, 2006 (the **Agreement**; NYSCEF Doc. No. 66), by and between 3B Group Inc. and ECS, and (ii) an Assignment and Assumption Agreement dated January 1, 2011 (the **Assignment Agreement**; NYSCEF Doc. No. 70) by and between 3B Group, Inc. as assignor and 3B Associates LLC as assignee, whereby 3B Group, Inc. assigned its interests in the net profits of ECS to 3B Associates LLC.

Pursuant to the Agreement, in "consideration of 3B's [*i.e.*, 3B Group, Inc.] work, efforts and assistance regarding ECS and the development of ECS's business, the sufficiency and receipt of which is hereby acknowledged," defendant agreed to pay to 3B Group, Inc. on a quarterly basis 10% of its net profits where such net profits were from $250,000 to $1 million, and 15% where such net profits were $1,000,001 and above (NYSCEF Doc. No. 66, ¶ 1). For purposes of the Agreement, net profits is defined as the net income of defendant, if any, as determined for federal income tax purposes in accordance with generally accepted accounting principles (*id.*). Net income is not limited to ordinary income of the defendant as the defendant now argues in its attempt to avoid paying the plaintiff the money due under the Agreement and in fact included a portion of the sales price if a controlling interest in the defendant was sold and/or transferred (*id.*, ¶ 2). The Agreement was binding upon the parties and "their respective heirs, representative

executors, successors and/or assigns" (*id.*, ¶ 7) and could not be "changed, modified or cancelled except by prior written agreement between the parties hereto (*id.*, ¶ 6). Pursuant to the Assignment Agreement, 3B Group, Inc. assigned all right, title and interest in its share of ECS's net profits to 3B Associates LLC as of January 1, 2011 (NYSCEF Doc. No. 70, ¶ 1). This assignment was done as part of a tax reorganization of the entity to change the type of entity from a corporation to a limited liability company in order to save on New York City income taxes (Behren Aff.; NYSCEF Doc. No. 208, ¶¶ 12-13). Pursuant to the Agreement, ECS made payments to 3B Associates LLC for net profits in each quarter of 2011 and 2012 and the first three quarters of 2013 (NYSCEF Doc. No. 74). Defendant consented to the assignment from 3B Group Inc. to 3B Associates LLC by paying money directly to 3B Associates LLC on October 12, 2012, December 21, 2012, and November 14, 2013_(NYSCEF Doc. No. 22) A certificate of dissolution was filed for 3B Group, Inc. in January 2013 (NYSCEF Doc. No. 84).

3B Associates LLC sued defendant asserting two causes of action for breach of contract and two causes of action for an accounting. By decision and order dated May 13, 2020 (NYSCEF Doc. No. 148, this Court granted defendant's motion for summary judgment to the extent of dismissing the two causes of action for an accounting (*id.*, at 6). The Court denied 3B Associates LLC's motion for summary judgment, finding there were material issues of fact as to whether 3B Associates LLC was an assignee or a successor-in-interest to 3B Group, Inc. and whether defendant consented to an assignment or sufficiently performed to constitute an acceptance of such a modification (*id.*, at 4-5). By decision and order dated October 22, 2020 (NYSCEF Doc. No. 193), this Court granted 3B Associates LLC's motion to amend and add 3B Group, Inc., as an additional plaintiff, because the parties disputed whether 3B Associates LLC was a successor

to 3B Group, Inc. and that if 3B Associates LLC was not the successor-in-interest as it claimed, 3B Group, Inc. would be entitled to prosecute this action as part of the winding up of 3B Group, Inc.'s affairs (*id.*, at 5).

Discussion

On a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

The defendant's affirmative defense for lack of consideration must be dismissed. The Agreement provides that in consideration of the services provided by the plaintiff, the defendant was obligated to make certain payments (NYSCEF Doc. No. 66, ¶ 1). The argument that the plaintiff failed to perform certain services at some point in time is not supported in the record and in any event does not support an argument that there was no consideration for entering into this Agreement initially. If the plaintiffs failed to perform certain services as the defendant now asserts, this amounts to an argument that the plaintiffs breached the Agreement. However, no contemporaneous basis for this assertion appears in this record, and there is no contemporaneous written evidence of any such assertion made by the defendant.

The defendant's affirmative defenses that plaintiffs committed a prior material breach of the Agreement and that the Agreement was terminated must also be dismissed. No evidence has been submitted on this motion that any contemporaneous written communication was sent to plaintiffs regarding a breach or termination. Mr. Hoffman's recently executed affidavit does not raise a triable issue of fact here in the absence of any contemporaneous evidence of the same. The Agreement also does not provide that termination could be effectuated orally. It specifically provides it cannot be "changed, modified or cancelled" without a prior written agreement.. The absence of the word termination does not create an ambiguity in the interpretation of the Agreement. The parties agreed that a writing was required.

On the prior motions for summary judgment, the Court found that there was an issue of fact as to whether 3B Associates LLC was an assignee or a successor-in-interest to 3B Group Inc. It is now clear on the record before this Court that 3B Associates LLC was the successor-in-interest to 3B Group Inc. The creation of 3B Associates LLC was a reorganization of 3B Group, Inc. for tax purposes (*see* Behrens Aff.; NYSCEF Doc. No. 208, ¶ 12 [the shareholders of 3B Group Inc. "decided to change the type of entity of the company from a corporation (3B Inc.) to a limited liability company (3B LLC) in order to save on New York City income taxes"]). At the time of 3B Associates LLC's formation, the members of 3B Associates LLC were the same as the shareholders of 3B Group, Inc. and had the same ownership interests (*compare* NYSCEF Doc. No. 71 *with* NYSCEF Doc. No. 72). Pursuant to the Assignment Agreement, all of 3B Group, Inc.'s interests were assigned to 3B Associates LLC. The record plainly demonstrates that 3B Associates LLC assumed the corporate rights and obligations of 3B Group, Inc. and is therefore a successor-in-interest (*ETF Intern. Associates, Inc. v American Stock Exchange LLC*, 87 AD3d

464, 464 [1st Dept 2011]). That the defendant made quarterly payments to 3B Associates LLC evidences its consent to the same (*see* NYSCEF Doc. No. 74). The defendant cannot avoid its obligation to plaintiffs arguing otherwise and simultaneously arguing that the predecessor-in-interest isn't winding up its affairs.

The plaintiffs are thus entitled to summary judgment against the defendant for its failure to make payments on net profits in 2014, 2015 and 2016. The plaintiffs have demonstrated their entitlement to payment of their proportion of the $7,386,500 Settlement Payment that the defendant received in 2016, because it is properly included in net profits. As discussed above, net income here was not intended to mean "ordinary income" only. The Agreement specifically provides that net profits shall be defined as the defendant's net income as determined for federal income tax purposes in accordance with generally accepted accounting principles and provides for the plaintiffs to receive a portion of the sales price if the controlling interest in the defendant was sold or transferred (NYSCEF Doc. No. 66, ¶¶ 1-2). Additionally, Mr. Hoffman previously testified that the Settlement Payment of $7,387,500 was received by defendant (tr. at 85, lines 19-23; NYSCEF Doc. No. 212) and that the $7,387,969 included on his tax return as capital gains constituted the Settlement Payment that belonged to defendant (*id.*, at 129, lines 14-25). There is no triable issue of fact as to whether the Settlement Payment belongs to the defendant and is considered net income pursuant to the Agreement. The plaintiffs are entitled to summary judgment for non-payment on the net profits, including the Settlement Payment, for 2014-2016.

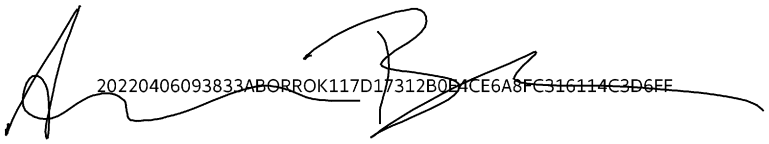
For the avoidance of doubt, defendant's motion for summary judgment is denied for the reasons set forth herein.

It is hereby ORDERED that 3B's motion is granted to the extent set forth herein; and it is further

ORDERED that the Clerk shall enter judgment in favor of plaintiffs and against defendant in the amount of $982,455.20 (representing plaintiffs' unpaid shares of net profits for 2014, 2015, and 2016), together with interest at the statutory rate from the date of December 22, 2017, until the date of the decision of this motion, and thereafter as calculated by the Clerk of the Court; and it is further

ORDERED that defendant's first, second, sixth, ninth, and eleventh affirmative defenses are dismissed; and it is further

ORDERED that the remainder of this action is severed and shall continue.



4/4/2022
DATE

ANDREW BORROK, J.S.C.

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