

PCT Contr., LLC v Riggs Distler & Co., Inc.
2022 NY Slip Op 31451(U)
May 2, 2022
Supreme Court, New York County
Docket Number: Index No. 655278/2018
Judge: Barry R. Ostrager
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**SUPREME COURT OF THE STATE OF NEW
YORK NEW YORK COUNTY**

PRESENT:	HON. BARRY R. OSTRAGER	PART	IAS 61EF
	<i>Justice</i>		
	-----X		
	PCT CONTRACTING, LLC,	INDEX NO.	655278/2018
	Plaintiff,	MOTION DATE	
	- v -	MOTION SEQ. NO.	
	RIGGS DISTLER & COMPANY, INC.,		
	Defendant.		DECISION AFTER TRIAL
	-----X		
	HON. BARRY R. OSTRAGER		

The bench trial of this action was conducted on March 21, 2022. The exquisitely simple issue in the case is whether an unsigned finder’s fee letter between the plaintiff PCT Contracting, LLC (“PCT”) and HMC Strategic Advisors LLC (“HMC”) entered into on August 3, 2015 was a “Material Contract” that should have been disclosed in the Asset Purchase Agreement (“APA”) dated November 2, 2016 between PCT and Riggs Distler & Company, Inc. (“Riggs”) pursuant to which Riggs acquired certain business assets and obligations of PCT.

Direct testimony by affidavit was submitted to the Court by each party, and each affiant was made available for cross-examination. The trial was conducted in a single day, and the Court finds that the testimony adduced at the trial and the exhibits introduced into evidence established the following facts:

1. HMC did substantial finder’s fee work for PCT, largely with prospective purchasers *other than Riggs*;
2. HMC requested a finder’s fee of 4% of any transaction in which HMC was involved in the August 3, 2015 letter, but HMC was entitled to be compensated if, and only if, a transaction was consummated;
3. Richard Persico (“Persico”) did not countersign the August 3, 2015 letter, although he was well aware of the fact that HMC was expending significant time seeking a buyer for

PCT assets and also advised HMC that PCT would prefer to compensate HCT for a successful sale rather than on an hourly basis;

4. Multiple sections of the APA between PCT and Riggs obligated PCT to disclose any “Material Contract” or any undisclosed liabilities;
5. The APA also contained a representation that PCT “had no pre-existing arrangements for brokerage or finder’s fee except for an agreement with Madison One and Robert Baker [on behalf of HMC], whose compensation shall be negotiated and paid entirely by Buyer [Riggs]”;
6. Subsequent to the execution of the APA an arbitrator rendered a 25-page interim award dated September 18, 2018 finding that the August 3, 2015 letter was a binding contract between PCT and HMC and holding that the finder’s fee services HMC provided to PCT entitled HMC to \$1,950,000 or 4% of the sales price Riggs paid for the assets Riggs purchased from PCT. The arbitrator also found that Richard Persico testified in a deposition that PCT had a contract with HMC;
7. PCT did not disclose any arrangement it had with HMC apparently because PCT claims it did not believe the unsigned August 3, 2015 letter exchanged between PCT and HMC was a binding contract.

PCT has asserted claims for breach of contract and indemnification against Riggs for the sums PCT paid to satisfy the arbitration award. PCT also claims that Riggs breached its obligation to negotiate with HMC in good faith to reduce the \$1,950,000 award HMC received.

During opening statements counsel for PCT stated that the issues before the Court are:

[W]hether or not the unsigned proposal from HMC dated August 3, 2015 was a material contract as defined by the Asset Purchase Agreement. If your Honor finds that it was, we lose. If your Honor finds that it was not, we go to the second issue.

That is, did PCT fraudulently misrepresent its deal with Bob Baker, HMC.

Trial Tr. at 4.

The short answer to counsel for PCT’s observations during its opening statement is that the HMC arrangement was a “Material Contract”. The testimony adduced at the trial established that Riggs priced its acquisition of certain assets and liabilities of PCT on the basis of PCT’s express warranties (Trial Tr. at 70; 72; Pierre Gauthier aff. ¶8). It is true, as PCT argues, that

Riggs was aware of Baker's very limited involvement in its transaction with PCT and "could have picked up the phone to call Baker," but the Court entirely credits the testimony of Pierre Gauthier, who was the CEO of the company that owned Riggs at the time of the PCT-Riggs transaction, that Mr. Persico, the CEO of PCT, told Mr. Gauthier that for Mr. Baker's limited role in the PCT-Riggs transaction, Mr. Baker could be compensated with "hockey tickets," a statement Mr. Persico did not dispute (Trial Tr. at 37). Mr. Gauthier further testified that:

Mr. Persico asked me to pay a nominal or small amount to Mr. Baker, saying that there was no contract but that he felt that Mr. Baker had done some work. But it was – I was led to believe it was a small amount, and therefore below the materiality level of which the APA was stated.

Trial Tr. at 70. Thus, even if the August 3, 2015 letter was not a Material Contract that had to be disclosed – it was – PCT induced Riggs to compensate Robert Baker by misrepresenting the quantum of compensation to which Mr. Baker might be entitled. The APA contains an express provision that precludes any argument that Mr. Gauthier was at fault for "not picking up the phone":

Section 8.07 Effect of Investigation. The representations, warranties and covenants of the Indemnifying Party, and the indemnified Party's right to indemnification thereto, shall not be affected or deemed waived...by reason of the fact that the Indemnified Party or any of its Representatives knew or should have known that any such representation or warranty is, was or might be inaccurate...

NYSCEF Doc. No. 150 at 58.

In all events, PCT is precluded by collateral estoppel from denying and relitigating the existence of the binding effect of the HMC Agreement. The arbitrator found that HMC was entitled to a \$1,950,000 finder's fee. An arrangement that gives rise to a nearly \$2 million liability is a "Material Contract" in a transaction in which the threshold of materiality is contractually fixed at \$50,000. And, arbitration awards are accorded collateral estoppel effect to

prevent parties from relitigating their claims. *Clemens v. Apple*, 65 N.Y.2d 746 (1985). PCT fully litigated its dispute with HMC before the arbitrator.

Moreover, the testimony adduced on cross-examination of PCT's trial witnesses (Messrs. Persico and Mach) clearly established that the arbitrator's decision was amply supported by the testimony adduced at this trial, *viz.*, that HMC expended time and effort on PCT's behalf and that PCT understood and agreed that HMC expected to receive substantial compensation from PCT. Mr. Persico, the CEO of PCT, conceded that the fee that Riggs had to negotiate with Baker "related to his work on the Riggs acquisition" (Trial Tr. at 29) and that "Mr. Baker was to be paid [by Riggs] strictly for work done for Riggs, not in the past." (Trial Tr. at 31). The Court also finds that Mr. Persico was dissembling when he testified that he offered to share the August 3, 2015 letter with Pierre Gauthier. Not only was Mr. Persico's testimony inconsistent with sworn testimony he gave in other proceedings (Trial Tr. at 41), it was contradicted by Mr. Gauthier (Trial Tr. at 73). Significantly, the arbitrator in the HMC-PCT arbitration also found Mr. Persico's testimony lacked credibility.

The totality of the testimony adduced at trial established that the value of any work that Baker/HMC did for PCT in connection with the Riggs transaction was well above the \$50,000 materiality threshold and that Riggs had no ability to negotiate a payment to Baker/HMC that deviated from the arbitral award HMC obtained against PCT.

Accordingly, the Court finds that PCT's claims fail, and the Clerk is directed to enter judgment dismissing all of PCT's claims with prejudice. The Court declines to grant Riggs attorney's fees or any other relief request in its counterclaims beyond that stated herein. The

parties had a contested dispute which was resolved in favor of the defendant. The attorneys for each party effectively represented their clients.

Dated: May 2, 2022


BARRY R. OSTRAGER, J.S.C.