

Madison Ave. Diamonds LLC v KGK Jewelry LLC

2015 NY Slip Op 31585(U)

August 18, 2015

Supreme Court, New York County

Docket Number: 159045/2012

Judge: Charles E. Ramos

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

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MADISON AVENUE DIAMONDS LLC and
SHAINDY LAX,

Plaintiffs and Counterclaim-Defendants,

-against-

Index No.
159045/2012

KGK JEWELRY LLC,

Defendant and Counterclaim-Plaintiff.

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

In motion sequence 005, KGK Jewelry LLC (KGK) moves for summary judgment pursuant to CPLR 3212, seeking to dismiss Madison Avenue Diamonds LLC and Shaindy Lax's (collectively, Madison) causes of action for breach of contract and for judgment on its counter-claims. In addition, Madison moves to compel discovery pursuant to CPLR 3124 and 3126 and leave to file an amended complaint pursuant to CPLR 3025.

I. Background

The facts set forth herein are taken from the parties' submissions, memoranda, and Rule 19-A statements, and are undisputed except where noted.

Disputes preceding this action surrounded Madison's alleged failure to make timely payments in order to settle outstanding debts for jewelry provided by KGK. In turn, Madison has alleged that said jewelry was of substandard quality.

In order to resolve these preexisting issues, the parties

entered into a settlement agreement which became effective on June 28th, 2012 (Settlement Agreement). The purpose of the Settlement Agreement was to "settle fully all differences, disputes and claims that may exist between" the parties "without any admission of wrongdoing or liability" (Izower-Fadde aff, exhibit A at 2).

Within the Settlement Agreement are a series of recitals coupled with a structured payment scheme calling for performance by both parties. The Settlement Agreement was designed to facilitate both payments made by Madison as well as the return of intellectual property by KGK to Madison.

Madison's Obligations Under the Settlement Agreement.

Pursuant to the "Payment Terms" portion of the Settlement Agreement, the parties agreed to particular dates upon which Madison was to make payments originally owed as a result of the preexisting disputes. Payments totaling \$3,000,000 were to be dispersed in a series of payments via wire transfer, initiating at the execution of the Settlement Agreement on June 28th, 2012.

In addition, if Madison were to default or fail to remit any portion of the settlement payments on time, the Settlement Agreement provided a 10-day cure provision. This cure provision required KGK to deliver written notice to Madison of their default or deficient payment. If, however, that deficient payment went uncured beyond the ten business days permitted, then all

remaining payments outstanding under the Settlement Agreement were to become "immediately and automatically" due (Izower-Fadde aff, exhibit A, § 1.3).

KGK's Obligations Under the Settlement Agreement

Pursuant to section 2 of the Settlement Agreement, KGK agreed to return a volume of intellectual property to Madison including models, molds, and, particularly relevant to this action, computer-aided-design files (CAD Files) (*id.* at § 2).

The CAD files operated as the architectural design of distinct jewels, gems, or other precious items commonplace within the trade. Although KGK maintained these CAD files in a particular format, the Settlement Agreement required the conversion of the files to different formats more easily accessible by Madison upon their return.

According to the Settlement Agreement, and not in dispute here, KGK was obligated to return the CAD files in a particular format within 45 days from the date of execution. Notably, KGK was obligated to convert the CAD files to stereo lithographic (STL) format, and deliver these converted files to Madison. Failure to successfully convert the files into STL format and perform delivery within 45 days of the Agreement's execution explicitly constituted a "material breach" of the Settlement Agreement by KGK (*id.* at § 2.1).

General Release

Section 4 of the Settlement Agreement sets forth general release provisions which are then broken down into subsections as applied to the parties independently. The releases became operative and binding upon a breach made by either Madison or KGK:

"...(I) the release set forth in section 4.1(a) below (i.e. the release of any claims against KGK by Madison) shall likewise become valid and binding upon the occurrence of Madison's breach of any of the provisions set forth in this Agreement, including its payment obligations under section 1 hereof, subject to the applicable cure and toll periods set forth therein, and (ii) the release set forth in Section 4.1(b) below (i.e., the release of any claims against Madison by KGK shall likewise become valid and binding upon the occurrence of KGK's breach of any of the provisions set forth in this Agreement, including its obligations under Section 2 hereof, subject to the applicable cure provisions set forth therein" (*id.* at \$4).

More simply stated, if Madison were to breach any provision, KGK would be relieved of its obligations to produce the CAD files. Similarly, if KGK were to breach any provision, Madison would be relieved of its obligations to abide by the structured payment scheme under the Settlement Agreement.

The Relevant Incident

Upon execution of the Settlement Agreement, Madison made its first payment of \$625,000 on June 28th, 2012. Within 30 days of the effective date of the Settlement Agreement, KGK returned the molds, models, and CAD Files and in doing so additionally provided a sample conversion of one CAD file into the STL format. Shortly thereafter, Madison indicated it was unable to review the

CAD files that KGK had delivered to Madison to which KGK offered to allow a representative from Madison to come to KGK offices to review the files.

On July 20, 2012, Madison sent Jeannette Perry, a CAD designer, to KGK's offices to review the CAD files. Ms. Perry reviewed the sample CAD file in STL format and expressed concern with the amount of time it took to open the file. Although KGK contends that Ms. Perry requested that the STL files be segmented (divided into smaller, more quickly accessible files), Madison disputes this assertion. Nevertheless, by August 9th, 2012, KGK had completed the process of segmenting all CAD Files in STL format and transferred them to KGK's New York offices (KGK memo of law at 13; Madison memo of law at 16).

On August 10th, 2012, Adam Snukal, counsel for KGK, reached out to Lawrence Rosen, counsel for Madison, to arrange for delivery of the CAD files converted into STL format. Although KGK maintains that it attempted to reach out to Madison that morning, Madison disputes such an assertion, arguing that such contact did not occur until midday (KGK memo of law at 14; Madison memo of law at 17).

The Parties' Contentions

It is KGK's assertion that the converted STL files were prepared and ready for delivery in order to meet the 45-day limitation but that Madison frustrated such delivery attempts by

making no effort to contact KGK and arrange to review and collect the files on either Saturday August 11th, 2012, or Sunday, August 12th, 2012. Moreover, KGK contends that delivery of the files on August 13th was in fact timely as per General Construction Law § 25, which they argue extended the contractual period for delivery to the following day. Further, KGK avers that Madison's acceptance of the converted files waived any right to repudiate its obligations and withhold payment to KGK and thus KGK is entitled to dismissal of Madison's Amended Complaint and an award of summary judgment for KGK in the amount of \$2.375 million.

Madison argues that KGK's failure to deliver the STL files within the 45-day period, pursuant to the Settlement Agreement, is in fact a material breach of the Agreement itself thus justifying its refusal to pay the remaining balance of \$2,375,000 in Settlement Payments, plus interest. Madison further argues that KGK has continuously "stonewalled" discovery by refusing to allow particular depositions (Madison memo of law at 32).

II. Discussion

KGK now moves for summary judgment pursuant to CPLR 3212. Supported by affidavits, documentary evidence, or other available proof, a motion for summary judgment shall be granted if "upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party"

(CPLR 3212[b]).

A motion for summary judgment shall be denied, however, if any party raises triable and material issues of facts (*id.*). Furthermore, if submissions made in opposition to the motion establishes that "facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just" (CPLR 3212[f]).

Neither party disputes that delivery of the STL files occurred on August 13, 2012, one day past the deadline set forth by the Settlement Agreement. However, what is in dispute is whether such delivery was permissible pursuant to the language of the Settlement Agreement when read against General Construction Law § 25 (GCL § 25). GCL § 25 provides in pertinent part:

"Where a contract by its terms authorizes or requires the payment of money or the performance of a condition ... within or before or after a period of time computed from a certain day, and such period of time ends on a Saturday, Sunday or public holiday, unless the contract expressly or impliedly indicates a different intent, such payment may be made or condition performed on the next succeeding business day ... with the same force and effect as if made or performed in accordance with the terms of the contract" (McKinney's N.Y. Gen. Constr. Law §25[1]).

KGK contends that this particular statute makes their August 13, 2012 delivery of the CAD files in STL format permissible. Madison disagrees arguing instead that the exact same law operates against KGK since the GCL only extends a performance

date if the parties do not intend the date to be firm. Madison's interpretation of the GCL is incorrect. The statute requires this Court to find that the contract "impliedly indicates a different intent", i.e., that no matter what, performance must be made on the contract date and that time was of the essence. Madison's reliance on the material breach provision in the Agreement to show that the (45) forty-five day period to deliver the STL files was intended to be firm is unwarranted given the terms of the settlement agreement. The agreement merely defines the seriousness of a failure to perform. There is no "time of the essence" clause in the Agreement and nothing in the Agreement suggests such an intent. In addition, there is no particular significance to the date set for performance, such as the expiration of a stock option. Madison has also failed to show any damages arising from the timing of KGK's delivery of the converted CAD Files, which is another indication that the set date for performance was not critical to the Settlement Agreement.

Interpretation of the Settlement Agreement

The parties to a contract can assure a finding that "time is of the essence" by including those, or equivalent words, within their agreement. The specification of a particular time frame within the language of the contract by itself is not determinative of whether a one day delay would constitute a

material breach of the agreement (*Urban Archaeology Ltd. v Dencorp Investments, Inc.*, 12 AD3d 96, 103 [1st Dept 2004]). While strict adherence to the terms of an option contract is ordinarily required, it is a broadly accepted principle that time is of the essence with this type of contractual provision (*id.*). This is not the case here.

The language at issue from the Settlement Agreement states: "within forty-five (45) days from the Effective Date hereof, KGK shall convert the CAD Files to STL format, and deliver the converted files to Madison, the failure of which shall constitute a material breach hereof by KGK" (Izower-Fadde aff, exhibit A, § 2.1).

Given the facts before us, it is clear that Madison chose to treat a failure to return the STL files as a material breach. The language of the Settlement Agreement expressly states that failure to deliver the CAD files in STL format within forty-five days "shall constitute a material breach" (Settlement Agreement Ex. A § 2.1). What is not expressed or implied, is that time was of the essence or that there is a waiver of GCL § 25. Thus, GCL § 25 applies and KGK's delivery of the converted CAD Files on the Monday immediately after the 45-day deadline was timely under the Settlement Agreement.

The bulk of the dispute revolves around the aforementioned release provisions set forth in the Settlement Agreement. KGK

argues, Madison must pay what is owed before it receives any of the benefits that it would otherwise receive under the Agreement (KGK reply brief at 8). "Read as a whole" KGK asserts, "the release provisions provide that there is no release unless the Settlement Payments are made (*id.*). Madison argues to the contrary, stating that if such a release did not release Madison's payment obligations under the Agreement, KGK would "be free to breach without cost" (Madison memo of law at 27). Madison's reasoning is flawed since it assumes that the delay of one day would have been entirely contrary to the intent of the parties.

It is undisputed that Madison received the benefit of the Settlement Agreement by accepting and taking possession of the converted and segmented CAD files in STL format after the alleged breach (Rule 19-A Statements ¶74) (*Stempel v Rosen*, 140 AD2d 326, 329 [2d Dept 1988] [the right to rescind a contract was barred by subsequent acceptance of the benefits growing out of the contract]). Thus, Madison was never released from its further payment obligations to KGK under the Settlement Agreement.

Cross-Motions

In light of the above, the cross-motions are denied as moot.

Accordingly, it is

ORDERED that defendant's motion for summary judgment (005) is granted;

ORDERED that plaintiff's cross-motion to compel discovery (005) is denied; and it is further

ORDERED that plaintiff's cross-motion for leave to file a second amended complaint (005) is denied.

Settle judgment on notice.

Dated: August 18, 2015

Enter:

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

J.S.C.