Paramax Corp. v VoIP Supply, LLC
2019 NY Slip Op 33839(U)
September 30, 2019
Supreme Court, Erie County
Docket Number: 812307-2017
Judge: Henry J. Nowak

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

PARAMAX CORPORATION,

Plaintiff,

- against

VoIP SUPPLY, LLC,
SAYERS TECHNOLOGY HOLDINGS, LLC,
BENJAMIN SAYERS,

Defendants.

DECISION

INDEX NO. 812307-2017

PRESENT: HON. HENRY J. NOWAK, J.S.C.
Justice Presiding

Defendants VoIP Supply, LLC (VoIP), Sayers Technology Holdings, LLC (Sayers Technology) and Benjamin Sayers move to dismiss the amended complaint of plaintiff Paramax Corporation (Paramax). Plaintiff cross-moves to disqualify defendants' counsel.

In its original complaint, Paramax asserted five causes of action – (1) breach of contract; (2) breach of amended and modified contract; (3) breach of the implied covenant of good faith and fair dealing; (4) quantum meruit and (4) promissory estoppel. Defendants moved to dismiss all but the second cause of action. This court granted dismissal of the quantum meruit cause of action but ultimately denied the motion to dismiss the causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and promissory estoppel. Defendants appealed. While the appeal was pending, Paramax amended its complaint, alleging the same four causes of action that survived defendants' original motion to dismiss.

Defendants' Motion to Dismiss the Amended Complaint

Defendants move to dismiss all four causes of action in the amended complaint, raising many of the same bases that they asserted in their prior motion. After oral argument on the instant motion, the Appellate Division, Fourth Department, issued a decision as to the denial of defendants' motion to dismiss three of the causes of action in the original complaint (*Paramax Corporation v VoIP Supply, LLC*, 175 AD3d 939, 2019 N.Y. Slip Op. 06267 [4th Dept 2019]). In that decision, the Appellate Division took judicial notice of the amended complaint but rejected Paramax's contention that defendants' appeal was rendered moot by its filing, insofar as the "new pleading does not substantively alter the existing causes of action" (*id.* at *1, quoting *Aetna Life Ins. Co. v Appalachian Asset Mgt. Corp.*, 110 AD3d 32, 39 [1st Dept 2013]). The Appellate Division then upheld the denial of defendants' motion to dismiss causes of action for breach of the implied covenant of good faith and fair dealing and promissory estoppel, but modified this court by dismissing the cause of action for breach of contract (*Paramax*, 175 AD3d at ___, 2019 N.Y. Slip Op. 06267 at *2).

1. The First Cause of Action for Breach of Contract

Based upon the Appellate Division decision, Paramax's first cause of action in the amended complaint for breach of contract must be dismissed for the reasons stated therein.

2. The Second Cause of Action for Amended and Modified Contract

Paramax brought this cause of action in the alternative to the first cause of action, alleging that "the parties agreed both orally and in writing to amend and modify the terms of the contract to provide that Paramax's financial advisory services were sufficient to entitle Paramax to a success fee upon a closing of the Sangoma transaction." Defendants move to dismiss Paramax's second cause of action, claiming that it is barred by the statute of frauds.

New York's statute of frauds voids all agreements to pay compensation for services rendered in connection with the sale of a business that are not evidenced by a writing signed by the party to be charged (New York General Obligations Law § 5-701 [a] [10]). Paramax argues that defendants waived this defense by failing to raise it in its initial motion to dismiss. A party may move to dismiss "on one or more of the grounds set forth in [CPLR 3211] subdivision (a), *and no more than one such motion shall be permitted*" (CPLR 3211 [e]). "Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion" (*id.*) The statute of frauds defense is set forth in paragraph five of CPLR 3211 (a). Therefore, the court agrees with Paramax that the statute of frauds defense has been waived.

3. The Third Cause of Action for Breach of the Implied Duty of Good Faith and Fair Dealing

When defendants moved to dismiss this cause of action in the original complaint, they claimed that it was based upon the same facts as the breach of contract claim and that the express terms of the contract precluded it. The Appellate Division rejected that argument, holding that "[e]ven if a party is not in breach of its express contractual obligations, it may be in breach of the implied duty of good faith and fair dealing . . . when it exercises a contractual right as part of a scheme to realize gains that the contract implicitly denies or to deprive the other party of the fruit [or benefit] of its bargain" (*Paramax*,175 AD3d at ___, 2019 N.Y. Slip Op. 06267 at *2, quoting *Elmhurst Dairy, Inc. v Bartlett Dairy, Inc.*, 97 AD3d 781, 784 [2d Dept 2012]).

Defendants now allege another basis to dismiss Paramax's third cause of action – that email correspondence constitutes documentary evidence that utterly refutes the allegations. The relevant email messages were generated by Sayers; therefore defendants knew about them when

they moved to dismiss the original complaint. The documentary evidence defense is set forth in paragraph one of CPLR 3211 (a) and was therefore waived by defendants' failure to raise it on its motion to dismiss the original complaint (CPLR 3211 [e]).

Even if this defense had not been waived, "[i]n order for evidence submitted under a CPLR 3211 (a) (1) motion to qualify as 'documentary evidence,' it must be 'unambiguous, authentic, and undeniable' " (*Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713, 714 [2d Dept 2012], quoting *Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 996-997 [2d Dept 2010]). The copies of email messages at issue fail to unambiguously and undeniably refute Paramax's claim that it is entitled to the success fee as a benefit of its bargain. In an April 5, 2017 message, Sayers informs Sangoma representative Bill Wignall of his desire to avoid paying the success fee ("I don't want to bring in [Paramax] people if I don't have to, that will cost me 5 %"). However, Sayers is far less definitive to Paramax representatives in a message the following day, on April 6, 2017:

> "I guess there is some confusion . . . I'm quite happy to pay the success fee when resulting from your work contacting and negotiating with potential buyers, especially if the valuation is driven up and everyone wins. I'm just unclear how it applies when no prospects have been contacted and the name Sangoma was added to the buyer list by me. We can certainly discuss tomorrow and if I'm wrong, so be it, I'll just have to consider it as you stated."

Paramax further alleges that on April 7, 2017, Sayers discussed and agreed with Paramax that the success fee was applicable to the Sangoma deal, and in an April 18, 2017 email to Mr. Wignall, Sayers acknowledged in writing that Paramax was owed the success fee.

4. The Fourth Cause of Action for Promissory Estoppel

The Appellate Division upheld Paramax's promissory estoppel cause of action, finding that it "is based on alleged assurances made by defendants after the written contract was

executed, which the written contract does not govern" (*Paramax*, 175 AD3d at ___, 2019 N.Y. Slip Op. 06267 at *2). The Appellate Division concluded "that plaintiff's allegations that defendants represented to plaintiff that they would pay the success fee in order to induce plaintiff to continue to work on the deal, that plaintiff relied on defendants' representations in performing the work, and that payment of the success fee was not made, are sufficient to state a cause of action for promissory estoppel" (*id.*). Defendants now claim that the promissory estoppel cause of action, like Paramax's second cause of action, is barred by the statute of frauds. This court finds that defense similarly was waived pursuant to CPLR 3211 (e).

Even if that defense had not been waived, "the Appellate Division departments have unanimously recognized that promissory estoppel may preclude enforcement of the statute of frauds if application of the statute would result in unconscionability" *(In re Estate of Hennel*, 29 NY3d 487, 493-94 [2017]). Even if defendants had not waived the statute of frauds defense by failing to raise it in their initial motion to dismiss, the court finds that if Paramax is able to prove all of the elements alleged for promissory estoppel, dismissal of that claim would lead to an unconscionable result.

Based upon the foregoing, this court grants defendants' motion to dismiss Paramax's first cause of action and denies defendants' motion to dismiss the remaining three causes of action.

Paramax's Cross-Motion to Disqualify Defendants' Counsel

The basis of Paramax's motion to disqualify defendants' counsel is that a partner at Gross Shuman, P.C., Jeffrey Human, Esq., is likely to be called as a witness on a significant, contested issue in this matter. Rule 3.7 (a) of the Rules of Professional Conduct provide that a "lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact." Furthermore, Rule 3.7 (b) provides that a "lawyer may not act as

advocate before a tribunal in a matter if: (1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client."

The motion is supported by the affidavit of Timothy Minneci, the Executive to Vice President and Managing Director of Paramax. Minneci claims that he had a telephone conversation with Mr. Human on April 7, 2017. In that conversation, Minneci told Human that during a telephone call the day before, Sayers referred to the fact that the success fee may not be applicable to the transaction with Sangoma Technologies. Minneci claims that he told Mr. Human that Paramax disagreed, and that Paramax had told Sayers that it would terminate the agreement and not provide its comments to an outstanding letter of intent if Sayers persisted in its claims that a success fee was inapplicable to the Sangoma transaction. Minneci informed Human that during the April 7 meeting, Paramax and Sayers ultimately agreed that the success fee was applicable, but he again reiterated to Human that Paramax would not hesitate to terminate the contract and would withhold its comments on the letter of intent if Sayers "was going to create an issue regarding the success fee moving forward." Minneci claims that Human then advised him to provide Paramax's comments to the letter of intent. Human allegedly explained that he would "go deal with Mr. Sayers" and commented that he did not know what Sayers was thinking.[1] Thereafter, Minneci provided Paramax's comments on the letter of intent to Human.

[1] The tone of this comment, "I don't know what (Sayers) is thinking," has been alleged differently in the record. Sayers claims that it was straightforward and literal, while Paramax asserts that it was more of an exclamation, expressing disbelief.

Minneci's affidavit further provides that he understood from his conversation with Human that Paramax's comments would not be utilized by defendants if Human concluded, after speaking with Sayers, that the success fee was not applicable to the Sangoma transaction. He further believes that Human would have contacted him had he not confirmed with Sayers that the parties agreed that the success fee was applicable to the Sangoma transaction, and because Human never contacted him regarding the success fee, that Human understood that the success fee was applicable.

Minneci's affidavit demonstrates that Human likely has knowledge of whether both Sayers and Paramax believed in April 2017 whether Paramax was entitled to the success fee. Accordingly, the court agrees that it is likely that he will testify as a witness in this action. Also, the issue of whether Paramax is entitled to a success fee in regard to the Sangoma transaction is certainly a significant issue in this case.

Sayers claims that he unequivocally maintained throughout the relevant time period that Paramax was not entitled to its success fee because they failed to identify or contact Sangoma in the course of its work on the transaction. Paramax disputes that Sayers' representations were clear, alleging that Sayers and Human directly and indirectly encouraged Paramax to perform additional work in regard to the transaction. The court finds that Human certainly may provide information that might contradict Sayers' position in this matter.

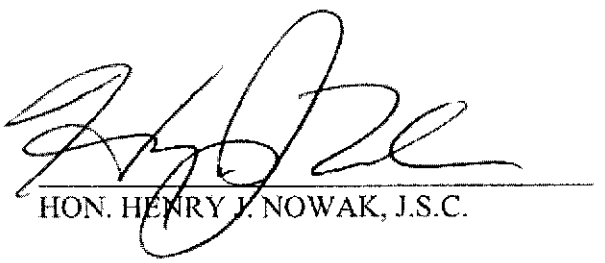
One exception to disqualification is if "disqualification of the lawyer would work substantial hardship on the client" (Rule 3.7 [a] [3]). Gross Shuman, P.C. has represented defendants from the time the proceedings were commenced by Paramax in September 2017. Over the past twenty months, defendants have demonstrated that Gross Shuman has spent

substantial time and effort to represent them in connection with motions, the appeal and document production.

Nonetheless, Paramax pleaded in both the original and amended complaints that it considered Gross Shuman attorneys as material fact witnesses in this action. Much of the legal work involved two motions to dismiss, an appeal of the first motion, and an effort to withhold relevant documents that ultimately were ordered by this Court. Some issues have been narrowed and documentary evidence has been disclosed, but the court does not find that defendants would suffer significant hardship by retaining new counsel to complete disclosure and prepare for trial. Therefore, the court grants Paramax's motion to disqualify Gross Shuman as counsel for defendants.

Submit order.

Dated: September 30, 2019



HON. HENRY J. NOWAK, J.S.C.