VIRGINIA: IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

MAX CLEANERS, INC.
Plaintiff,
v. Case No.: CL-2009-11984
CADENAS, LLC and
CARLOS C. CADENAS
Defendants.

MEMORANDUM IN SUPPORT OF DEFENDANTS' SUMMARY JUDGMENT MOTION

STATUTORY AUTHORITY

Defendants move for summary judgment pursuant to Virginia Supreme Court Rule 3:20:

"Any party may make a motion for summary judgment at any time after the parties are at issue, except in an action for divorce or for annulment of marriage. If it appears from the pleadings, the orders, if any, made at a pretrial conference, the admissions, if any, in the proceedings, or, upon sustaining a motion to strike the evidence, that the moving party is entitled to judgment, the court shall enter judgment in that party's favor."

Defendant attaches hereto the following Exhibits in support of its motion:

Exhibit 1: Plaintiff's Complaint – filed by Plaintiff on 8/18/2009
Exhibit 2: Plaintiff's Responses to Defendants' 1st Request for Admissions
Exhibit 3: Plaintiff's Responses to Defendants' 2nd Request for Admissions
Exhibit 4: Plaintiff's Responses to Defendants' 3rd Request for Admissions

In support of their motion, Defendants also reference Virginia Supreme Court Rule 4:11:

"...(b) Any matter admitted under this Rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission...
(d) Only such requests for admissions and the answers thereto as are offered in evidence shall become a part of the record..."

ARGUMENT

I. Summary Judgment as to Count I: Fraud. Plaintiff has attempted to plead a cause of action for actual fraud. To prevail in its claim for actual fraud, Plaintiff must prove: (1) false representation; (2) of a material fact; (3) intentionally and knowingly made; (4) with the intent to mislead; (5) reliance by the party misled; and (6) resulting damage to the party misled. Evaluation Research Corp. v. Alequin, 247 Va. 143 (1984).

a. **Plaintiff's Lack of Due Diligence Bars Reliance.** Defendants rely on the holding in Harris v. Dunham, 203 Va. 760 (Va. 1962) in asserting that Plaintiff's own lack of due diligence in investigation negates the required element of reliance.

Defendants cite the Plaintiff's own pleadings and admissions by reference, to be incorporated herein as if fully restated: Pl.'s Compl. Ex. 1 at ¶¶ 11, 14(b); Pl.'s Resp. to Def.'s. 3rd Admis. at ¶¶ 16, 17; Pl.'s Resp. to Def.'s. 2nd Admis. at ¶¶ 1, 2, 4, 5, 11, 12, 13.

Defendants rely on the Plaintiffs pleadings and admissions to argue that, as in Dunham, the Plaintiff "either undertook and made a full and independent investigation and inquiry and acted upon the information so obtained, or made a partial inquiry, with full opportunity of complete investigation and ascertainment of all the facts, and then elected, not to exhaust the readily available sources of information, but to act upon the knowledge obtained from his partial inquiry." Id. at 769 *citing* DeJarnette v. Brooks Lumber Co., 199 Va. 18 at p. 30. The Court in Dunham went on to quote a previous holding in which it held that "'[i]n either of the latter instances, if he in fact acts upon the information so secured by himself, he will not be heard to say that he relied upon the previous misrepresentation of fact.'" Id. *citing* Masche v. Nichols, 188 Va. 857 at 868.

Defendants argue that the facts of Dunham are controlling in the instant case and that the Plaintiff here as in Dunham that "[t]he evidence before us shows conclusively that [Plaintiff] had a full opportunity to investigate completely, with readily available sources of information. Had he taken advantage of his opportunity and elected to exhaust the available information, he could easily have discovered those things which he now says were misrepresented to and concealed from him." Id. at p. 279. As such, Defendants argue that the Dunham Court's application of the rule in Nichols is directly applicable and that Plaintiff is barred from claiming reliance on Defendants' alleged non-disclosure of fact.

Lacking the element of reliance, Plaintiff's actual fraud claim must fail and there being no other material fact genuinely in dispute, Defendants are entitled to summary judgment.

b. No Inducement or Reliance by Plaintiff. Defendants argue that based on the Plaintiff's own pleadings and admissions, there was no reliance by Plaintiff upon the Defendants alleged misrepresentations.

Defendants cite the Plaintiff's own pleadings and admissions by reference, to be incorporated herein as if fully restated: Pl.'s Compl. ¶¶ 11, 12, 14, 18, 25, 26, 27; Pl.'s Resp. to Def.'s. 3rd Admis. at ¶¶ 4, 5, 6.

Defendants argue that Plaintiff's Complaint clearly states that the alleged misrepresentations occurred between September 27, 2007 and August 5, 2008. The Agreement of Sale relied upon by Plaintiff in its other counts (Pl.'s Compl. at Ex. 1) was clearly dated and ratified on September 27, 2007 with the Plaintiff having signed on August 21, 2007, more than one month before the date of the alleged misrepresentations.

The Virginia Supreme Court in DeJarnette v. Brooks Lumber Co., 199 Va. 18 stated that in a case of actual fraud "the burden was on [Plaintiff] to prove by clear, cogent and convincing evidence that the officers, agents or employees of the defendant corporation made a misrepresentation of a material fact as distinguished from an expression of opinion. Such representation must have been made for the purpose of inducing the sale and must have been relied upon by [Plaintiff] to his detriment." Id. at p. 28.

Defendant argues that due to the timing of the alleged misrepresentations regarding non-disclosure of a particular client that occurred after the Plaintiff had already signed the contract, there can be no reliance or inducement of the Plaintiff upon the misrepresentation at time of signing because they did not occur until over a month later.

II. Summary Judgment as to Count II: Breach of Contract. Plaintiff has attempted to plead a case for breach of an express written contract. To prevail in its claim for breach of contract, Plaintiff must prove: (1) the existence of an express written contract between the parties; and (2) that Defendant breached the terms of that contract.

a. The Contract Does Not Require Transfer of Any "Soapy Joes" Contract.

Defendants cite the Plaintiff's own pleadings and admissions by reference, to be incorporated herein as if fully restated: Pl.'s Compl. at ¶ 29; Pl.'s Compl. Ex. 1; Pl.'s Resp. to Def.'s. 3rd Admis. at ¶¶ 4, 5.

Plaintiff alleges that: "By failing to assign or otherwise convey to Max Cleaners the "Soapy Joe's" contract, defendants breached the Agreement of Sale." (Pl.'s Compl. at ¶ 29). Plaintiff's complaint provides no basis for the duty to assign or convey any "Soapy Joe's" contract or any other contract. However, Plaintiff has admits that it bases the duty to disclose upon such client information and/or contracts being a component of goodwill as it has also defined by admission. (see Pl.'s Resp. to Def.'s 3rd Admis. at ¶¶ 4, 5.

Defendant argues that Plaintiff's definition of goodwill is correct but its application of the definition is flawed. In Standard Drug v. General Electric, 202 Va. 367 (1960) the Virginia Supreme Court defined goodwill as: "that intangible property right or asset created in the public mind by the skill, experience, dependability and integrity of the manufacturer or producer of the commodity, and the trade-mark or trade name is the symbol of those qualities and constitutes an inseparable part of the goodwill. It is a valuable aid to the growth and enlargement of the business." Id. at 377. Our Supreme Court has further defined goodwill as "the increased value of the business, over and above the value of its assets, that results from the expectation of continued public patronage." Russell v. Russell, 11 Va. App. 411 at 415.

Furthermore, Plaintiff has admitted that any client lists and goodwill of the "Zips" dry cleaners were expressly excluded from the transferred assets pursuant to an Addendum to Contract of Sale dated 8/5/2008 as admitted to in Pl.'s Resp. to Def.'s 3rd Admis. at ¶ 19, 21, 22.

As a matter of law, a specific contract or client information relating to a specific contract do not fit the stated definition of goodwill. Rather, they are part of the assets of the business distinct from goodwill. Plaintiff's use of goodwill to impose a duty of disclosure or transfer of the asset upon Defendant is misplaced, and because that is its sole basis for the duty, its breach of contract count on that basis must fail and summary judgment should granted.

b. <u>The Alleged "Contract Warranty of Revenue" Was Not A Warranty But Rather a Condition that was Waived by Plaintiff.</u> Plaintiff alleges that "Defendants also breached their contract warranty of revenue stated to be $39,000-$42,000 prior to closing." (Pl.'s Compl. at ¶ 29) Defendants find no support for any such contract warranty of revenue but assume that Plaintiffs must be referring to Pl.'s Compl. Ex. 1 at ¶ 11.

Defendants' argue that this paragraph contains language of a condition that if not met, presumably after inspection by Plaintiff of the sales tax and tax return information of the Defendant, that the Plaintiff's sole remedy would be to invoke the second sentence and declare the contract null and void and receive a refund of its deposit. As previously stated, Plaintiff undertook an investigation after which he waived the right to declare the contract null and void, or otherwise rescind the contract. This is supported by Plaintiff's admissions in Pl.'s Resp. to Def.'s 2nd Req. for Admis. at ¶ 2, 13; Pl.'s Resp. to Def.'s 3rd Req. for Admis. at ¶¶ 14, 17.

Furthermore, Pl.'s Resp to Def.'s 3rd Req. for Admis. ¶ 14 seems in direct conflict with its allegations as to "breach of contract warranty of revenue" in relation to the $2,184,000 figure. Defendant is left to wonder what "contract warranty of revenue" Plaintiff claims is breached as the $39,000-$42,000 figures alleged in its Complaint are nowhere to be found.

Waiver is the voluntary, intentional abandonment of a known legal right, advantage, or privilege. Employers Ins. Co. v. Great American, 214 Va. 410, 412-13 (1973). Defendants argue that as a condition that has been waived by Plaintiff, such condition does not provide a proper basis for a breach of contract claim as evidenced by Plaintiff's own admissions. For the sake of argument, even it if it were a warranty, Plaintiff's own admissions indicate that it was not the "contract warranty of revenue" allegedly breached. There being no other mention of revenues in the contract and there being no other material facts genuinely in dispute, Defendants request summary judgment in their favor.

c. The Contract is Executory in Nature and has Merged Into the Bill of Sale.

Plaintiff has admitted to the genuineness and authenticity of several contract documents including the Contract upon which it sues and a Bill of Sale. None of the contract documents contain a survival clause that would prevent the obligations therein to be extinguished by the Bill of Sale admitted to by Plaintiff. (Pl.'s Resp. to Def.'s 1st Req. for Admis at ¶ 1-10.)

Defendant relies on the Court's reasoning in Empire Mgmt. and Dev. Co. v. Greenville Assoc., 255 Va. 49 in which it was stated that "[t]he merger doctrine deals with extinguishing a previous contract by an instrument of higher dignity. "Miller v. Reynolds, 216 Va. 852, 854 (1976).

d. Contract Merger Clause and the Parol Evidence Rule Prohibits Prior Oral Statements to Contradict Express Contract Terms. Defendants cite the Plaintiff's own pleadings and admissions by reference, to be incorporated herein as if fully restated: Pl.'s Compl. at ¶ 17; Pl.'s Compl. Ex. 4; Pl.'s Resp. to Def.'s. 3rd Admis. at ¶¶ 18.

As a matter of law, Parol evidence is not admissible in the interpretation of an unambiguous written contract that contains a merger/integration clause. *see e.g.* Tiffany v. Tiffany, 1 Va. App. 11 (1985); *and* Robinette v. Robinette, 4 Va. App. 123 (1987). Therefore,

based on Plaintiff's admission, its claims of breach of any oral representations that contradict the express written terms surely must fail. Specifically, there being no basis for the $39,000-$42,000 weekly revenue warranty. This warranty exists only in the mind of the Plaintiff and as a matter of law, parol evidence cannot be admitted because of unilateral mistake as to its content. *see e.g.* Fox-Sadler C. V. Earl E. Norris Roofing Co., 229 Va. 106 (1985). As there is no basis for breach of the alleged warranty as evidenced by Plaintiff's pleadings and admissions, and there being no material fact genuinely in dispute, Defendants ask for summary judgment.

III. Summary Judgment as to Count III: Breach of Restrictive Covenant. Plaintiff has attempted to plead a case for breach of a restrictive covenant contained in a written contract between the parties. To prevail in its claim for breach of restrictive covenant, Plaintiff must prove: (1) the existence of an express written contract between the parties and (2) that the Defendant breached the terms of that contract.

Further, the Virginia Supreme court has stated summarized a number of holdings regarding such covenants in restraint of trade by stating that "covenants in restraint of trade are not favored, will be strictly construed, and, in the event of an ambiguity, will be construed in favor of the employee. Richardson v. Paxton Co., 203 Va. 790, 795, 127 S.E.2d 113, 117 (1962). Second, the employer bears the burden to show that the restraint is no greater than necessary to protect a legitimate business interest, is not unduly harsh or oppressive in curtailing an employee's ability to earn a livelihood, and is reasonable in light of sound public policy. Roanoke Engineering Sales Co., Inc. v. Rosenbaum, 223 Va. 548, 552, 290 S.E.2d 882, 884 (1982)." Modern Environments, Inc. v. Stinnett, 263 Va. 491, 561 S.E.2d 694 (Va., 2002). Defendants contend that the Court's reasoning in Stinnett is apposite in the instant business sale transaction as the nature of the covenants and the relationship of the buyer and seller is substantially similar to that of employer and employee.

a. **The Alleged Competition is Expressly Permitted by the Covenant; and The Alleged Competing Business is Not a Party to the Covenant.** Defendants cite the Plaintiff's own pleadings and admissions by reference, to be incorporated herein as if fully restated: Pl.'s Compl. at ¶ 17; Pl.'s Compl. Ex. 4 (the "Covenant"); Pl.'s Resp. to Def.'s. 3rd Admis. at ¶¶ 23, 24. Plaintiff admits that the Defendants allegedly breached the covenant by operating a competing business located at 6347 Columbia Pike, Falls Church, Virginia 22041.

Unfortunately for Plaintiff, its Complaint, the Covenant and its own admissions clearly indicate that this location was expressly contemplated and permitted to compete with Plaintiff, without reservation. Furthermore, Plaintiff admits that the 6347 Columbia Pike location was owned by a separate entity, Cayle, Inc., that is not a party to the Covenant or this lawsuit. Plaintiff further admits that it does not allege or know of any other locations that are being operated in breach of the Covenant. It is important to note that the date of the aforesaid admissions is July 9, 2010, which is a Friday that is one day prior the discovery cutoff date. Defendants request summary judgment on this basis.

IV. **Summary Judgment as to Count IV: Tortious Interference.** Plaintiff has attempted to plead a cause of action for tortious interference with contract. To prevail in its claim for tortious interference with contract, Plaintiff must prove: (1) that there was a contract between the Plaintiff and a third party; (2) that the defendant knew of this contract; and (3) that the defendant used improper methods to cause the third party to breach/terminate the contract; and (4) that the defendant intended to cause the third party to breach the contract; and (5) that Plaintiff was damaged by the breach/termination of the contract.

a. **Plaintiff is not a Party to the Existing Contract Interfered With; and Defendant is a Party to the Existing Contract Interfered With.** Defendants cite the Plaintiff's own pleadings and admissions by reference, to be incorporated herein as if fully restated: Pl.'s

Resp. to Def.'s. 3rd Admis. at ¶¶ 24-31. Clearly Plaintiff admits that it is not a party to the contract allegedly interfered with. Plaintiff clearly has no standing to sue and fails in establishing the elements for tortious interference with an existing contract. Also, Plaintiffs seems to have failed to establish any existing contract by admitting, on the eve of the discovery cutoff, to not knowing any of its terms and makes the rather self-serving, conclusory statement that "Plaintiff alleges that there was a contract between Defendant(s) and Soapy Joes." (Pl.'s Resp. to Def.'s. 3rd Admis. at ¶¶ 30-31)

Clearly Plaintiff admits that both of the Defendants are a party to the alleged contract. At most, Defendants may have interfered with their own contract and, as a matter of law, "a person cannot intentionally interfere with his own contract." Fox v. Deese, 234 Va. 412 at 427 *citing* Chaves v. Johnson, 230 Va. 112, 120 (1985).

Based on Plaintiff's own admissions which negate several of the necessary elements to the tortious interference count, the Defendants hereby request summary judgment in their favor as to this count.

b. Defendant's Actions Cannot be the Proximate Cause of Plaintiff's Damages.

Defendants cite the Plaintiff's pleadings and admissions by reference, to be incorporated herein: Pl.'s Compl. at ¶ 19-20; Pl.'s Resp. to Def.'s. 3rd Admis. at ¶¶ 11, 13.

"A plaintiff thus must prove two primary factors relating to damages. (citation omitted). First, a plaintiff must show a casual connection between the defendant's wrongful conduct and the damages asserted. Second, a plaintiff must prove the amount of those damages by using a proper method and factual foundation for calculating damages." Saks Fifth Avenue v. James, Ltd., 272 Va. 177 at 189 (2006) *citing* Shepherd v. Davis, 265 Va. 108 at 125 *and* United Constr. Workers, 194 Va. at 891.

Plaintiff's pleadings and admissions preclude any such causal connection that would support its claim for $1,000,000 in damages. Plaintiff in its Complaint admits to having met with "Soapy Joes" (party to the allegedly interfered/diverted contract) in November 2008. (Pl.'s Compl. at ¶ 20).

Plaintiff admits to the content of their discussions by making the rather damaging admission that "[n]egotiations occurred during the first meeting with Soapy Joe's representatives in November 2008, and the meeting ended with an offer from Sung Man Kim to Soapy Joe's, and representatives of Soapy Joe's indicated that they needed to "think about it" and would respond to plaintiff in time. While an evasive response to a properly propounded request for admissions, the content of the discussions clearly evidence an opportunity for Plaintiff to acquire the purported contract and through at least July 9, 2010 (the date of the Plaintiff's response), Soapy Joes is still "think[ing] about it". Soapy Joes is still thinking about it, yet Plaintiff has filed its Complaint on August 18, 2009 and engaged in litigation for nearly a year, while he waits to hear "Soapy Joe's" response. Clearly, Plaintiff is the proximate cause of its alleged damages, not the Defendants.

CONCLUSION

Based on the above-referenced pleadings and admissions that so thoroughly undermine each and every count of the Plaintiff's Complaint, and there being no material fact genuinely in dispute, Defendants are entitled to summary judgment as to all counts, and request that this honorable Court enter an Order dismissing all of Plaintiff's counts with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on the 27th day of July, 2010, a true and accurate copy of the accompanying Memorandum in Support of Defendant's Summary Judgment Motion was sent via facsimile to:

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