STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(FILED: June 21, 2013)

THE LAMAR COMPANY, LLC d/b/a LAMAR ADVERTISING	:	
v.	:	**C.A. No. KC 11-0189**
MODIFICATIONS OF AMERICA, INC. and DARRELL S. MORRIS	:	

DECISION

RUBINE, J. This matter is before the Court following a jury-waived trial. Plaintiff The Lamar Company, LLC d/b/a Lamar Advertising, filed a Complaint against Modifications of America, Inc. and Darrell S. Morris, seeking payment of outstanding amounts related to contracts for billboard advertising. This Decision constitutes the Court's findings of fact and conclusions of law, consistent with Superior Court Rules of Civil Procedure 52(a).

I

Findings of Fact

Plaintiff The Lamar Company, LLC, d/b/a Lamar Advertising (Lamar or Plaintiff) sells advertising on billboards in various locations throughout Rhode Island. Defendant Modifications of America, Inc. (Modifications) is a firm that offers its services to the public for renegotiation of mortgage loans and related services, and which purchased billboard advertising from Lamar. Defendant Darrell S. Morris (Morris) is the principal owner of Modifications, who also, in one instance, personally guaranteed Modifications' payment to Lamar for billboard advertising.

At trial, Plaintiff introduced contracts representing agreements for billboard advertising between Lamar and Modifications. Each contract represented an agreement by Lamar to run

advertisements on one of its billboards for a specific amount of time, at a certain price, with Modifications' agreement to pay for such services in the amounts detailed in the agreements. Each contract also specified certain "flights" of billboard advertising—explained at trial as an interval of advertising at a particular location, for a particular period of time—and provided a price to which the parties agreed to for each flight. Each contract resulted in invoices presented by Lamar to Modifications, in accordance with the schedule and prices set forth in the various contracts, and specifying payment terms of net thirty days. Several invoices were rendered with respect to each of the four contracts that were identified at trial, with the corresponding contract numbers identified on each invoice. Notably, Morris signed one of the contracts, number 280,[1] on behalf of Modifications, and also signed a personal guarantee of Modifications' obligations under this particular contract.

Chris Cockerill (Cockerill), the vice president and general manager of Lamar, testified that he was familiar with the business arrangements between Lamar and Modifications. Mr. Cockerill explained, and the Court finds as fact, that Lamar owns the billboards and rents advertising space on its billboards to its customers. He further explained the term "flights," and testified that a four-week flight represents an agreement to advertise for four weeks at a particular location. Price for such advertising was determined by the traffic count at each billboard location, with high-traffic locations commanding a higher price per flight. Mr. Cockerill testified that up until approximately September or October of 2010, Modifications stayed current with its payments to Lamar for advertising.[2] Mr. Cockerill also testified that none

[1] For ease of reference at trial, the contracts were identified by the last three digits of the full contract number.

[2] In fact, at one point in their business relationship, Morris authorized Lamar to use a credit card number kept on file to pay for invoices.

of the invoices rendered by Lamar to Modifications were disputed by Modifications or by Morris, either verbally or in writing, and that the advertising on the specified billboards was completed as agreed prior to each invoice being rendered. Mallory Clayton (Clayton), who was the account manager at Lamar for the Modifications account, testified that all advertising was billed at prices listed on the invoices that were previously agreed to in the contracts.

Three such contracts form the basis of Plaintiff's Complaint against Modifications and Morris. These three contracts resulted in invoices dating from June 21, 2010 to September 30, 2010, which were introduced at trial and which currently remain unpaid, in the total amount of $29,200. One of these contracts, number 280, contains the signature of Darrell Morris signing the contract as surety. This particular contract resulted in unpaid invoices totaling $5000.

In response to Plaintiff's Complaint, which seeks payment of these invoices, Defendants base their defense, as well as a Counterclaim, upon a letter dated August 23, 2010, sent by Lamar to David Conti (Conti). (Defs.' Ex. E, Aug. 23, 2010 Letter). At the time the letter was sent, Conti was an employee of Modifications; however, he had previously operated a business similar to Modifications, known as Latin Services, which had also purchased billboard advertising from Lamar. Notably, Latin Services was a separate company, and was of no relation to Modifications. The August 23, 2010 letter, which was signed by Laina Porro—in her capacity as Office Manager of Lamar—was authorized by Lamar's general manager Cockerill to be sent to Conti, along with a copy sent to Morris. The letter indicates that it was written in an effort to collect a balance of $1200—outstanding since April 2010—on Conti's account relating to Latin Services' billboard advertising with Lamar. This letter concluded by stating, "[y]our employer, Mortgage Modification, is in good standing with us and is on a payment schedule for their advertising. Their account will be in jeopardy of having their advertising suspended if we cannot

get this matter resolved."

At trial, Clayton testified that, despite this language, Modifications' account with Lamar was not in jeopardy of suspension at that time, and the letter was instead designed to embarrass and encourage Conti to pay his unrelated debt to Lamar. However, upon reading the letter, Morris became upset and ceased paying invoices relating to Modifications' advertising with Lamar. Testimony and evidence produced at trial showed that Clayton's efforts to appease Morris and maintain Lamar's business relationship with Modifications proved unsuccessful. Plaintiff then filed a Complaint against Modifications and Morris, seeking payment of outstanding amounts owed for advertising.

II

Conclusions of Law

The essence of this case is a contract claim in the nature of book account, for non-payment of sums due and owing from Defendants. Defendants maintain that Lamar's actions—in threatening suspension of Modifications' advertising for failure of an unrelated party to make payments due on unrelated accounts—constitute a breach of the implied duty of good faith and fair dealing, as well as an anticipatory breach of contract. Defendants claim that the implied threats contained in the August 23, 2010 letter to Conti constitute a complete defense for Modifications' failure to pay invoices arising on or after the date of the alleged breach, and also gives rise to a cause of action for breach of contract as alleged in the Counterclaim.

This Court finds, however, that neither Modifications nor Morris have established any legally cognizable defense to liability for the unpaid invoices. This Court does not believe Lamar's conduct in making an implied threat of future suspension constitutes such conduct that rises to the level of a breach of the implied covenant of good faith and fair dealing, thereby

affording Modifications a defense to payment of amounts otherwise due and owing under the contracts with Lamar. Nor does the language contained in the August 23, 2010 letter give rise to a cause of action against Lamar for breach of contract.

In Rhode Island, it is well established that '"virtually every contract contains an implied covenant of good faith and fair dealing between the parties.'" Dovenmuehle Mortgage, Inc. v. Antonelli, 790 A.2d 1113, 1115 (R.I. 2002) (quoting Centerville Builders, Inc. v. Wynne, 683 A.2d 1340, 1342 (R.I. 1996)). This implied covenant exists between the parties to a contract so that the contractual objectives may be achieved. Ide Farm & Stable, Inc. v. Cardi, 110 R.I. 735, 739, 297 A.2d 643, 645 (1972) (citing Psaty & Fuhrman v. Housing Auth., 76 R.I. 87, 68 A.2d 32 (1949)). The applicable standard in determining whether the implied covenant of good faith and fair dealing has been breached is "whether or not the actions in question are free from arbitrary or unreasonable conduct." Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 66 F. Supp. 2d 317, 329 (D.R.I. 1999), aff'd, 217 F.3d 8 (1st Cir. 2000).

Here, this Court finds the August 23, 2010 letter, threatening suspension of advertising for Conti's then current employer, may have been an ill-advised and provocative tactic to motivate Conti to bring his own account current. However, the Court cannot find that such conduct by Lamar was so arbitrary and unreasonable as to thwart the contractual objectives between Lamar and Modifications. Indeed, the purpose of the bilateral agreements between Lamar and Modifications was for Lamar to provide advertising to Modifications on its billboards in exchange for Modifications' agreement to pay an agreed price for such advertising. In no way did the statements made in the August 23, 2010 letter thwart the essential purpose of those agreements. In fact, Lamar fully performed its contractual obligation to provide uninterrupted billboard advertising for Modifications, both before and after the transmittal of the August 23,

2010 letter. Allowing Modifications to accept such advertising services without payment to Lamar would therefore produce an inequitable result, unjustly enriching Modifications.

In addition to claiming Lamar breached an implied covenant of good faith and fair dealing, Defendants aver that the August 23, 2010 letter constituted an anticipatory breach of contract. It is well settled that "in order to give rise to an anticipatory breach of contract, the defendant's refusal to perform must have been positive and unconditional." Thompson v. Thompson, 495 A.2d 678, 682 (R.I. 1985) (quoting 11 Williston, Contracts § 1322 at 130 (3d ed. Jaeger 1968)). Further, such "a repudiation can be evidenced by either a statement to that effect or 'a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach.'" Id. (quoting 2 Restatement (Second) Contracts § 250(b) at 272 (1981)).

Here, it is undisputed that prior to August 23, 2010, Modifications was in good standing and had an ongoing business relationship with Lamar. Prior to that date, Modifications' accounts were current, and Modifications was not overdue in its payments to Lamar. However, it is clear to the Court that any implied threat to suspend Modifications' advertising was never carried out by Lamar, and at best constituted an inartful attempt by Lamar to collect a debt totally unrelated to that owed by Modifications. Moreover, the language used by Lamar in the letter does not pronounce a "refusal to perform" that is "positive and unconditional," as required by our case law. See id.

Furthermore, evidence was presented showing that, upon learning of Morris' adverse reaction to the letter, Clayton attempted to appease the situation by offering certain incentives for Modifications to remain current in its accounts and continue advertising with Lamar. However, despite such efforts at appeasement, Morris decided—on behalf of Modifications—to cancel contract number 782. This cancellation was to be effective October 11, 2010; however, prior to

that date, Lamar had already run several flights of Modifications' advertising, for which Modifications was invoiced but had not yet paid. As a result, at the time the August 23, 2010 letter was sent, Modifications had an outstanding balance due to Lamar of $28,100, but was not in default of the contract provision requiring amounts to be paid within thirty days of the invoice date. However, Morris indicated he wanted no more advertising as to contract number 782, and refused to pay for any outstanding invoices on that contract, even though the advertising had already run, as per the contract. Also, the other two contracts—numbered 641 and 280—were scheduled to run their course, but Modifications refused to pay for that ongoing advertising, and also refused to renew the advertising at the locations identified in contracts 641 and 280. Accordingly, this Court finds that Modifications retained the benefit of such advertising services, without payment to Lamar.

Thus, notwithstanding the statements made by Lamar in the letter, the very purpose of the contracts between Lamar and Modifications were indeed fulfilled. Each invoice that forms the basis for Lamar's claims were for services actually provided by Lamar. The billboard services were provided without dispute, and Lamar fulfilled its obligations under the three contracts in question. Plaintiff has met its burden of proving that Modifications owes Lamar $29,200, along with contractual interest accrued on the balance based upon non-payment of sums due and owing, and reasonable attorneys' fees expended by Lamar in its effort to collect these sums under the three contracts as shown on nine invoices introduced at trial. Furthermore, since Defendant Morris personally guaranteed two unpaid invoices totaling $5000, this Court finds Modifications and Morris jointly and severally liable for $5000 of the $29,200 due and owing

from Modifications to Lamar.[3]

Turning to Defendants' Counterclaim, this Court finds that the Defendants/Counterclaim Plaintiffs have failed to establish that Lamar in any way violated the terms of the contracts. In addition, even if the Defendants could prove liability for Plaintiff's alleged breach, there is no proof whatsoever that any such breach caused damage to the Defendants/Counterclaim Plaintiffs. At trial, Defendants proffered evidence of loss of business resulting from Plaintiff's alleged breach through exhibits and Morris' testimony, which detailed that Modifications' gross sales were lower in 2011 than compared to similar periods in 2010. However, there was no evidence to suggest that such diminished sales were in any way related to anything having to do with Lamar or the August 2010 letter to Conti. Accordingly, this Court finds Defendants' attempt to justify non-payment after August 23, 2010 is insufficient as a matter of law.

III

Conclusion

For the reasons stated within this Decision, judgment shall enter for Plaintiff Lamar against Defendant Modifications for $29,200. As a result of Defendant Morris' guaranty on contract number 280, $5000 of the sum of $29,200 shall be entered as judgment against Morris, for which Morris and Modifications are jointly and severally responsible. The Counterclaim is denied and dismissed. The Court will enter judgment consistent with this Decision.

[3] Plaintiff has offered no evidence from which this Court could calculate reasonable attorneys' fees. In addition, the interest as provided by the contract at 1.5% per month is also subject to post-judgment calculation. The attorneys' fees and interest are clearly provided by contract and were agreed to by the parties therein. The computation of the precise amounts to be added to the judgment will be determined based on further evidence presented at a future hearing following entry of judgment.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

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CASE NO: KC 11-0189

COURT: Kent County Superior Court

DATE DECISION FILED: June 21, 2013

JUSTICE/MAGISTRATE: Rubine, J.

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