xLon Beauty, LLC v Day
2018 NY Slip Op 30142(U)
January 22, 2018
Supreme Court, New York County
Docket Number: 656771/2016
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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xLON BEAUTY, LLC,

Plaintiff,

-against-

DORIS DAY,

Defendant.

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DECISION AND ORDER
Index No.: 656771/2016

Mot. Seq. Nos.: 001 -and- 002

O. PETER SHERWOOD, J.:

In motion sequence 001, defendant, Doris Day ("Defendant"), moved to dismiss all five causes of action of plaintiff, xLon Beauty LLC ("Plaintiff"). Following oral argument this court dismissed counts four (good faith and fair dealing) and five (unjust enrichment), and on notice, converted the motion on the remaining claims to a motion for summary judgement. Although not required, defendant then filed a motion for summary judgment (motion sequence number 002) and the parties filed briefs. At oral argument plaintiff's counsel conceded the fraud claim. The court now grants the motion and dismisses the two remaining claims (breach of contract, and fraudulent inducement).

I. BACKGROUND

This case arises from two agreements between Defendant, a dermatologist regularly featured on radio and television, and Plaintiff, the manufacturer of an "anti-aging" product, Cura Perfect (the "Product") for Defendant to promote the Product. The breach of contract claim alleges that Defendant failed to "make herself available . . . for photographs, speaking engagements and/or commercials in video format" in accordance with the terms of the parties second promotional agreement (NYSCEF Doc. No. 11 ["7% Agreement"] § 4). The fraudulent inducement claim centers on Defendant's purported representations prior to entering the first agreement that she would use her business connections to help promote the Product.

On August 26, 2015, Defendant met with Plaintiff's owners, Sy Garfinkel and Jason Weinberg (NYSCEF Doc. No. 36 ["def's 19-a"] ¶¶ 5, 11; NYSCEF Doc. No. 104 ["pl's 19-a," together with def's 19-a, "19-a"] ¶¶ 5, 11). Plaintiff contends that at this meeting, Day made oral promises that she would use her media connections to promote the Product if Plaintiff entered into the contemplated agreement (pl's 19-a ¶ 14; NYSCEF Doc. No. 79 ["Garfinkel aff"] ¶¶ 6-7;

NYSCEF Doc. No. 89 ["Weinberg aff"] ¶¶ 7-8) but was insincere (*see* Weinberg aff ¶ 10 ["[s]he did not intend to fulfill her promises to promote the Product when she made them"]). In a sworn affidavit, Defendant contends that at the August 26 meeting, she "never made any promises or representations to Xlon -- beyond that which [she] agreed to do in the written contracts [the parties] entered -- concerning [her] endorsement or the promotion of Cura Perfect" (NYSCEF Doc. No. 38 ["Day aff"] ¶ 9).

The alleged promises do not appear in the contracts executed by the parties. Nevertheless, Plaintiff contends Defendant later "referred to" or "confirmed" the purported promises through emails and text messages (pl's 19-a ¶ 14, citing Garfinkel aff ¶¶ 14-19, exhibits B-H). The correspondence reflect defendant's efforts to promote the Product. They do not confirm the existence of any promise to promote the Product, as plaintiff contends. For example, in exhibit D to Garfinkel's affidavit, Defendant writes to Garfinkel:

> "I hope you accept the time, my closing my office to go to Florida, commercializing my name to constantly promote this product without any compensation at all up to this point *as a token of my appreciation* to you and your beautiful Romana"

(emphasis added).

On or around September 18, 2015, the parties executed the first endorsement agreement, wherein Defendant granted Plaintiff the right to license and utilize Defendant's name and likeness to promote the Product in exchange for a 3% royalty fee (19-a ¶¶ 17-29; *see also* NYSCEF Doc. No. 50 ["3% Agreement", together with 7% Agreement, "Agreements")]. Defendant also agreed to make herself available for photographs, speaking engagements and commercials, for which Plaintiff was to provide "at least thirty (30) days written notice of any photo/video shoots or public appearances" (19-a ¶¶ 21, 22; *see also* 3% Agreement § 4.B).

Defendant contends that, after executing the 3% Agreement, she made efforts to promote the Product, including sharing samples with her television connections at Dr. Oz, Good Morning America, and the View, by introducing the product to Estee Lauder, and by submitting the product for consideration in Allure Magazine's "Best of Beauty" awards (Day aff ¶¶ 14-19; affirmation of Joshua N. Paul ["Paul aff"], exhibits 17-19 [corroborating emails]). Plaintiff disputes this contention, although it provides no evidence in support (pl's 19-a ¶ 31, citing Garfinkel aff ¶¶ 11-13 [asserting that Defendant "certainly gave the impression that she was complying with her promises to promote the product, though I do not believe that she was actually doing so"] and

Weinberg aff ¶ 21 [same]; *see also* Weinberg aff ¶¶ 22-25 [noting his lack of knowledge as to whether defendant carried through with her claimed attempts to promote the product]).

In late 2015, after Defendant advised Plaintiff that she had received complaints from customers that their they were told orders were out of stock and had been delayed,[1] Defendant voiced concerns over Plaintiff's ability to distribute the Product and began to consider terminating the agreement (19-a ¶¶ 38-42). Plaintiff contends "the dissatisfaction was likely a ploy" to gain more compensation (*see* pl's 19-a ¶ 41). In response to Defendant's concerns that she was doing more to promote the Product than was contemplated when the 3% Agreement was signed (*see* NYSCEF Doc. No. 82), and despite Weinberg's "belief" that Defendant never intended to keep her oral promises (*see* Weinberg aff at ¶10), in or around September 18, 2016 (NYSCEF Doc. No. 51), the parties entered into a second endorsement agreement, increasing the royalty percentage from 3% to 7%. But for the royalty percentage increase, the 7% Agreement is identical to the 3% Agreement (compare 7% Agreement with the 3% Agreement, 19-a ¶¶ 43-44; NYSCEF Doc. No. 20 and 21).

On September 29, 2016, Weinberg requested, via email, that Defendant make herself available for a video shoot on November 1, 2016 (19-a ¶ 45; Paul aff, exhibit 24, NYSCEF Doc No. 63). That same day, Defendant requested to terminate the contract, also through email (19-a ¶ 46; Paul aff, exhibit 25). Nevertheless, Plaintiff insisted that Defendant appear for the video shoot (19-a ¶ 47). Defendant declined, expressing, *inter alia*, her concerns of lack of compensation and efficacy of the Product (NYSCEF Doc. No. 65 ["I have not been paid a penny for my time or efforts . . . [According to] patient feedback . . . this product does not last as long or work as well as what I expected or what is on the packaging"]). On December 8, 2016, counsel for Plaintiff sent Defendant a letter rejecting termination of the 7% Agreement on the grounds that notice was not mailed in accordance with the terms of that agreement (*id.* ¶ 48). After disputing this rejection, on February 13, 2017, Defendant sent a letter to Plaintiff via Federal Express purporting to terminate the agreement immediately under Section 12.D (*id.* ¶ 50; Paul aff, exhibit 29). Under Section 12D, termination does not become effective until 60 days after written notice (*see* 7% Agreement § 12D).

> Under Section 12A, Defendant may terminate the agreement upon thirty days' notice if xLon fails to make payment to defendant of any sums due her. Section

[1] Plaintiff does not dispute this. Instead it explains that the delayed orders were part of a "test run" prior to fully bringing the Product to market (pl's 19-a ¶ 39).

12c authorizes either party to terminate upon 60 days written notice in the event of a breach of the 7% Agreement (*see* NYSCEF Doc. No. 21, §12).

As relevant to this dispute, the Agreements require "at least thirty (30) days written notice of any photo/video shoots or public appearances" (*see id.,* § 4.B). Further, all forms of termination require written notice (Agreements § 12). Under Section 5 of the 7% Agreement any "notice required to be given pursuant to this Agreement shall be in writing and mailed to the above addresses for the parties by certified or registered mail, return receipt requested, or delivered by a national overnight express service." Plaintiff concedes that it "never provided notice via certified, registered, or overnight mail" but argues there was no requirement to do so (pl's 19-a ¶ 53).

The Agreements provide that Defendant's royalties were to be paid on a quarterly basis, along with a written quarterly royalty statement (Agreements § 3). Plaintiff concedes it never provided Defendant with any written royalty statement and did not pay any royalty despite sales of the Product (19-a ¶¶ 52, 54).

Finally, Plaintiff contends that Defendant made multiple offers to purchase Plaintiff (*see* pl's 19-a ¶¶ 56-60). Plaintiff contends Defendant planned to sabotage Plaintiff and its Product launch in order to purchase Plaintiff at a reduced price (*see id.* ¶ 61; Weinberg aff ¶ 22 [describing August 10, 2016 meeting with Defendant where Defendant purportedly discussed her "possible intention of sabotaging the launch of Cura Perfect"], exhibit M [notes from meeting]). Plaintiff argues this provides a motive for the (now abandoned claim of) alleged fraud (*see* NYSCEF Doc. No. 103 ["pl's mem"] at 10).

II. DISCUSSION

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.,* 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation,* 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines,* 64 NY2d 1092 [1985]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver,* 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop,* 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, v Ceppos,* 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see Zuckerman v City of New York, supra; Ehrlich v American Moninger Greenhouse Mfg. Corp.,* 26 NY2d 255, 259 [1970]).

Lastly, "[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin,* 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.,* 294 AD2d 348 [2d Dept 2002]).

A. *Breach of Contract*

Defendant is entitled to summary judgment dismissing the claim for breach of contract on multiple grounds. First, by virtue of Plaintiff's concession that it never provided written notice of its requests for Defendant to "make herself available," Plaintiff failed to satisfy a condition precedent for Defendant's performance. Second, Plaintiff failed to pay Defendant royalties in accordance with the terms of the Agreements. Third, Plaintiff failed to provide periodic royalty reports.

As to the notice requirement, Plaintiff argues that the parties did not intend for the written notice requirement to apply to Defendant's promotional appearances (pl's mem at 17-18), or alternatively, that the parties intended that "written notice" of these appearances could have been provided through letter or email (*id.* at 4).[2] However, "a written agreement that is clear and

[2] At oral argument, the court theorized that the notice provision of §5, does not apply to the notice requirement set forth in §4B because §4B requires only "written notice" while §5 sets forth a more elaborate procedure, requiring that the notice be "mailed . . . by certified mail . . . or delivered by a national overnight express service" (NYSCEF Doc. No. 21, ¶5). This theory is unavailing. All notice provisions reference "written notice" only. Were the Agreements to be interpreted so as not to require mailing or express delivery, §5 would be rendered meaningless in violation of the well settled principle that every contract should be construed "so as to give full meaning and effect to the material provisions. A reading of the contract should not render any portion meaningless. Further, a contract

unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009] [internal citations omitted]).

Plaintiff attempts to inject ambiguity into the Agreements by noting that, while Section 4.A requires Defendant to "make herself available (barring any other personal or professional commitments), for photographs, speaking engagements and/or commercials in video format for advertising and promoting the Product," Section 4B only requires plaintiff provide Defendant "at least thirty (30) days' written notice of any photo/video shoots or public appearances." Plaintiff contends that the latter provision is narrower than the provision describing Defendant's duties (pl's mem at 4). However, Plaintiff does not explain how anything described in Section 4A would not also be covered by Section 4B. Nor does Plaintiff allege that it made any request that would not also be covered under Section 4B (*see* Weinberg aff ¶ 13-14).

Plaintiff also contends that the parties' conduct modified the written notice requirements (pl's mem at 18). However, as Weinberg himself admits, there was only a "single occasion" in which Defendant made an appearance without written notice (Weinberg aff ¶ 18). This falls far short of demonstrating a "course of conduct" that modified the explicit terms of the Agreements. Both of the cases on which Plaintiff relies involved numerous instances in which the parties acted in contravention to the written terms of an agreement, and thus are distinguishable on the facts (*see Echevarria v 158th St. Riverside Dr. Hous. Co., Inc.*, 113 AD3d 500, 501 [1st Dept 2014] [finding that defendant's multiple occasions of making repairs "suggests that any provision in the occupancy agreement requiring the unit owner to repair the door might have been modified by the parties' subsequent course of conduct"]; *Ficus Investments, Inc. v Private Capital Mgt., LLC*, 61 AD3d 1, 11 [1st Dept 2009] [despite lack of official appointment, parties' status as CFO and vice president of company demonstrated by course of conduct, including vice president having "signed thousands of documents for the Company in that capacity"]).

As to the failure to pay, Plaintiff asserts that "xLon only was required to pay when there were 'Adjusted Gross Revenues' which required subtraction of various items" but it presents no

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should be read as a whole and every part will be interpreted with reference to the whole" *Beal Savings Bank v Sommer*, 8 NY3d 318, 324 (2007) (internal quotations and citations omitted).

proof of any "required subtraction" (pl. mem, p. 19), so as to relieve it of its obligation to make royalty payments.

Even if the "required subtractions" were sufficient to fully offset payment of royalties, it does not justify Plaintiff's failures to provide periodic royalty statements. The excuse given for not making royalty payments illustrates the importance of Plaintiff's obligation. Plaintiff states that "such statements were not due until after . . . the first quarter" *(id.)*. This defense fails because the first statement was due in early 2016 under terms of the 3% Agreement and none was ever provided to Defendant. Plaintiff then argues that "[i]t appears that Day breached by failing to perform very early in her agreement . . . which raises the issue of who breached the agreement first" *(id.)*. However, Plaintiff offers no admissible proof of any such breach. Weinberg and Garfinkel assert self-servingly that they "believe" Defendant did not promote the Product but the record shows otherwise (*see, e.g.,* multiple examples referenced *infra* at p. 8). The record also shows that prior to the time Defendant sought to terminate the 7% Agreement on September 29, 2016, she complained of Defendant not performing under terms of the Agreements. The court also notes that despite Plaintiff's post-complaint allegations of breach by Defendant, there is no dispute that a year after the 3% Agreement was signed, Plaintiff enhanced the promised compensation in response to Defendant's complaint that she had been doing more work than planned under terms of the 3% Agreement (*see* NYSCEF Doc. No. 54).

Accordingly, because there are no issues of fact (1) that Plaintiff failed provide written notice thereby triggering Defendant's obligation to "make herself available," (2) that Plaintiff failed to pay royalties and (3) that Plaintiff failed to provide written royalty statements, Plaintiff's claim for breach of contract is DISMISSED. Defendant has shown that Plaintiff breached the Agreements thereby relieving Defendant of any obligation to perform. Further, assuming Plaintiff was obligated to give formal notice of termination after Plaintiff's multiple breaches, that obligation was satisfied (*see* 19-a ¶50).

B. *Plaintiff's Fraud-Based Claims*

"In a fraudulent inducement claim, the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract . . . and not merely a misrepresented intent to perform" (*Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323-24 [1st Dept 2004] [citations omitted]; *see also J.M. Bldrs. & Assoc., Inc. v Lindner*, 67 AD3d 738, 741 [2d Dept 2007] ["[a] present intent

to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud"]). Further a "fraud-based cause of action is duplicative of a breach of contract claim 'when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract'" *Manas v VMS Assoc., LLC*, 53 AD3d 451, 453 (1st Dept 2008).

The alleged deceit here was integral to the contract, not extraneous or collateral to it as is required in order to make out a claim of fraudulent inducement (*see id.; see* also *International Plaza Assoc. v Lacher*, 63 AD3d 527 [2009] and *Wyle Inc. v ITT Corp.*, 130 AD3d 438, 439 [1st Dept 2015] [noting, with respect to a claim for fraudulent inducement "it is necessary that the plaintiff plead and prove a breach of duty distinct from, or in addition to, the breach of contract"]). Moreover, because the deceit alleged is that Defendant was insincere when she promised to perform, the claim is duplicative of the breach of contract claim. For these reasons if no others, the fraudulent inducement claim must be dismissed.

Defendant maintains that there was never any representation made, but as described above, this remains a contested issue of fact as both Weinberg and Garfinkel now offer affidavits that contradict Defendant's claims (*see*, Garfinkel aff ¶7, NYSCEF Doc. No. 79 and Weinberg aff ¶¶ 7-10, NYSCEF Doc. No. 89). According to Weinberg, the statement was made to induce Plaintiff to enter into the 3% Agreement (*see id.*). That agreement was replaced by the 7% Agreement as to which there is no claim of either fraud or fraudulent inducement.

Moreover, Defendant has made a prima facie showing that the purported representation (i.e. that Defendant would use her business connections to promote the product) was not false.[3] Specifically, Defendant shared samples of the Product with Tory Johnson, host of a weekly segment on Good Morning America (Day aff ¶ 17; Paul aff, exhibits 17, 32). Plaintiff disputes that Defendant made "substantial efforts" to have the Product appear on television on the basis of a text message defendant sent to Garfinkel stating that she "asked [Good Morning America and]

[3] Plaintiff maintains that Defendant never actually used her business connections, but has not argued directly that Defendant falsely guaranteed appearance of the Product in magazines and on television (*see* pl's mem at 3; *see also* Garfinkel aff ¶¶ 11-13 [stating that Defendant "certainly gave the impression that she was complying with her promises to promote the product, though I do not believe that she was actually doing so"] and Weinberg aff ¶ 21 [same]). However, to the extent that Plaintiff attempts to argue that the failure to secure promotional opportunities is a basis for its fraud claims, such an argument would fail for lack of reasonable reliance (*see Nerey v Greenpoint Mortg. Funding, Inc.*, 144 AD3d 646, 647 [2d Dept 2016] [noting that "where the alleged misrepresentation concerns a future matter completely beyond the defendant's control and outside of the defendant's particular knowledge, reliance on the alleged misrepresentation is not justifiable"]).

they won't do it" (Garfinkel aff, exhibit G). If anything, this exhibit demonstrates Defendant's efforts to promote the Product through her media connections.

Defendant also shared samples with makeup artists for Good Morning America and the Dr. Oz show (Day aff ¶ 15). In opposition, Plaintiff offers only Weinberg's statement that he "never saw any evidence that Dr. Day followed through on her promises to have Cura Perfect promoted on the Dr. Oz show" (Weinberg aff ¶ 24).[4] Defendant also shared the product with Estee Lauder (Day aff ¶ 18; Paul aff, exhibit 18). Plaintiff's only refutation comes from Weinberg's statement that he "was never aware of any efforts by her to actually do so, nor [saw] any results from such alleged promotion" (Weinberg aff ¶ 25). Finally, neither party disputes that Defendant submitted the Product for consideration in Allure Magazine's "Best of Beauty" awards (19-a ¶ 37; Paul aff, exhibit 19) and recorded an infomercial for the purpose of promoting the Product (*see* 19-a ¶32).

Rather than address the element of falsity, Plaintiff focuses instead on the element of scienter and argues that whether this representation was "knowingly false or intended to deceive" is exclusively in Day's knowledge (*see* pl's mem at 11-13).[5] However, by failing to rebut Defendant's showing as to to the underlying falsity of the representation, an essential element to of Plaintiff's fraudulent inducement claim, Plaintiff fails to rebut Defendant's prima facie showing of entitlement to summary judgment (*Kaufman v Cohen*, 307 AD2d at 119.

Plaintiff also argues that summary judgment should be denied on the basis that certain facts relevant to the complaint are solely within Defendant's control, Defendant has not yet been deposed, and Defendant has not fully complied with Plaintiff's discovery requests – namely, requests for admissions, and document requests relating to her efforts to "sabotage or otherwise harm the business of Xlon" (*see* pl's mem at 6-12, citing *e.g. Berkeley Fed. Bank & Tr. FSB v 229 E. 53rd St. Assoc.*, 242 AD2d 489, 490 [1st Dept 1997] [affirming stay of motion for summary judgment pursuant to CPLR 3212 [f] "upon an ample showing that facts relevant to the subject pleading are exclusively within appellants' knowledge and that appellants have repeatedly failed to comply with respondents' discovery requests"]). However, as none of Plaintiff's bases for

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[4] Plaintiff's 19-a statement states that Defendant "expressly promised to promote the product on [the Dr. Oz] show" at a meeting with Weinberg, but the cited documents do not support his assertion (*see* Weinberg aff ¶ 22 [noting only that Defendant "indicated during the meeting that she would promote Cura Perfect with the celebrity Dr. Oz"], exhibit M [notes from meeting]).

[5] Defendant similarly argues that this evidence shows lack of scienter (*see* NYSCEF Doc. No. 37 at 11-13). However, since this evidence also goes directly to the issue of falsity, the court need not examine Defendant's intent as of the time the representations were made.

further discovery bear on the issues that are dispositive to this motion, Plaintiff's claimed need for further discovery cannot alter the result on this motion. Accordingly, Defendant's motion to dismiss the fraudulent inducement claims is GRANTED and the amended complaint is DISMISSED in its entirety[6].

Accordingly, it is hereby

ORDERED that the motion for summary judgment of Defendant, Doris Day, to dismiss the complaint is GRANTED in its entirety; and judgment shall be entered against Plaintiff, xLon Beauty, LLC, dismissing the complaint together with costs to be taxed against Plaintiff upon presentation of a proper bill of costs.

This constitutes the decision and order of the court.

DATED: January 22, 2018

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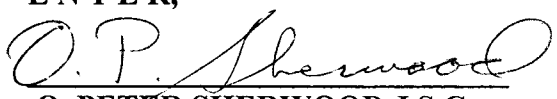

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[6] Even if Plaintiff had not withdrawn its fraud claim, that claim would have to be dismissed for the reasons the fraudulent inducement claim must be dismissed, among other reasons which the court need not address here.