CAS Mktg. & Licensing Co. v Jay Franco & Sons, Inc.
2019 NY Slip Op 32732(U)
September 16, 2019
Supreme Court, New York County
Docket Number: 654563/2016
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 53EFM

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CAS MARKETING & LICENSING CO.	**INDEX NO.** 654563/2016
Plaintiff,	**MOTION DATE** 05/30/2019
- v -	
JAY FRANCO & SONS, INC.,	**MOTION SEQ. NO.** 001
Defendant.	**DECISION + ORDER ON MOTION**

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 51
were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff's motion for partial summary judgment on its breach of contract claim is granted. Defendant's cross motion to amend its answer to assert the affirmative defense of statute of frauds is also granted on consent of the parties (NYSCEF Doc. No. 48). For the reasons set forth below, however, the statute of frauds is not applicable to the contract alleged in this action.

FACTUAL BACKGROUND

CAS Marketing (**CAS)** seeks to recover over $3 million in unpaid commissions from Jay Franco & Sons, Inc. (**Franco**) pursuant to an unwritten contract between the parties. Franco, a family business, manufactures bedding, bath and beach products (Compl., ¶ 3). CAS is in the business of assisting manufacturers with the use of trademarks owned by third parties (*i.e.*, brands such as Disney and Marvel, among others) (*id.*, ¶ 2). In the mid-1990's Franco began to work with CAS to obtain licenses for various brands that Franco wanted to use on its products. CAS claims that

as a direct result of its services, Franco acquired licenses for various well-known brands, which it has been able to profitably and successfully use on its products. CAS claims that for each license that Franco has used and continues to use, it agreed to pay CAS quarterly commissions, calculated as a percentage of the revenue generated from the sale of its products. CAS also alleges that Franco agreed to provide it with quarterly written reports detailing how it calculated the amount of CAS's commissions (the **Quarterly Reports**).

According to the complaint, Franco started to make payments to CAS "sporadically" rather than quarterly beginning in 2013 and, at or around the same time, also stopped providing CAS with the requisite Quarterly Reports. When CAS's owner Cheryl Stoebenau died in September 2015, Franco ceased making payments altogether (*id.*, ¶ 5). CAS alleges that despite "due demand," Franco refused to provide it with any Quarterly Reports or to make any further payments (*id.*, ¶ 6). The complaint asserts four causes of action for: (1) breach of contract, (2) promissory estoppel, (3) unjust enrichment, and (4) quantum meruit. By this motion, CAS is withdrawing its claims for promissory estoppel and quantum meruit (NYSCEF Doc. No. 67, Ftnt. 1). Rather, CAS now seeks to recover only commissions earned between the first quarter of 2013 and Ms. Stoebenau's death on September 4, 2015 (*id.*).

CAS argues that resolution of the case is a matter of simple arithmetic:

> After multiplying the undisputed commission rates by the undisputed net sales figures for the undisputed Relevant Licenses, the evidence shows that (i) CAS Marketing earned $6,692,448.77 in quarterly commissions between July 1, 2008 and September 4, 2015; (ii) Defendant has paid CAS Marketing only $3,030,000.00 on account, which covers the quarterly commissions earned between July 1, 2008 and part of the first quarter of 2013; and thus (iii) Defendant owes CAS Marketing the balance of $3,662,448.77 for the quarterly commissions earned from the remainder of the first quarter of 2013 to September 4, 2015.

(Ptf. Memo of Law, p. 6, NYSCEF Doc. No. 67).

Franco disputes CAS's account. According to Franco, the relationship it had with CAS, and more specifically with Ms. Stoebenau was more informal in that sometimes Ms. Stoebenau would act as an agent with respect to certain licenses (*e.g.*, identifying brand owners with a potential interest in licensing their trademarks to Franco for use in connection with the types of products Franco sells) and other times as a consultant (*e.g.*, helping to support and maintain licensing relationships after they were entered into, such as by assisting with approval processes, and helping Franco come up with new products that a licensor might like). According to Franco, sometimes Ms. Stoebenau's role would change with respect to particular licensors and particular license agreements. Franco asserts that this was "an informal, contractually undocumented relationship throughout" (*Def. Memo in Opp.,* p. 1, NYSCEF Doc. No. 83). Franco seeks to portray the payments made to Ms. Stoebenau – payments totaling millions of dollars – as largely discretionary and voluntary. Franco also claims that by 2010, Ms. Stoebenau's work as a consultant had "essentially ceased, her role in procuring and negotiating renewals of existing license agreements was non-existent and she was left out of Franco's relationships with its three major licensors" (*id.*, p. 1-2). Franco claims that going forward from 2010, it was only making payments – often large ones - to Ms. Stoebenau "'on account'" (*id.,* p. 2).

At their depositions, both Franco's president, Jay N. Franco, and its vice-president, Jay A. Franco, acknowledged the business relationship between CAS and Franco and both testified that Ms. Stoebenau would be paid different commissions depending on whether her work was classified as an agent or as a consultant (JNF EBT, 22:16-23:11; JAF EBT, 27:6-29:10). Joseph N. Franco defined "agent" as "someone that brings new properties, unaware to the company,"

and a "consultant" as "someone that helps facilitate the business that's already existing or the relationship that already exists" (JNF EBT, 23:6-11). Depending on the license (but not necessarily on whether she was classified as a consultant or agent), CAS would be compensated either .8 or 1 percent of the net sales of that license (*e.g*., JAF EBT, 71:2-6; 72:16-25; 77:8-17; 79:5-11). Both Messrs. Franco testified that Franco would pay CAS commissions for each license on which Ms. Stoebenau acted as an agent or consultant calculated as a percentage of Franco's net sales of products using these licenses (JNF EBT 23:14-25:9; 86:23-87-8; JAF EBT, 42:18-44:20; 53:19-54:8).

> Q. So after a license was acquired, was her work as an agent on that particular license consistent, like she was doing a lot every month or was it sporadic?
>
> A. No, a lot of times she became a consultant, sort of she backed away and didn't do much, because we took over, and a lot of times she stayed involved.
> It depends on what the relationship we had with them. I mean really sometimes she was very close to the licensor and that was when she stayed more involved.
>
> Q. During CAS's relationship with Jay Franco, was there an understanding that CAS would be compensated for its services as an agent?
>
> A. Yes.
>
> Q. Was this always the understanding that CAS's work would be compensated?
>
> A. Yes.
>
> Q. During CAS's relationship with [Franco] was there an understanding that CAS would be compensated for its services as a consultant?
>
> A. Yes.
>
> Q. Was that always the understanding?
>
> A. Yes.

(JAF EBT, 42:6-43:7).

Both as agent or consultant, CAS's payments were always calculated as a commission based on sales, never as a salary or retainer (*id.*, 43:8-44:3). Significantly, Jay A. Franco also testified that if CAS was the agent or a consultant on an existing license but there was a particular quarter where it did not perform any services, there was an understanding that CAS would still be paid commissions for that quarter (*e.g.*, JAF EBT, 55:3-13).

In fact, Franco would sometimes pay CAS even when Franco obtained a license without Ms. Stoebenau's aid:

> Q. Was there ever an understanding between [Franco] and CAS that CAS would be compensated if [Franco] acquired a license without involving CAS?
>
> Like, for example, if Jay Franco went out and got a license on its own and CAS was not involved?
>
> A. We would pay her anyway as a consultant.
>
> Q. Do you know when that arrangement arose?
>
> A. It's just our way. You know, we had a relationship with Cheryl [Stoebenau]. So if we were able to get something and it ended up pretty good for us, and it was able to be profitable for everyone we – why would we ever leave Cheryl out, you know.

(*id.*, 57:3-18).

The only time CAS would not get paid was if there were no sales (*id.*, 91:24-92:5). Jay A. Franco explained:

> … All these things were because we had a personal relationship with her, we kept paying her even through her sickness when she wasn't able to perform.

> You're asking me was there any other reason why she shouldn't be paid. We never held back on her even when she wasn't able to perform during her time of sickness.

(*id.*, 122:17-24).

When asked if there was any time period after which CAS began working with Franco that CAS should ***not*** be compensated for its services, Jay A Franco testified: "when [Ms. Stoubenau] passed away" (*id.*, 55:21-25; also, 75:24-25 ["I think she would have been paid until her death"]). Jay A. Franco then confirmed his understanding of the contract's duration:

> Q. And so globally for this entire deposition when you say to the time of death, you mean to the end of third quarter 2015, 9/30?
>
> * * *
>
> A. I – I would assume.

(*id.*, 101:25-102:6).

The problem with Franco's position, and most significantly, in addition to their admissions at deposition, Franco confirmed each license, commission percentage and relevant time period in its First Set of Requests for Admission (**RAF**) (NYSCEF Doc. No. 30). For example, RAF no. 8, provides:

> 8. For the license listed on Line 23 of the Chart (Disney, Disney Branded, Contract *********,[1] Bates Number JFS00017027), during the time period from 1/1/2011 to Cheryl Stoebenau's death on 9/4/2015:
>
> a. CAS Marketing's commission rate was 0.8% of Net Sales.
>
> Admitted ___X___________ Denied _______________

(*id.*).

Likewise, for RAF no. 9:

[1] Certain redacted information was sealed in this action upon good cause shown (Mtn. Seq. 002).

9. For the license listed on Line 28 of the Chart (Disney Enterprises, Star Wars Rebels, Contract ***********, Bates Number JFS00017038), during the time period from 4/1/2014 to Cheryl Stoebenau's death on 9/4/2015:

a. CAS Marketing's commission rate was at least 0.8% of Net Sales.

Admitted __X____________ Denied ______________

b. CAS Marketing's commission rate was 1% of Net Sales.

Admitted ______________ Denied ______X________

(*id.*)

These admissions in Franco's RAF, totaling 17 questions with respect to Franco's licenses (not including subparts) including the appropriate commission percentages, along with Franco's admissions at deposition, and the sales figures otherwise confirmed by Franco, directly correspond to the amounts CAS seeks on this summary judgment motion. To the extent that any license was disputed by Franco, CAS does not seek those amounts from Franco.

SUMMARY JUDGMENT STANDARD

On a motion for summary judgment, the movant has the initial burden of establishing its entitlement to judgment as a matter of law with evidence sufficient to eliminate any material issue of fact (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [1st Dept 2017] [citing *Alvarez v Prospect Hosp.,* 68 NY2d 320, 324 [1986]). The court must view the facts in the light most favorable to the non-moving party and summary judgment should be denied if there is any doubt as to the existence of triable issues or there are any issues of fact for trial (*id.*).

DISCUSSION

CAS has established its entitlement to summary judgment as a matter of law. As discussed above, Franco's principals, Jay A. Franco and Jay N. Franco, both admitted at deposition to the existence of an agreement to pay commissions to CAS with respect to certain licenses. They also admitted to the fact that this agreement was in effect until Ms. Stoebenau's death in September 2015. They testified to the exact percentage owed with respect to each license, *i.e.* either 1 percent or .8 percent, and also confirmed which of the company's licenses were subject to such commissions in the RAF, which set forth the percentage of commission for the relevant time period (NYSCEF Doc. No. 30). The commissions sought by CAS on this motion are all set forth in detail on a five-page chart submitted by CAS's counsel in its moving brief, which chart is based entirely on Franco's admissions in its RAF and the deposition testimony of its principals. Although Franco opposes the motion for summary judgment, significantly, Franco does not raise any issue with the way in which CAS calculated the commissions owed and does not raise any issue with respect to any license set forth on CAS's chart.

In opposition, Franco simply argues that CAS cannot establish the existence of an implied-in-fact contract between the parties. As the Court of Appeals has explained, an implied-in-fact contract arises "from a mutual agreement and an intent to promise, when the agreement and promise have simply not been expressed in words" (*Maas v Cornell Univ.*, 94 NY2d 87, 93 [1999] [citation and quotation omitted]). The promise may be inferred in whole or in part from the parties' conduct (*id.*). The same basic contract elements of consideration, mutual assent, legal capacity and legal subject matter apply to an implied-in-fact contract (*id.* at 94). Mutual assent may be manifest by full or part performance (*id.*, citing Restatement [Second] of Contracts, s. 18). Here, there is simply no question of a contract between the parties: Franco has admitted as much. Nor

are the terms too indefinite: Messrs. Franco have testified to the exact percentage of commissions owed, the licenses subject to commission and the duration of the commission period (*i.e.*, until Ms. Stoebenau's death unless terminated by the parties). The subject licenses, commission amounts, and relevant time periods are also confirmed by the RAF. Franco's opposition does not raise any triable issue of fact with respect to any specific license or amount. There is plainly no issue with consideration as it is undisputed CAS performed services for Franco in exchange for commission and Franco does not argue as much.

The fact that certain proposed written contracts previously exchanged between the parties were never executed and were, purportedly, rejected by Franco is also immaterial and does not negate the agreement that Franco admits was in effect during the relevant time period. Nor does CAS claim that Franco ever agreed to any 1990's-era draft contract that it produced in discovery, nor does it seek to enforce the terms of any such draft contract. Simply put, this argument by Franco is nothing but a red herring. Franco cannot create a genuine issue of material fact by relying on these rejected proposals as evidence of the parties' intent to only be bound by a written contract when the parties' conduct clearly establishes this to not be the case.

Finally, inasmuch as Franco relies on the statute of frauds for its argument that the contract is unenforceable, the the statute of frauds does not apply here since Franco expressly admitted the existence of a contract (*see Holender v Fred Cammann Prods., Inc.* 78 AD2d 233 [1st Dept 1980]; *Boscov's Dept. Stores, LLC v AKS Intl. AA Corp.*, 2003 WL 21576405 [SD NY 2003]). "The Statute of Frauds was designed … to prevent the enforcement of unfounded fraudulent claims," not as "a bar to a contract fairly, and admittedly, made" (*Morris Cohon & Co. v Russell*,

23 NY2d 569, 574 [1969] [citing 4 Williston, Contracts [3d ed.], s. 567A, pp. 19-20]). Here, the peril of perjury and risk of unfounded fraudulent claims is largely, if not entirely, absent (*id.*). CAS seeks to enforce only what Franco has admitted to owing and is not pursuing any additional claims.

For the avoidance of doubt, to the extent that Franco in its opposition papers argues that the relationship was not formal and that therefore no amounts are in fact due, the argument fails. Having made the admissions in the RAF that certain percentages were to be applied to the specific sales during the specific periods set forth in the RAF, Franco can not now argue that those amounts are not in fact due.

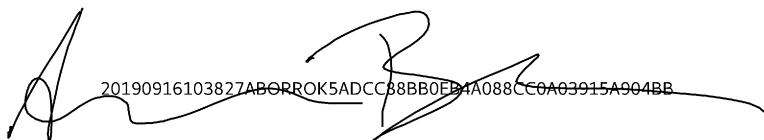
Accordingly, it is

ORDERED that plaintiff's motion is granted and it is further

ORDERED that the clerk is directed to enter judgment in favor of plaintiff CAS Marketing in the amount of $3,662,448.77, plus costs, disbursements, and pre-judgment interest of $1,564,037.76 as of April 23, 2019 and calculated at the rate of 9% thereafter, for a total amount of ______________________________________; and it is further

ORDERED that plaintiff's claim for unjust enrichment is dismissed as moot; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.



9/16/2019				
DATE			ANDREW BORROK, J.S.C.	
CHECK ONE:	X CASE DISPOSED		NON-FINAL DISPOSITION	
	X GRANTED	DENIED	GRANTED IN PART	OTHER
APPLICATION:	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	REFERENCE