SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 60

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REVELATIONS PERFUME AND COSMETICS, INC.,

Plaintiff,

Index No.: 603350/08

-against-

DECISION

PRINCE ROGERS NELSON p/k/a PRINCE, PAISLEY PARK ENTERPRISES, INC. AND UNIVERSAL MUSIC PUBLISHING GROUP,

Defendants.

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FOR PLAINTIFF

Gregory P. Guilia
Duane Morris LLP
1540 Broadway
New York, New York 10036-4086

FOR DEFENDANT Universal Music Publishing Group

David Donahue
Fross Zelnick Lehrman & Zissu, P.C.
866 United Nations Plaza
New York, New York 10017

FOR DEFENDANTS Prince Rogers Nelson p/k/a Prince and Paisley Park Ent., Inc.

Kenneth Novikoff
Rivkin Radler LLP
926 RXR Plaza
Uniondale, New York 11556

FRIED, J.:

Motion sequence numbers 019 and 022 are consolidated for disposition.

In motion sequence number 019, defendant Universal Music Publishing Group

(UMPG) moves, pursuant to CPLR 3212, for partial summary judgment dismissing plaintiff's claim for lost profit damages asserted as against it.

In motion sequence number 022, defendants Prince Rogers Nelson p/k/a Prince (Prince) and Paisley Park Enterprises, Inc. (Paisley Park) move, pursuant to CPLR 5015 (a) (1), to vacate the default judgment entered as against them.

The facts of this case have been discussed in detail in my earlier decisions and will not be reiterated here, except to the extent necessary to dispose of the present motions. Briefly, plaintiff asserts that UMPG failed to instruct or use reasonable efforts to cause Prince to promote and/or approve a celebrity fragrance developed by plaintiff. The only cause of action asserted as against UMPG is for breach of contract, for which plaintiff seeks lost profits.

Motion sequence number 019

UMPG contends that plaintiff has failed to meet the stringent evidentiary requirements to permit it to seek lost profit damages. Specifically, UMPG asserts that plaintiff has not produced evidence that lost profits were contemplated by the parties to the contract at the time that the contract was executed; that plaintiff has failed to demonstrate that its lost profits are directly traceable to UMPG's alleged breach; and that plaintiff cannot establish, "with reasonable certainty," the degree of its alleged lost profits, which, according to UMPG, are merely speculative.

Plaintiff's president, Larry Couey (Couey), was deposed in this matter, and testified that, from 1998 to 2006, plaintiff's best-selling brand, in terms of sales for any only calendar year, was "Lilu," which sold approximately $3 million wholesale. Couey EBT, at 126-127.

According to Couey, the vast majority of fragrances developed by plaintiff were never sold in department stores. *Id.* at 66-67.

In response to defendants' interrogatories, plaintiff stated that, from 1998 to 2006, plaintiff's celebrity-endorsed fragrances were limited to the following four persons: Bethany Hamilton; Tova Borgnine; Stacie J. Golden; and Shelby Bruce. Motion, Ex. 5. Of these celebrity fragrances, the best-sellers were those endorsed by Bethany Hamilton ($1,480,107), best one-year total wholesale sales in 2005). Motion, Ex. 7.

Couey testified that the celebrity-endorsement deal with Prince was a new phase of its business, with the intended launch of the perfume to be in large retail department stores, such as Macy's. Couey EBT, at 692-693. However, at the time of the execution of the agreement that is the subject of this litigation, plaintiff was not an approved vendor at Macy's or at any other department store. Motion, Ex. 3.

Pursuant to the terms of the agreement entered into between the parties, plaintiff's right to use Prince's marks licensed to it was limited by UMPG's "right, at its sole discretion, to pre-approve all aspects of the Licensed Products, including, without limitation, the use and form of the Licensed Marks, biographical data, [and the] name of the products." Motion, Ex. 12, Agreement, Art. 6.1. It is noted that neither Prince nor Paisley Park signed this agreement, but merely provided plaintiff with an inducement letter that was attached to and incorporated into the agreement.

Further, pursuant to the agreement, plaintiff was required to spend certain minimum amounts with respect to marketing and advertising the products; there was no corresponding marketing and advertising financial commitment on the part of UMPG.

Article 10 of the agreement states:

> "10.1. [UMPG] agrees that [it] shall instruct and use reasonable efforts to cause [Prince] to promote the Licensed Product during reasonable marketing opportunities scheduled by [plaintiff] that do not interfere with [Prince]'s other professional commitments, commercial ventures or endorsements. [UMPG] also agrees that [it] will instruct and use reasonable efforts to cause [Prince] to use his reasonable efforts to promote the Licensed Products whenever reasonably possible and appropriate, for example during television appearances, performance opportunities and guest appearances.
> 10.2. [UMPG] shall instruct and use reasonable efforts to cause [Prince] to be available at reasonable times for the purpose of appearing at events and photo shoots to endorse and promote the sale of the Licensed Products, subject to [Prince]'s professional and personal schedule."

Motion, Ex. 12.

According to an e-mail sent by Couey on November 8, 2006, with respect to questions raised about the minimum sales aspect stated in the agreement, Couey said:

> "These numbers were agreed upon and etched and are realistic (hopefully conservative) numbers. However, there are NO guaranteed payments and there never were so why are they being alluded to now? We are bearing the entire financial risk."

Motion, Ex. 14.

Article 14 of the agreement details termination provisions, none of which indicated or alluded to lost profit damages. Motion, Ex. 12. The contention that lost profits were never contemplated by the parties when the agreement was executed is confirmed by an affidavit of Michael Rexford, UMPG's Vice-President of business Affairs.

In response to interrogatories, plaintiff stated that it is only seeking lost profits damages from UMPG. Motion, Ex. 15. In calculating the extent of these lost profits, plaintiff's expert, Wayne A. Hoeberlein (Hoeberlein), has opined that, based on forecasts prepared by plaintiff, if Prince had adhered and committed to specific timing of personal appearances at Macy's, the sales of the Licensed Products would have achieved a market share of .55% of the overall fragrance market in the United States during 2009, or a .8% market share of the women's fragrance market, thereby estimating that plaintiff is entitled to $5.6 million in lost profits. Motion, Ex. 28. The projections upon which this opinion is based were prepared by Couey, based, in part, on the existing sales data for fragrance products sold to Pacific Sunwear. Couey Aff.

UMPG contends that all such opinions are speculative and, therefore, plaintiff is not entitled to assume lost profits as damages for UMPG's alleged breach of the agreement.

In opposition, plaintiff states that UMPG's motion does not address the issue of its liability, pursuant to the terms of the agreement, and, therefore, it must be accepted that UMPG is liable to plaintiff for breach of the agreement.

With respect to lost profits, plaintiff asserts that lost profits were reasonably forseeable by the parties at the time that the agreement was executed and, consequently, should such loss be evidenced, plaintiff would be entitled to such damages. Moreover, plaintiff contends that such loss is directly traceable to UMPG's failure to have Prince perform his obligations under the agreement. Further, plaintiff claims that the calculations used to determine the extent of its lost profits are not speculative, basing this argument on the extensive professional backgrounds of Couey and the other executive of plaintiff whose

expertise and experience formed the basis of those calculations. Lastly, plaintiff disagrees with UMPG's characterization of its launch of the Prince-endorsed products as a "new business," alleging that it constituted no more than an expansion of plaintiff's existing business.

In reply, UMPG provides a portion of the deposition testimony of Robin Littrell, a Macy's executive, who testified that Macy's decision not to sell the Prince-endorsed perfume was not based on Prince's failure to make personal appearances. In addition, UMPG states that, whereas plaintiff discussed various contract provision negotiations prior to the execution of the final agreement, plaintiff confirmed that the final contract between the parties did not contemplate lost profits damages. Further, UMPG argues that plaintiff has failed to provide any evidence that any retailer refused to carry, or stopped carrying, the Prince-endorsed fragrance because of Prince's failure to promote the product. Lastly, UMPG maintains that plaintiff had never attempted to market a product endorsed by an "A-list" celebrity before, and that all of its calculations with respect to lost profits are speculative.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be

denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

UMPG's motion for partial summary judgment dismissing plaintiff's claim for damages based on lost profits is granted.

> "Loss of future profits as damages for breach of contract have been permitted in New York under long-established and precise rules of law. First, it must be demonstrated with certainty that such damages have been caused by the breach and, second, the alleged loss must be capable of proof with reasonably certainty. In other words, the damages may not be speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes. In addition, there must be a showing that the particular damages were fairly within the contemplation of the parties to the contract at the time it was made. If it is a new business seeking to recover for loss of future profits, a stricter standard is imposed for the obvious reason that there does not exist a reasonable basis of experience upon which to estimate lost profits with the requisite degree of reasonable certainty [internal citations omitted]."

Kenford Company, Inc. v County of Erie, 67 NY2d 257, 261 (1986).

Plaintiff has failed to provide any evidence to demonstrate that the parties contemplated lost profits as damages at the time that the agreement was entered into, that the alleged lost profits are directly traceable to UMPG's failure to use reasonable efforts to have Prince make personal appearances to endorse the product, or that the extent of the alleged lost profits is anything more than mere speculation.

First, the agreement itself is silent on the subject of lost profits, and it contains a merger clause stating that "[t]his Agreement supercedes all prior agreements, negotiations, representations, warranties and undertakings between the parties with respect to such subject

matter." Hence, plaintiff fails to meet the first test, that the parties contemplated lost profits at the time the contract was entered into, which would entitle it to such relief. *Dermot Company, Inc. v 200 Haven Company,* 73 AD3d 653 (1st Dept 2010).

Second, the basis of plaintiff's claim asserted as against UMPG is that UMPG failed to use reasonable efforts to cause Prince to promote and/or approve a celebrity fragrance developed by plaintiff. Therefore, in order to prevail on its claim for lost profits, plaintiff must prove that Prince's failure to promote the fragrance was the cause of plaintiff's loss. This plaintiff has failed to do.

The only evidence presented on this point is the portion of the deposition testimony of a Macy's executive that Macy's decision not to carry the fragrance was not caused by Prince's failure to make public promotional appearances at Macy's. Therefore, there is nothing to demonstrate a causal link between UMPG's alleged breach and plaintiff's failure to sell the fragrance.

Lastly, plaintiff's calculations with respect to the amount of the profits that it lost is based on nothing more than the pure speculation of its executives, founded on assumptions and conjecture, comparing the Prince-endorsed fragrance with other fragrances marketed to different vendors, and assuming that plaintiff would launch a second and third Prince-endorsed product. *Zink v Mark Goodson Productions, Inc.*, 261 AD2d 105 (1st Dept 1999). In addition, any attempt to estimate future profits could not be done with any degree of reasonable certainty, since the agreement, when allegedly breached, had only been in effect for approximately one year (*Calip Dairies, Inc. v Penn Station News Corp.*, 262 AD2d 193 [1st Dept 1999]), and such profits are based on hopes regarding consumer taste. *See*

generally, Interfilm, Inc. v Advanced Exhibition Corp., 249 AD2d 242 (1st Dept 1998).

It is noted that UMPG states that the standards used to determine whether a non-breaching party is entitled to seek lost profits as damages are more stringently applied to new ventures, such as the one under scrutiny herein. Whereas plaintiff maintains that this arrangement was merely an extension of its existing business, UMPG contends that plaintiff had little experience in marketing products licensed by "A-list" celebrities to department stores. However, regardless of how the marketing and distribution is viewed, even under the less stringent application for existing businesses, plaintiff has still failed to raise any material question of fact regarding the speculative aspect of the lost profits or whether the parties intended to allow lost profits damages at the time the contract was executed. *PIA Investments Ltd. v UBS Securities, Inc.*, 211 AD2d 599 (1st Dept), *affd* 86 NY2d 812 (1995).

As a consequence of the foregoing, UMPG's motion is granted.

Motion sequence number 022

On December 3, 2010, I granted plaintiff, a default judgment as against defendants Prince and Paisley Park for their non-appearance at court on December 1, 2010, and the matter of damages was set down for a hearing before a Special Referee by order of this court dated January 18, 2011. The Special Referee scheduled the inquest for April 27, 2011.

On the afternoon of April 26, 2011, Prince and Paisley Park retained current counsel and the inquest was adjourned until May 5, 2011. Counsel states that it was only after he received plaintiff's "Hearing Exhibit" that he was aware of the extent of the damages being sought as against Prince and Paisley Park.

In support of the application to vacate the default judgment, Prince has submitted an affidavit in which he claims that his default was unintentional, and that he was unaware of the order granting his previous counsel's motion to withdraw and ordering him and Paisley Park to retain new counsel by December 1, 2010. Prince states that his manager asserts that she never received a copy of the order, and that he was rarely in one location, preparing for a world tour.

Prince also maintains that he has a meritorious defense to the action, in that, contrary to plaintiff's position, he always intended to help promote the fragrance.

In opposition to the motion to vacate the default judgment, plaintiff argues that Prince and Paisley Park were properly served with their prior counsel's motion to withdraw by means of Federal Express, facsimile and e-mail on their manager in London, as evidenced by a sworn affidavit of service. Motion, Ex. D. Further, plaintiff states that Prince and Paisley Park were served with a notice of the default judgment, as evidenced by an affidavit of service by regular and certified mail.

According to plaintiff, the addresses to which the notices were sent were correct and have not been challenged by Prince and Paisley Park's current counsel, who only state that the manager never received the documents.

In addition, plaintiff points to the movants' pattern of failing to provide discovery, pursuant to court orders, as indicative of their wilful and contumacious pattern of conduct, which, argues plaintiff, should preclude them from being granted vacatur of the default judgment.

CPLR 5015 (a) provides that

> "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:
> 1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry ... ."

Plaintiff has provided sufficient proof of mailing the notices to Prince and Paisley Park. The affirmation of Prince's and Paisley Park's attorney that their manager did not receive such notices, unsupported by an affidavit from that manager, is insufficient to rebut the presumption of proper mailing. *Dune Deck Owners Corp. v JJ & P Associates Corp.*, 71 AD3d 1075 (2d Dept 2010).

Moreover, the movants' non-compliance with court-ordered disclosure creates an inference of wilful and contumacious conduct, warranting denial of the motion to vacate the default judgment. *See Bryant v New York City Housing Authority,* 69 AD3d 488 (1st Dept 2010)(continued failure to comply with discovery orders warrants striking defendant's answer and denying its motion to vacate).

Based on the foregoing, it is concluded that movants have failed to provide a reasonable excuse for their failure to appear, and, hence, their motion to vacate the default judgment entered against them is denied.

Accordingly, it is hereby

ORDERED that Universal Music Publishing Group's motion for partial summary judgment dismissing plaintiff's claim for lost profits (motion sequence number 019) asserted

as against it is granted; and it is further

ORDERED that the motion of Prince Rogers Nelson p/k/a Prince and Paisley Park Enterprises, Inc. seeking to vacate the default judgment entered against them (motion sequence number 022) is denied.

DATED: 8/3/2011

ENTER:

HON. BERNARD J. FRIED
J.S.C.