

CBS Outdoor Group Inc. v Ernest Lawrence Group, Inc.
2007 NY Slip Op 31622(U)
June 8, 2007
Supreme Court, New York County
Docket Number: 0115332/2006
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: MARTIN SHULMAN
J.S.C.

Justice

PART

Index Number : 115332/2006

CBS OUTDOOR GROUP INC

vs

ERNEST LAWRENCE GROUP INC

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO.

115332/2006

MOTION DATE

001

MOTION SEQ. NO.

MOTION CAL. NO.

his motion to/for _____

PAPERS NUMBERED

1,23,45

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in
 accordance with the attached decision
 and order.

FILED

JUN 14 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):Dated: June 8, 2007

MARTIN SHULMAN

J.S.C.

Check one: FINAL DISPOSITIONCheck if appropriate: DO NOT POST NON-FINAL DISPOSITION REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

-----X
CBS OUTDOOR GROUP, INC., a Delaware Corp.,
f/k/a VIACOM OUTDOOR GROUP, INC.,

Plaintiff

INDEX NO. 115332/06

-against-

ERNEST LAWRENCE GROUP, INC.,

Defendant.

Hon. Martin Shulman:

Plaintiff CBS Outdoor Group, Inc. ("plaintiff" or "CBS") moves pursuant to CPLR 3212 for judgment on its amended verified complaint for breach of a subway billboard contract. Defendant Ernest Lawrence Group ("defendant" or "ELG") opposes the motion.

The parties do not dispute that on or about September 3, 2003, ELG, as agent for Casino International, Inc., executed a contract with plaintiff's predecessor, Viacom Outdoor Group, Inc., for the placement of advertising in New York City subway cars (the "Contract"). The Contract was for a period of one year, from October 13, 2003 through October 10, 2004, with monthly payments to be made in advance of placement. Plaintiff sent monthly invoices of \$4,250 directly to ELG. Only the first invoice, forwarded on or about October 13, 2003, was paid. Plaintiff annexes copies of four more \$4,250 invoices, forwarded to ELG for November and December of 2003, and for January and February of 2004. Plaintiff alleges that none of these invoices was paid. Plaintiff also annexes correspondence from Casino International, Inc., dated January 12, 2004, asking plaintiff to "Please kill [the contract] immediately."

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The Contract gave either party the right to cancel on 60 days notice, and plaintiff alleges that it treated the correspondence from Casino International, Inc. as a 60 day notice, and canceled the Contract effective February 29, 2004. Plaintiff alleges that CBS fully performed all of its obligations under the Contract, that ELG accepted the invoices without objection, and that a balance of \$17,000 remains outstanding. Plaintiff additionally seeks interest on the unpaid balance at a rate of 18%, plus the costs and reasonable attorneys' fees incurred in this action pursuant to paragraphs 9 and 10 of the Terms and Conditions of the Contract.¹ In opposition to plaintiff's motion for summary judgment, ELG's President, Lawrence Balin, whose signature appears on the Contract, alleges that ELG was acting as the disclosed agent for the actual advertiser, and that any claim for payment must be made against the advertiser, Casino International, Inc.

It is well settled that an agent for a disclosed principal will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or add its personal liability for or to that of the principal (*Savoy Record Co. v. Cardinal Export Corp.*, 15 N.Y.2d 1, 4, 254 N.Y.S.2d 521 [1964]; *News America Marketing, Inc. v. Lepage Bakeries, Inc.*, 16 A.D.3d 146, 147, 791 N.Y.S.2d 80 [1st Dept., 2005]). In this

¹ Paragraph 9 of the Terms and Conditions of the Contract provides that, "in the event of such suit for collection of unpaid accounts, all costs of the suit, including reasonable attorney fees and expenses may be added to the monies owed. For purposes of this condition, reasonable attorney fees are deemed and accepted to be twenty five percent (25%) of the unpaid account."

Paragraph 10 of the Terms and Conditions of the Contract states, in part, "Payments are subject to late payment charge of one and one-half percent (1.5%) per month (18% per annum), or such lesser amount as permitted by law. Such charge will be added after thirty (30 days)."

case, however, ELG's factually unsupported allegations regarding industry custom and practice are unpersuasive (see, e.g., *Fairchild Publications Div. of Capital Cities Media, Inc. v. Rosston, Kremer & Slawter, Inc.*, 154 Misc.2d 27, 29-30, 584 N.Y.S.2d 389 [Sup. Ct., NY County, 1992]), and cannot, in any event, be used to vary or contradict the clear and unambiguous language in the Contract (see *News America Marketing, Inc. v. Lepage Bakeries, Inc.*, 16 A.D.3d at 148).

Paragraph 9 of the Terms and Conditions of the Contract states in pertinent part:

The Agency and Advertiser agree to pay for the advertising service covered by this Contract and agree to be jointly and severally liable for payment thereof, including reasonable expenses for collection, attorneys fees and expenses and court costs....The Company shall hold the Agency and the Advertiser jointly and severally liable in the event of any default in payment. Should either of the Agency or the Advertiser become bankrupt or be delinquent in payment, Company may proceed hereunder against Advertiser and/or Agency, without relieving either party of its liabilities to Company.

This language constitutes a deliberate, unambiguous and separate expression personally obligating ELG to make payment (see *PNC Capital Recovery v. Mechanical Parking Systems, Inc.*, 283 A.D.2d 268, 270, 726 N.Y.S.2d 394 [1st Dept 2001]; *Fairchild Publications Div. of Capital Cities Media, Inc. v. Rosston, Kremer & Slawter, Inc.*, 154 Misc.2d 27, *supra*). Given the clear expression of the parties' intent, as stated within the four corners of the Contract, the allegations and inferences asserted by ELG in opposition to plaintiff's motion fail to raise a triable issue of fact (see *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 795 N.Y.S.2d 502 [2005]; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 597 [1980]).

Accordingly, it is

ORDERED, that plaintiff's motion for summary judgment against defendant is granted; and it is further

ORDERED that the New York County Clerk is directed to enter judgment in favor of plaintiff CBS Outdoor Group, Inc., a Delaware Corp., f/k/a Viacom Outdoor Group, Inc. and against defendant Ernest Lawrence Group, Inc. in the amount of \$17,000.00, together with interest as calculated by the Clerk of the Court at the contractual rate of 18% per annum from the date of each default² until the entry of judgment, and thereafter at the statutory rate, together with attorneys' fees in the amount of \$4,250.00 pursuant to paragraph 9 of the parties' Contract (Exh. A to motion), and costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the Decision and Order of this court. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York
June 8, 2007



HON. MARTIN SHULMAN, J.S.C.

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² As per paragraph 10 of the parties' Contract, interest at 18% on each of the four outstanding invoices in the amount of \$4,250.00 shall be calculated from December 1, 2003; December 31, 2003; January 31, 2004; and March 3, 2004.