UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	ED CV 15-01921-DFM	Date	April 11, 2018
Title	Bennion & Deville Fine Homes Inc. v. Windermere Real Estate Servs. Co.		

Present: The Honorable	Douglas F. McCormick	
Denise Vo		n/a
Deputy Clerk		Court Reporter / Recorder
Attorneys Present for Plaintiffs:		Attorneys Present for Defendants:
n/a		n/a

Proceedings: (In Chambers) Order re: Defendant's Motion for Partial Summary Judgment (Dkt. 154)

Defendant/Counterclaimant Windermere Real Estate Services Company ("Defendant") has moved for partial summary judgment on Plaintiffs' interpretation of provisions of the Area Representation Agreement ("ARA") between Defendant and Windermere Services Southern California, Inc. ("WS SoCal"). Dkt. 154. Plaintiffs filed an opposition, Dkt. 157, and Defendant filed a reply, Dkt. 162.

Standard of Review

Summary judgment is appropriate if the moving party demonstrates that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A fact is material when, under the governing substantive law, it could affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Id.

A party seeking summary judgment bears the initial burden of establishing the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. The moving party can satisfy this burden in two ways: (1) by presenting evidence that negates an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to establish an essential element of the nonmoving party's case that the nonmoving party bears the burden of proving at trial. Id. at 322-23. Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the nonmoving party to set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial. Horphag Research Ltd. v. Garcia, 475 F.3d 1029, 1035 (9th Cir. 2007). When ruling on a summary judgment motion, the court must view the facts and draw all reasonable inferences in the light most favorable to the non-moving party.

Scott v. Harris, 550 U.S. 372, 378 (2007). The court should not weigh the evidence or make credibility determinations. Anderson, 477 U.S. at 255.

Courts may interpret contracts on a summary judgment motion if, "after considering the language of the contract and any admissible extrinsic evidence, the meaning of the contract is unambiguous." Miller v. Glenn Miller Prods., Inc., 454 F.3d 975, 990 (9th Cir. 2006). "The rationale for this proposition is simple: ambiguity in a contract raises a question of intent, which is a fact question precluding summary judgment." National Union Fire Ins. Co. of Pittsburgh, Pa. v. Argonaut Ins. Co., 701 F.2d 95, 97 (9th Cir. 1983).

Factual Background

Defendant and WS SoCal entered into the ARA in 2004. See Dkt. 154-4 at 5-23 (ARA). Section 4.1 of the ARA states that the "term of this Agreement shall . . . continue until it is terminated as follows":

> (a) At any time by mutual written agreement of the parties.
>
> (b) By either party upon one hundred eighty (180) days written notice to the other party.
>
> (c) By either party upon ninety (90) days written notice to the other party; provided that such termination shall be limited to termination for cause based upon a material breach of the Agreement described in the notice and not cured within the ninety (90) day period. The parties pledge to deal with one another in good faith and each party agrees to give the other reasonable notice and opportunity to cure any real or perceived default or misperformance or malperformance on either party's part.
>
> (d) By either party without giving prior notice if the other party [goes bankrupt or takes other action not applicable in this case.]

Id. § 4.1. The ARA continues:

> **4.2 Termination Obligation**. In the event either party elects to terminate the Agreement as provided in 4.1(b) above (the "Terminating Party"), it is agreed that the other party (the "Terminated Party") will be paid an amount equal to the fair market value of the Terminated Party's interest in the Agreement (the "Termination Obligation"), in accordance with the provisions of this agreement. The fair market value of the Terminated Party's interest in the agreement will be determined by mutual agreement of the parties or, if unable to reach agreement, by each party selecting an appraiser and the two appraisers selecting a third appraiser. The fair market value of the Terminated Party's interest will be determined by the appraisers

without consideration of speculative factors including, specifically, future revenue. The appraisers shall look at the gross revenues received under the Transaction during the twelve months preceding the termination date from then existing licensees that remain with or affiliate with the Terminating Party. The median appraisal of the three appraisers shall determine price, and each party agrees to be bound by the determination.

There will be no Termination Obligation if the termination by the Terminating Party is made in good faith based upon the material breach of the obligations of the Terminated Party under this Agreement continuing after reasonable notice and opportunity to cure.

4.3 Payment. The Termination Obligation shall be paid in monthly installments solely from Continuing License Fees described below, until paid in full. Monthly installments in an amount equal to twenty-five percent (25%) of the Continuing License Fees, if any, received by the terminating Party from licensees in the Region existing at the termination date and remaining with or affiliating with the Terminating Party. The monthly payments will be made on the twenty-fifth day of the month following the receipt of the revenues, commencing with the twenty-fifth day of the month following the first full calendar month after the determination of the Termination Obligation. The parties acknowledge that the Termination Obligation is not a purchase transaction but, rather, constitutes a payment of the agreed "run-off" entitlement of the Terminated Party and for tax purposes will be expensed by the Terminating Party and recognized as income by the Terminated Party. The parties acknowledge that this [Termination Obligation] provision has been specifically negotiated, and both parties agree that it constitutes a reasonable and fair liquidated amount as of the date of execution of this agreement.

4.4 No Other Obligation. . . . Except as specifically provided herein neither party will owe any obligation to the other following termination of the Agreement, except for final accounting and settlement of any previously accrued license fees, and excluding any accrued claim for damages and associated attorneys' fees and costs, or otherwise arising by law.

Id. §§ 4.2-4.4 (emphases added).

Plaintiffs' damages expert, Peter D. Wrobel, opines that Plaintiffs have suffered "at least $4,237,999 in damages." See Dkt. 154-4 at 25. The most significant portion of Plaintiffs' damages is what Wrobel calculates as the "Net Value of [WS SoCal] as of January 2015," which Wrobel describes as follows:

> It is my understanding that [Defendant] effected a constructive termination of the area representation relationship with [WS SoCal] by late summer 2014, and later provided [WS SoCal] a formal notice of termination in January 2015. In either event, it is my further understanding that the termination of the area representation relationship was without cause. This termination triggered a clause in the [ARA] which provided for the terminating party to pay the terminated party "an amount equal to the fair market value of the Terminated Party's interest in the Agreement." The value of [WS SoCal in January 2015] . . . was $2,592,526.

See id. at 26 (quoting § 4.2 of the ARA). Thus, Wrobel assumed that the Termination Obligation was equal to WS SoCal's net value at the termination date. See id.; see also Dkt. 154-4 at 53-54 (testifying at his deposition that $2.6 million figure represented the Termination Obligation).

Analysis

In its motion for partial summary judgment, Defendant argues that Plaintiffs' damages analysis violates the ARA's express language about how the Termination Obligation should be calculated. Defendant asks this Court to find therefore, as a matter of law, that (1) future revenues cannot be considered when determining the Termination Obligation; and (2) only revenue received from licensees other than B&D Fine Homes and B&D SoCal may be considered when determining the Termination Obligation. See Dkt. 154 at 3.[1] For the reasons set forth below, Defendant's motion is **GRANTED**.

The First Amended Complaint alleges that Defendant caused the "premature" and "constructive" termination of the ARA in 2014 by failing to register a Franchise Disclosure Document ("FDD"). See Dkt. 31 at 31-32. The First Amended Complaint also alleges that this "constructive" termination obligated Defendant to comply with § 4.2 of the ARA. See id. at 10, 32. Wrobel's report calculated the Termination Obligation accordingly and purported to apply the provisions of § 4.2 of the ARA.

Plaintiffs now take a somewhat different position in opposing Defendant's motion. Plaintiffs argue that Defendant's constructive termination did not trigger the Termination Obligation provision of § 4.2. See Dkt. 157 at 13-15. Plaintiffs argue that "[Defendant]'s current effort to apply the Termination Obligation to any without cause termination of the ARA must be rejected." Id. at 15.

[1] Plaintiffs argue that Defendant's partial motion should be denied because Defendant failed to meet and confer under Local Rule 7-3. See Dkt. 157 at 4-5, 10-13. The parties discussed this motion in at least general terms before the previously-assigned Magistrate Judge in November 2017. See Dkt. 152. Plaintiffs therefore were not prejudiced by any failure to meet and confer separately.

The Court begins with the ARA, which sets out four ways that it could be terminated:

- under § 4.1(a), i.e., with stated cause;
- under § 4.1(b), i.e., without stated cause;
- under § 4.1(c); or
- under § 4.1(d).

Both sides appear to agree that the Termination Obligation provision of § 4.2 should apply only to "without stated cause" terminations under § 4.1(b). The Court agrees that the unambiguous language of the ARA supports this interpretation of the contract.

But the Termination Obligation is but one measure of Plaintiffs' potential damages. Plaintiffs have several breach of contract claims based on the ARA (see Dkt. 31 ¶ 163); several of these claims involve provisions other than § 4.2; and the Termination Obligation only applies to terminations under § 4.1(b). Moreover, Plaintiffs' claim that Defendant breached the ARA by not paying the Termination Obligation is disputed; for example, Defendant claims that the agreement was terminated under § 4.1(a) with stated cause and that Plaintiffs' uncured material breaches of the ARA nullify the Termination Obligation under the last paragraph of § 4.2.

Defendant argues that judicial estoppel precludes Plaintiffs from now taking a position different from the allegations of the First Amended Complaint. The Court does not understand Plaintiffs' position to be an inconsistent position. The First Amended Complaint did, at times, link the Termination Obligation to Plaintiffs' theory of "constructive" termination. But Plaintiffs also alleged other breaches of the ARA and that those breaches caused unspecified damages. See Dkt. 31 ¶¶ 163(a), (e), (f), (g), (h), and (j), 164.

At the hearing, Defendant argued that § 4.4 of the ARA limits parties claiming damages for breach of the ARA to the Termination Obligation and previously accrued license fees. The Court does not agree, given the final clause (". . . and excluding any accrued claim for damages . . . or otherwise arising by law."). Even if the language were ambiguous, it would be construed against Defendant, as the ARA's drafter. See Masonite Corp. v. Pac. Gas & Elec. Co., 65 Cal. App. 3d 1, 8 (1976).

But to the extent that the Termination Obligation is one of the vehicles by which Plaintiffs claim contract damages, the Court agrees with Defendant that the unambiguous language of the ARA states that (1) future revenues cannot be considered when determining the Termination Obligation, that is, "[t]he fair market value of the Terminated Party's interest in the agreement" shall be "determined by . . . look[ing] at the gross revenues received under the Transaction during the twelve months preceding the termination date"; and (2) those gross revenues shall be limited to "gross revenues received . . . from then existing licensees that remain with or affiliate with the Terminating Party."

Wrobel did not follow the unambiguous language of the ARA when he calculated the Termination Obligation, which he equated with the net value of WS SoCal. First, he "adjusted" the 2015 through 2019 cash flows "due to the failure of [Defendant] to properly register its [FDD]." Section 4.2 of the ARA does not permit such an "adjust[ment]." Second, it does not appear that he limited his calculations to gross revenues from existing licensees that remained with or affiliated with Defendant. Section 4.2 of the ARA requires that gross revenues be limited thusly. Wrobel has accordingly calculated something different from what the unambiguous language of the contract defines as the Termination Obligation.

As the Court noted above, Plaintiffs have other breach of contract claims, including breach of contract claims based on Defendant's failure to register FDDs. The applicability of Wrobel's damages model to those breach of contract claims is not before the Court. What is before the Court is the unambiguous language of the ARA, which is all the Court will rule on herein.

That said, as discussed at the hearing, this order raises the issue of how Plaintiffs intend to prove their damages at trial. Defendant indicated at the hearing that it wished to file a motion in limine addressing this matter. Should this still be the case, Defendant is ORDERED to file any such motion within 14 days of the date of this order; Plaintiff should file any opposition within 14 days of the motion filing date; and Defendant should file any reply within 7 days of the opposition filing date. The Court will address any such motion at the final pretrial conference.