UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BENNION & DEVILLE FINE HOMES, INC., a California corporation, et al., Plaintiffs, v. WINDERMERE REAL ESTATE SERVICES COMPANY, a Washington corporation, and DOES 1-10, Defendant.	CASE NO. CV 15-1921 R ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT [59]

Before the Court is Defendant's Motion for Summary Judgment, which was filed on September 19, 2016. (Dkt. No. 59). Having been thoroughly briefed by all parties, this Court took the matter under submission on October 4, 2016.

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). To meet its burden of production, "the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. v. Fritz Cos.*, 210 F.3d 1099 (9th Cir. 2000). Once the moving party meets its initial burden of showing there is no genuine issue of

material fact, the opposing party has the burden of producing competent evidence and cannot rely on mere allegations or denials in the pleadings. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. *Id*.

"A trial court can only consider admissible evidence in ruling on a motion for summary judgment." *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002). Authentication is a condition of admissibility which may be "satisfied by 'evidence sufficient to support a finding that the matter in question is what its proponent claims.'" *Id.* (citations omitted). "Declarations must be made with personal knowledge; declarations not based on personal knowledge are inadmissible and cannot raise a genuine issue of material fact." Finally, once the moving party has met its burden of showing there is not genuine issue of material fact, the opposing party may not simply rely on legal conclusions or hearsay to defeat summary judgment.

Defendant Windermere Real Estate Services Company ("WSC") argues that (1) portions of Plaintiffs' claims one through six are barred by the statute of limitations, (2) Plaintiffs' fourth claim is barred because there were no damages, and (3) Defendant is entitled to judgment on the seventh claim because the Area Representation Agreement was not a franchise agreement. Plaintiffs counter these arguments in their Opposition to Motion for Partial Summary Judgment (Dkt. No. 60) based in substantial part on a declaration filed concurrently with the Opposition. Defendant has since challenged the admissibility of the Deville declaration. Each of WSC's grounds for summary judgment and evidentiary objections will be addressed in turn.

Under the Coachella Valley Agreement, Area Representation Agreement, and Southern California Franchise Agreement, WSC was required to provide Plaintiffs with the "Windermere System" and certain technology and technological support. WSC argues that Plaintiffs' claims for breach of contract and breach of implied covenant of good faith and fair dealing accrued in 2004 and 2011, both beyond the statute of limitations. Plaintiffs offer evidence of technology issues in 2013 and 2014 and argue that their claims are not barred by the statute of limitations under the continuous accrual theory. Furthermore, Plaintiffs submit that they are only seeking damages for conduct that occurred during the relevant statutory periods.

The statute of limitations for a claim for breach of contract, or implied covenants based on contracts, is four years. Cal. Civ. Proc. § 337(1). Under the continuous accrual theory, "a series of wrongs or injuries may be viewed as each triggering its own limitations period, such that a suit for relief may be partially time-barred as to older events but timely as to those within the applicable limitations period." *Aryeh v. Canon Bus. Solutions, Inc.*, 292 P.3d 871, 875-76 (Cal. 2013).

Defendant argues that the technological issues constitute one single breach rather than divisible breaches. In support of this argument, WSC cites to *Ancala Holdings, LLC v. Price*, in which the Ninth Circuit struck down a continuous accrual theory because the breach "continued to accrue because [defendants] failed to cure the initial breach, it was not 'continuous' in the sense that a separate and discrete obligation [to perform under the contract] accrued each day." 220 F. App'x 569, 572-73 (9th Cir. 2013). This is easily distinguishable from the case at bar. Plaintiffs complain of many technical issues of various types at various times. Each issue and failure to correct it was a breach of the contract's requirements to provide technical services and support. The technological failures from the start of the relationship are separate and divisible from later issues the Plaintiffs experienced during the non-time barred periods. Therefore, the continuous accrual theory applies.

However, Defendant also argues that large portions of the Deville declaration are inadmissible. Defendant objects to many statements in the declaration on the basis of a lack of personal knowledge, improper argumentation or legal conclusions, hearsay, and lack of authentication. Plaintiffs cite to paragraph 7 and subparagraphs (a) through (e) of the Deville Declaration as evidence of technological issues during the non-time barred periods. Mr. Deville claims therein that properties listed on the WSC's website did not properly display, issues existed within search engines which prevented "entire neighborhoods from being recognized," and email accounts did not function for days at a time, among other problems. Mr. Deville fails to state how he is aware of these conclusory statements and the exhibits attached as support are inadmissible hearsay.

The Deville Declaration does not state the he ever used the technology which allegedly

failed to function as required by the contracts. He does not state that he worked to fix the technology himself. He provides no information as to how he came to know the technology failed. The Court is left without any foundation for this evidence. There is no evidence to support a finding that Mr. Deville had personal knowledge of the matters testified to. Rather he provided a list of nine subparagraphs after a conclusory introduction paragraph stating that "WSC failed to provide the contractually required technology." The documents attached as supporting evidence are also inadmissible. Exhibits 1 and 3 contain an email chain in which Mr. Deville passes along issues raised by his staff. They are out of court statements regarding technological problems offered to prove that there were technological problems. Except for the select emails from WSC's employee, Mike Teather, they are inadmissible hearsay. Exhibit 2 and 4 contain a similar email chain, except this time Mr. Deville is never copied on the email; providing even less personal knowledge on his part. Exhibits 1 through 4 are hearsay and inadmissible.

Given that the evidence of technological issues within the non-time barred periods is inadmissible, Defendant's Motion for Partial Summary Judgment as to the technology and "Windermere system" portions of claims one through six is granted.

Defendant next argues that Plaintiffs have failed to prove any damage as a result of WSC "soliciting [Plaintiffs'] participation in offers and sales of franchises in violation of the franchise laws." WSC claims that Plaintiffs' testimony that they have not been subjected to civil or criminal liability as a result of the violation of franchise laws show that Plaintiffs have not suffered any damage. Bob Deville's declaration states that the Plaintiffs incurred legal expenses in an effort to discover, understand, and mitigate any potential liability as a result of their participation in the violation of franchise laws. Defendant objects to the admissibility of the relevant paragraph 26 of the Deville Declaration.

Paragraph 26 of the Declaration states that the company "spent a non-trivial amount of time and money seeking to mitigate or avert any potential . . . action[.]" This conclusory, self-serving statement is insufficient to raise a genuine issue of material fact. Mr. Deville does not state how he knows about the legal costs incurred by Services Socal. He does not state how much the legal work cost. He gives no indication of who met with attorneys, when they met, how much

time they spent working, or any other factual details of the "non-trivial" costs Services SoCal incurred. This evidence is inadmissible because it is nothing more than a self-serving conclusion with no foundation to support a finding that Mr. Deville has personal knowledge of the matter. Therefore, Defendant's Motion for Partial Summary Judgment as to the fourth claim is granted.

Plaintiff Services SoCal claims that WSC violated section 20020 of the California Business and Professions Code by terminating the Area Representation Agreement without good cause. Section 20020 prohibits franchisors from terminating a franchise "prior to the expiration of its term, except for good cause." Cal. Bus. & Prof. Code §20020. In its Motion for Summary Judgment, Defendant argues that it is entitled to judgment as a matter of law because the Area Representation Agreement was not a franchise as evidenced by the lack of franchise fee paid by Services SoCal.

The California Franchise Relations Act ("CFRA") in part defines a franchise as an agreement between two or more persons by which "the franchisee is required to pay, directly or indirectly, a franchise fee." Cal. Bus. & Prof. Code § 20001 (a)-(c). The CFRA defines a franchise fee as any fee the franchisee "is required to pay for the right to enter into a business under a franchise agreement, including, but not limited to, any such payment for such goods or services." Cal. Bus. & Prof. Code § 20007. However, "[California] statutes define a franchise fee as a fee paid for the right to do business, not ordinary business expenses during the course of business." *Thueson v. U-Haul Intern., Inc.*, 144 Cal.App.4th 664, 676 (Cal. App. 1st Dist. 2006).

Plaintiff argues that its payments to WSC for services leading up to the agreement, technological support, training fees, and transportation of its employees all constitute franchise fees on their own accord. Additionally, Plaintiff argues that payments to third parties for advertising, and financial audits also constitute franchise fees. These payments were not made "for the right to enter into a business under a franchise agreement." Plaintiff's attempt to distinguish from *Thueson* is unconvincing. The payments at issue in *Thueson*, telephone bills and computer system fees, were determined to be the cost of doing business rather than the required fee to enter into a business. Plaintiff claims that the fees it paid were made to "acquire and/or maintain the rights under the Area Representation Agreement." Maintaining a contractual right is

different than the right to enter into a business. Plaintiff has provided no evidence that these numerous fees were required to enter into or "acquire" the business.

WSC and Services SoCal next dispute the nature of the $35,000 payment made by Plaintiff to Mark Ewing. WSC in its Motion for Summary Judgment argues that the payment could not have been a franchise fee because Ewing was not an affiliate of WSC and the payment was made to receive the right to Ewing's revenues from other franchises. Plaintiff responds that it "understood" that Mr. Ewing was an affiliate of Defendant. Additionally, the parties dispute the purpose of the $35,000 paid to Mr. Ewing.

"A payment to . . . third parties not affiliated with the franchisor is not a 'franchise fee' within the meaning of section 31011 . . . provided that such payment is not made for the right to enter into the business." Cal. Dept. Corp., Release 3-F. Plaintiff has failed to produce competent evidence as to the status of Mr. Ewing. Plaintiff cites to the Deville Declaration as evidence of its "understanding" of Mr. Ewing's position. Mr. Deville's understanding of Mr. Ewing's position is insufficient to establish that he was in fact affiliated with Defendant. More importantly, the payment was not made for the right to enter into business. Given that Ewing was not affiliated with WSC, it follows that he did not have the power to grant Plaintiffs the right to enter into business with WSC. Plaintiffs may have had to, in effect, buy out Mr. Ewing from the position he had in Southern California, but compensating a third party for a share of the market is not a franchise fee. As a matter of law, the payment to Mr. Ewing was not a franchise fee. Thus, Plaintiff has failed to offer sufficient proof of a franchise agreement and Defendant is entitled to judgment as a matter of law.

Finally, Plaintiff claims that the Area Representation Agreement qualifies as an area franchise under the CFRA. An area franchise meets the definition of a franchise under the CFRA, but does not require the payment of a franchise fee. Cal. Bus. & Prof. Code § 20006. An area franchise is "any contract or agreement between a franchisor and a subfranchisor whereby the subfranchisor is granted the right, for consideration . . . , to sell or negotiate the sale of a franchise in the name or on behalf of the franchisor." Cal. Bus. & Prof. Code § 20004. The parties dispute whether or not Services SoCal had the right to negotiate the sale of a franchise on behalf of WSC.

The key issue in any negotiations by Services SoCal on behalf of WSC was whether it was able to freely negotiate its own terms rather than merely representing the terms desired by WSC. If Plaintiff merely passed along terms approved by WSC, then it was no more than a sales representative of WSC and not a subfranchise.

First, Plaintiff argues that the Area Representation Agreement gives Plaintiff the authority to negotiate contracts based on three clauses. None of the three clauses cited give Plaintiff such authority. The agreement plainly states that licenses offered by Services SoCal "will in all cases be subject to the approval of WSC and will be granted and issued by WSC to the licensee." This language makes clear Plaintiff's lack of authority to negotiate terms on its own behalf. Second, Plaintiff argues that regardless of the contractual authority, it did in fact negotiate franchise agreements for WSC. Plaintiff cites to the Deville Declaration's statement that Mr. Deville "negotiated terms with prospective franchisees that were different than those WSC later desired to offer the prospects." Mr. Deville's statement that he did negotiate terms "that were different" than WSC's terms is conclusory and self-serving and therefore inadmissible.

In sum, Plaintiffs failed to show admissible factual evidence of a continuing breach of contract to avoid the statute of limitations on a theory of continuous accrual. Plaintiffs failed to produce competent evidence of damages caused by their involvement in Defendant's violation of franchise laws. The various technology fees, training payments, and the $35,000 payment to Mark Ewing are insufficient as a matter of law to constitute a franchise fee. Finally, Plaintiffs failure to produce evidence of authority to negotiate franchise agreements precludes the Area Representation Agreement from qualifying as an area franchise.

IT IS HEREBY ORDERED that Defendants' Motion for Partial Summary Judgment is GRANTED.

Dated: October 20, 2016.

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE