2009

Young Living Essential Oil, Inc. v. Carlos Marin : Reply Brief

Utah Court of Appeals

Barnard N. Madsen; Scott D. Preston; Joseph M. Hepworth; Fillmore Spencer LLC; Attorneys for Respondent.
Scott B. Mitchell; Attorney for petitioner.

IN THE SUPREME COURT OF UTAH

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YOUNG LIVING ESSENTIAL OIL, INC.,	*	
	*	**PETITIONER'S REPLY BRIEF**
Plaintiff/Appellee/ Respondent,	*	
vs.	*	
CARLOS MARIN,	*	Case No. 20090875-SC
Defendant/Appellant/ Petitioner.	*	

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DEFENDANT'S APPEAL FROM FINAL ORDERS OF THE FOURTH JUDICIAL DISTRICT COURT, THE HONORABLE SAMUEL MCVEY PRESIDING

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Scott B. Mitchell (5111)
2469 East 7000 South
Suite 204
Salt Lake City, Utah 84121
Attorney for Petitioner

Barnard N. Madsen (4626)
Scott D. Preston (11019)
Joseph M. Hepworth (4337)
FILLMORE SPENCER, LLC
3301 North University Avenue
Provo, Utah 84604
Attorneys for Respondent

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ARGUMENT

I. MR. MARIN HAS PROVIDED EVIDENCE OF THE PARTIES' COURSE OF DEALING AND CONDUCT.

Plaintiff first contends that Mr. Marin's reliance on the covenant of good faith and fair dealing is misplaced because his affidavit provides no evidence of a "course of dealing." (Resp. Br. 13). In support of this contention, plaintiff relies solely on paragraph 4 of Mr. Marin's affidavit, which plaintiff refers to as a "prior oral agreement about 'marketing tools'". (Resp. Br. 13). According to plaintiff, paragraph 4 of Mr. Marin's affidavit "is not 'course of dealing' evidence, it is extrinsic evidence of 'new, independent rights and duties' not contained in the parties' subsequent, expressly-integrated written Agreement." (Resp. Br. 13).

Mr. Marin believes that plaintiff's contention is revealing in that it completely disregards paragraphs 5, 7-9, and 11-13 of his affidavit, in which Mr. Marin provides specific and detailed testimony regarding the parties' course of dealing and conduct.

In paragraph 5 of his Affidavit, Mr. Marin testifies that after plaintiff failed to provide the marketing tools necessary for him to do his job he spent more than a month working on his own with

> ... the third party vendor [of the marketing tools] hired by plaintiff, Rainmaker Consulting, in order [to] expedite the delivery of the marketing tools. I wrote more than 20 marketing and training scripts for video and web based content. On two occasions, I traveled to St. Augustine,

Florida to work with Rainmaker Consulting shooting marketing videos.

(R. 0125)

In paragraph 7 of his Affidavit, Mr. Marin testifies that

> [o]n or about February 7, 2005, after plaintiff failed to provide the marketing tools as promised, I contacted Gary Young, plaintiff's Chief Executive Officer, and David Stirling, plaintiff's Chief Operating Officer, with my growing concerns about my ability to meet the performance guarantees. Mr. Young and Mr. Stirling acknowledged that plaintiff had failed to perform as promised, assured me that my inability to satisfy the performance guarantees would not affect my receipt of the advance payment of $25,000 due February 15, 2005, and expressed their confidence that the marketing tools would be ready for my use by mid-February to early March 2005.

(R. 0125-0124)

In paragraph 8 of his Affidavit, Mr. Marin testifies that on or about March 16, 2005, he informed Steve Bentley, plaintiff's Chief Financial Officer that his

> ... failure to satisfy his performance guarantee was the unavoidable result of plaintiff's failure to provide the promised marketing tools, that I could and would meet my performance guarantees when the tools were provided, and that I expected plaintiff to continue making payment to me in accordance with the terms of the Agreement. Mr. Bentley acknowledged that plaintiff had failed to perform as promised, represented that plaintiff anticipated that its website would be completed within approximately two weeks, and stated that plaintiff would be making a partial $15,000 payment to me.

(R. 0124)

In paragraph 9 of his Affidavit Mr. Marin testifies that

> [o]n April 12, 2005, I spoke again with Gary Young regarding plaintiff's failure to provide the marketing tools. Mr. Young responded by telling me that he would "get to the bottom" of the problem and see what he could do.

(R. 0124-0123)

In paragraphs 11 and 12 of his Affidavit, Mr. Marin testifies that

> [o]n April 26, 2005, I telephoned Mr. Stirling regarding plaintiff's failure to provide the promised marketing tools. Mr. Stirling again assured me that they would be provided soon and again requested my patience... On May 3, 200[5], Mr. Stirling notified my that he had received an e-mail from Rainmaker Consulting (i.e., "John's Folks") "which indicated they are making progess" on the website. Mr. Stirling asked me to "hold tight." A copy of the e-mail is attached hereto. Thus, 49 days after plaintiff stopped making payments to me in accordance with the terms of the Agreement, plaintiff acknowledged that it had still not provided me with the marketing tools which were absolutely essential for me to be able to do my job and again requested my continued patience.

(R. 0123)

Finally, in paragraph 13 of his Affidavit Mr. Marin testifies that

> [o]n or about June 8, 2005, when plaintiff had still not provided any of the marketing tools which I needed in order to do my job, I spoke with Mr. Young and informed him that I believed I had been patient long enough in waiting for the repeatedly promised marketing tools and that I could no longer afford to continue my contractual relationship with plaintiff.

(R. 0123-0122)

Mr. Marin respectfully submits that his testimony regarding the course of dealing and conduct of the parties is sufficient to establish issues of fact as to: (a) whether plaintiff failed to act consistently with the parties' agreed upon common purpose of marketing and distributing plaintiff's product through a mainstream network marketing model; (b) whether plaintiff failed

to act consistently with Mr. Marin's justified expectation that plaintiff would provide Mr. Marin with the marketing tools necessary in order for him to be able to satisfy his performance guarantees; and (c) whether plaintiff failed to cooperate in providing the necessary marketing tools thereby making it difficult or impossible for Mr. Marin to meet his performance guarantees and is now attempting to take advantage of the non-performance which it caused.

II. PLAINTIFF SHOULD NOT BE ALLOWED TO RELY ON THE INTEGRATION CLAUSE TO CIRCUMVENT ITS COVENANT OF GOOD FAITH AND FAIR DEALING.

Plaintiff recognizes that in *Brown v. Moore*, 973 P.2d 950, 954 (Utah 1998), the Court held that "[i]n determining whether a party has breached the covenant of good faith and fair dealing, **we are not limited to an examination of the express contractual provisions; we will also consider the course of dealing between the parties.**" (Citations omitted)(emphasis added). Nevertheless, plaintiff contends that "*Brown's* holding is unhelpful to Marin, because there was a clear integration clause in the Agreement Marin signed, specifically excluding implied obligations or 'representations' from the parties' written Agreement." (Resp. Br. 24).

Plaintiff's contention is misplaced for two reasons. First, the integration clause in the Agreement which Mr. Marin signed does not specifically exclude implied obligations. More

importantly, plaintiff provides no authority which would support the proposition that the implied covenant of good faith and fair dealing may be circumvented by an integration clause. Mr. Marin has found no such authority; but has found authority to the contrary. In their exhaustive treatise on the subject of "Contractual Good Faith," the authors conclude that although the issue has not been resolved by extensive case law, parties should not be allowed to disclaim the obligation to perform in good faith: "A contract clause providing, for example, that a party 'shall not be bound by any obligation of good faith under this contract' should not be enforceable." Steven J. Burton and Eric G. Anderson, *CONTRACTUAL GOOD FAITH Formation, Performance, Breach, Enforcement* § 3.2.5 Disclaimers of Good Faith at p. 72.[1]

Plaintiff also suggests that the Court could adopt the "well-reasoned" holding of the Court of Appeals of Ohio in *United States Construction Corporation v. Harbor Bay Estates, Ltd.*, 876 N.E.2d 637, ¶ 42 at 643 (Ohio 2007), that "[t]he implied covenant of good faith and fair dealing cannot be used to make an end run around the parol evidence rule." (Resp. Br. 33). Plaintiff's description of the *Harbor Bay Estates* case as "well-reasoned" is curious. Not only is the Ohio court's statement dictum, but its

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[1]It is also noteworthy that (while the contract at issue in this case is not governed by the UCC) the Utah Uniform Commercial Code specifically prohibits any agreement to disclaim the obligation of good faith. Utah Code Ann. § 70A-1a-302(2).

opinion provides no reasoning or analysis with respect to this issue. *Id.* Further, as authority for its statement the *Harbor Bay Estates* court cites an earlier decision of the Court of Appeals of Ohio in *McNulty v. PLS Acquisition Corp.*, 8th Dist. No. 79025, 2002-Ohio-7220, 2002 WL 31875200, ¶ 24, which is easily distinguishable from the case at bar. There, the court explained that

> The record clearly indicates that the oral promises and representations were made **prior** to the execution of the contracts. McNulty cannot attempt to rewrite an unambiguous written contract with provisions he knew were not included. The implied covenant of good faith and fair dealing cannot be used to make an end run around the parol evidence rule.

Id. (emphasis added).

In the case at bar, Mr. Marin relies not only on representations made prior to the execution of the parties' agreement, but also on the parties' continuing course of dealing and conduct through the several months after its execution. He is, therefore, not attempting to make an end run around the parol evidence rule.

Further, even if an integration clause might otherwise operate to circumvent the covenant of good faith and fair dealing, the parol evidence rule has a "very narrow application" and operates to exclude only **prior or contemporaneous** conversations, representation, or statements. *E.g., Tangren Family Trust v. Tangren*, 2008 UT 20, ¶ 11, 182 P.3d 326. It does

not apply to **subsequent** conversations, representations, or statements. *E.g., Calamari and Perillo on Contracts*, Fifth Edition, § 3.2(a). Accordingly, the parol evidence rule would not apply to paragraphs 5, 7-9, and 11-13 of Mr. Marin's affidavit because they relate to conversations, representations, and statements made subsequent to the execution of the parties' agreement.

III. MR. MARIN CONCURS WITH PLAINTIFF'S SUGGESTION THAT IT SHOULD BE ALLOWED TO SUBMIT A REVISED FEE AFFIDAVIT AND ALLOW THE TRIAL COURT TO EXERCISE ITS DISCRETION IN MAKING AN AWARD OF ATTORNEY FEES.

Mr. Marin appreciates plaintiff's admission that it is not entitled to recover attorney fees related to its tort and other non-contract claims, and in connection with issues on which it did not prevail. Mr. Marin also believes that it would be appropriate for plaintiff to submit a revised fee affidavit to the trial court if it prevails on this appeal and that it would then be within the discretion of the trial court to determine whether plaintiff's reduced fee request is reasonable.

Mr. Marin will respond briefly to the arguments which plaintiff has made in support of the trial court's fee award.

A. Attorney fee awards must be reasonable even in default cases.

Plaintiff argues that it was appropriate for the trial court to award attorney fees without making a finding of reasonableness because Mr. "Marin's objection was untimely and the award was

therefore uncontested." (Resp. Br. 35). This argument is without merit. Even in default cases the trial court is not bound by the prevailing party's affidavit, but must independently determine the amount of a reasonable attorney fee. *See Amyx v. Columbia House,* 2005 UT App 118, ¶5, 110 P.3d 176. Rule 73 of the Utah Rules of Civil Procedure specifically requires that "a request for attorney fees shall be supported by affidavit or testimony" setting forth, inter alia, "factors showing the reasonableness of the fees." There would be no reason for testimony "showing the reasonableness of the fees" unless a finding on that issue is required. The only circumstances in which Rule 73 does not require a showing of the reasonableness is where "the party claims attorney fees in accordance with the schedule in subsection (d) or in accordance with Utah Code Section 75-3-718 **and no objection to the fee has been made."** Rule 73(a), URCP (emphasis added).

B. It was not reasonable for plaintiff to spend tens of thousands of dollars in attorney fees addressing an issue which it acknowledges Mr. Marin "has never disputed or even addressed."

Despite the fact that this case was decided on summary judgment without either party having conducted any discovery, plaintiff contends that it is more than a simple breach of contract case because "Pre-*Tangren*, Young Living was prudent in fulfilling its obligation under *Hall* to provide 'all relevant'

evidence to the trial court on the issue of integration." (Resp. Br. 36). This contention is unpersuasive. As plaintiff correctly acknowledges, Mr. "Marin has never disputed or even addressed the integration clause." (Resp. Br. 14). Accordingly, contrary to plaintiff's assertion, Mr. Marin respectfully submits that it was incredibly inefficient for plaintiff to have spent tens of thousands of dollars addressing an issue which has never been in dispute.[2]

CONCLUSION

For the foregoing additional reasons, Mr. Marin respectfully requests that the Memorandum Decision of the Court of Appeals be reversed and that this action be remanded to the Court of Appeals with instructions for remand to the trial court for a trial on the merits.

DATED this 18th day of May 2010.

Scott B. Mitchell
Attorney for Petitioner

[2]Mr. Marin also finds interesting plaintiff's assertion that it "sought for and obtained Marin's approval of extensions to respond" to Mr. Marin's counter-motion for summary judgment. Mr. Marin's counsel does not recall any such requests and there is nothing in the record which would substantiate them. However, Mr. Marin does not deny that they were made and his counsel's normal practice would be to grant them as a matter of courtesy. That said, however, having granted plaintiff a nearly four month extension, Mr. Marin finds it curious that plaintiff would now take issue with the filing of Mr. Marin's objection to plaintiff's fee affidavit only seven days after it was due.

MAILING CERTIFICATE

Undersigned certifies that two copies of the foregoing were mailed this 18th day of May 2010 via first class U.S. Mail, postage prepaid, to the following:

Barnard N. Madsen
Scott D. Preston
Joseph M. Hepworth
FILLMORE SPENCER LLC
3301 N. University Avenue
Provo, Utah 84604