

2009

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

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Young Living Essential Oil, Inc. v. Carlos Marin*, No. 20090875 (Utah Court of Appeals, 2009).
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IN THE SUPREME COURT OF UTAH

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YOUNG LIVING ESSENTIAL OIL,
INC.,

Plaintiff/Appellee/
Respondent,

vs.

CARLOS MARIN,

Defendant/Appellant/
Petitioner,

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BRIEF OF THE PETITIONER

Case No. 20090875-SC

* * * *

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

* * * *

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FILED
UTAH APPELLATE COURTS

MAR 16 2010

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STATEMENT OF JURISDICTION

The Supreme Court of Utah has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication. Utah Code Ann. § 78A-3-102(5).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

1. **Issue:** Whether the court of appeals erred in its assessment of defendant's argument that plaintiff breached the implied covenant of good faith and fair dealing. Review of the district court's grant of summary judgment is for correctness, according no deference to that court's legal conclusions. *Brown v. Moore*, 973 P.2d 950, 953 (Utah 1998). On certiorari review, the Supreme Court reviews the decision of the court of appeals, not the decision of the district court. See *Massey v. Griffiths*, 2007 UT 10, ¶ 8, 152 P.3d 312. This issue was presented in the Petition for Writ of Certiorari at pages 9-14.

2. **Issue:** Whether the court of appeals erred in affirming the district court's award of attorney fees. The standard of review on appeal of the amount of a district court's award of attorney fees is patent error or clear abuse of discretion. *Jensen v. Sawyers*, 2005 UT 81, ¶127, 130 P.3d 325 (citing *Valcarce v. Fitzgerald*, 961 P.2d 305, 316 (Utah 1998)). On certiorari review, the Supreme Court reviews the decision of the court of appeals, not the decision of the district court. See *Massey v. Griffiths*, 2007 UT 10, ¶ 8, 152 P.3d 312. This issue

was presented in the Petition for Writ of Certiorari at pages 14-19.

DETERMINATIVE RULES

Rule 7(f)(2), *Utah Rules of Civil Procedure*

(f)(2) Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

Rule 56(c), *Utah Rules of Civil Procedure*

(c) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

I. Nature of the Case, course and disposition of proceedings.

This is an action for damages in which plaintiff asserts a claim for breach of contract based upon defendant Carlos Marin's failure to meet certain "performance guarantees" detailed in the written contract between the parties. Mr. Marin does not dispute that he failed to meet his performance guarantees. It is Mr. Marin's contention, however, that plaintiff's prior material

breach of the contract excused him from his performance guarantees. Specifically, Mr. Marin contends that plaintiff breached the implied covenant of good faith and fair dealing inherent in the contractual relationship between the parties when it failed to cooperate in providing Mr. Marin with the marketing tools which were necessary in order for Mr. Marin to meet his performance guarantees.

The trial court granted summary judgment in plaintiff's favor, rejecting Mr. Marin's defense on the basis that "[i]t is well settled that the implied covenant of good faith and fair dealing cannot be used to impose new, independent duties in a written agreement." See Addendum 2. The trial court also reasoned that the parol evidence rule barred the testimony which Mr. Marin offered to prove his claim. See Addendum 2. The Utah Court of Appeals affirmed. See Addendum 1.

The trial court also awarded plaintiff \$43,903 in attorney fees. See Addendum 3. The Utah Court of Appeals affirmed. See Addendum 1.

II. Statement of Facts

1. Plaintiff is in the business of manufacturing and selling therapeutic grade essential oils and wellness supplements. Historically, plaintiff has sold its products through a network of individuals who are for the most part practitioners of alternative medicine, massage therapists, and quasi-naturopath

non-licensed wellness enthusiasts. When plaintiff's representatives first contacted Mr. Marin, they represented to Mr. Marin that they desired to increase their company's sales volume using a mainstream network marketing model, i.e., marketing their products through traditional network marketing sales representatives directly to the individual consumer. Plaintiff's representatives were aware of the fact that Mr. Marin had previously built a global network of more than 500,000 distributors for Amway Corporation using a mainstream network marketing model and they wanted Mr. Marin to accomplish similar results for plaintiff. (R. 0126)

2. The parties entered into a Field Advisor to Executive Board Distributor Agreement on January 12, 2005 (hereinafter the "Agreement"). (R. 0090)

3. Paragraph 18 of the Agreement provides that "there are no representations, warranties, or other agreements between the Parties in connection with the subject matter hereof except as specifically set forth herein." (R. 0082)

4. Under paragraph 4 of the Agreement, plaintiff promised to pay Mr. Marin advance payments of:

\$25,000 on execution of the Agreement (12 January 2005);
\$25,000 on 15 February 2005;
\$25,000 on 15 March 2005; and
\$25,000 on 15 April 2005.

(R. 0089)

5. Under paragraph 3.4 of the Agreement, Mr. Marin agreed that he would meet the following performance guarantees of cumulative "auto ship" sales volume by the specified dates:

\$5,000 by 15 February 2005;
\$30,000 by 15 March 2005;
\$100,000 by 15 April 2005;
\$300,000 by 15 May 2005;
\$600,000 by 15 June 2005; and
\$900,000 by 15 July 2005.

(R. 0089)

6. On January 12, 2005, in connection with the execution of the Agreement, plaintiff paid a \$25,000 advance to Mr. Marin.

(R. 0368)

7. By February 15, 2005, Mr. Marin met his \$5,000 cumulative "auto ship" sales volume performance guarantee under paragraph 3.4 of the Agreement. (R. 0368)

8. Accordingly, on February 15, 2005, plaintiff paid Mr. Marin another \$25,000 advance. (R. 0368)

9. Mr. Marin was unable to meet his \$30,000 cumulative auto ship sales volume performance guarantee by March 15, 2005 in accordance with paragraph 3.4 of the Agreement. (R. 0368)

10. On March 15, 2005, plaintiff paid Mr. Marin another \$15,000 advance. (R. 0368)

11. Mr. Marin was unable to meet his April 15, 2005 performance guarantee by April 15, 2005. (R. 0368)

12. Prior to the parties' execution of the Agreement, plaintiff represented to Mr. Marin that it was nearing completion

of a new mainstream marketing website, recruiting DVD, audio CD, and other marketing materials (hereinafter referred to as the "marketing tools"). It was understood by both plaintiff and Mr. Marin that these marketing tools would be necessary in order for Mr. Marin to be able to meet his performance guarantees under the Agreement and it was represented to Mr. Marin that they would be available for use by February 1, 2005. (R. 0126-0125)

13. Unfortunately, while plaintiff repeatedly promised to do so, it failed to provide Mr. Marin with any of the necessary marketing tools (except for one mediocre but expensive brochure which Mr. Marin's distributors were not interested in purchasing). (R. 0125)

14. On or about February 7, 2005, after plaintiff failed to provide the marketing tools as promised, Mr. Marin contacted Gary Young, plaintiff's Chief Executive Officer, and David Stirling, plaintiffs' Chief Operating Officer, with his growing concerns about his ability to meet his performance guarantees. Mr. Young and Mr. Stirling acknowledged that plaintiff had failed to perform as promised, assured Mr. Marin that his inability to satisfy his performance guarantees would not affect his receipt of the advance payment of \$25,000 due February 15, 2005, and expressed their confidence that the marketing tools would be ready for Mr. Marin's use by mid-February to early March 2005. (R. 0125-0124)

15. On or about March 16, 2005, Steve Bentley, plaintiff's Chief Financial Officer, informed Mr. Marin that due to Mr. Marin's failure to meet his March 15, 2005 performance guarantee, plaintiff was considering withholding further payment to Mr. Marin under the Agreement. In response, Mr. Marin made it very clear to Mr. Bentley that his failure to satisfy his performance guarantee was the unavoidable result of plaintiff's failure to provide the promised marketing tools, that he could and would meet his performance guarantees when the tools were provided, and that he expected plaintiff to continue making payment to him 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 Mr. Marin. (R. 0124)

16. On April 12, 2005, Mr. Marin spoke again with Gary Young regarding plaintiff's failure to provide the marketing tools. Mr. Young responded by telling Mr. Marin that he would "get to the bottom" of the problem and see what he could do. (R. 0124-0123)

17. Despite its acknowledgment that it had failed to provide Mr. Marin with the marketing tools which he needed to do his job, and despite its requests for Mr. Marin to remain patient while it

continued in its efforts to provide the marketing tools, plaintiff failed to pay Mr. Marin \$10,000 of the advance payment due March 15, 2005 in accordance with paragraph 4 of the Agreement and failed to make any of the \$25,000 advance payment due to be paid to Mr. Marin on April 15, 2005. (R. 0123)

18. On April 26, 2005, Mr. Marin telephoned Mr. Stirling regarding plaintiff's failure to provide the promised marketing tools. Mr. Stirling again assured Mr. Marin that they would be provided soon and again requested that Mr. Marin be patient. (R. 0123)

19. On May 3, 2007, Mr. Stirling notified Mr. Marin that he had received an e-mail from Rainmaker Consulting (i.e., "John's folks") "which indicated they are making progress" on the website. Mr. Stirling asked Mr. Marin to "hold tight." Thus, 49 days after plaintiff stopped making payments to Mr. Marin in accordance with the Agreement, plaintiff acknowledged that it had still not provided Mr. Marin with the marketing tools which were absolutely essential for him to be able to do his job and requested his continued patience. (R. 0123)

20. On or about June 8, 2005, when plaintiff had still not provided any of the marketing tools which Mr. Marin needed in order to do his job, Mr. Marin spoke with Mr. Young and informed him that he believed he had been patient long enough in waiting for the repeatedly promised marketing tools and that he could no

longer afford to continue to his contractual relationship with plaintiff. (R. 0123-0122)

21. The Complaint commencing this action was filed on July 26, 2006. (R. 0023)

22. Plaintiff filed its Motion for Partial Summary Judgment on March 21, 2007. (R. 0105) Mr. Marin filed his Response to Motion for Partial Summary Judgment and Counter-Motion for Partial Summary Judgment on April 4, 2007. (R. 0111)

23. Following a hearing held October 1, 2007, the trial court issued its Order granting plaintiff's Motion for Partial Summary Judgment and denying Mr. Marin's Counter-Motion for Partial Summary Judgment. (R. 0462)

24. On May 27, 2008, plaintiff filed a Motion for Order of Voluntary Dismissal of Plaintiff's Second, Third, Fourth, Fifth and Sixth Cause of Action. (R. 0495) On that same date, plaintiff submitted a Proposed Final Judgment and an Affidavit of Attorneys' Fees and Costs. (R. 0505)

25. Mr. Marin served his Objection to Plaintiff's Proposed Final Judgment and Fee Affidavit on June 7, 2008. However, the Objection was not filed with the trial court until June 11, 2008. (R. 0499)

26. On June 12, 2008, the trial court entered a Final Judgment in which it awarded plaintiff \$61,362.43 in compensatory damages and awarded plaintiff \$43,903 in attorney fees. (R.

0505)

27. Mr. Marin filed his Notice of Appeal on July 14, 2008.

(R. 0514)

28. The Utah Court of Appeals filed its MEMORANDUM DECISION (Not For Official Publication) affirming the trial court's ruling on September 24, 2009. (See Addendum 1)

SUMMARY OF ARGUMENT

I. THE COURT OF APPEALS ERRED IN ITS ASSESSMENT OF MR. MARIN'S ARGUMENT THAT PLAINTIFF BREACHED THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

The trial court granted plaintiff's Motion for Partial Summary Judgment based upon the undisputed fact that Mr. Marin failed to meet his "performance guarantees." In opposing summary judgment, Mr. Marin does not deny that he failed to meet his performance guarantees. Rather, it is Mr. Marin's contention that plaintiff's prior material breach of its obligation of good faith and fair dealing excused Mr. Marin from further performance under the Agreement. See, e.g., *Holbrook v. Master Protection Corp.*, 883 P.2d 295, 301 (Utah App. 1994) (one party's material breach excuses the other party's further performance).

Specifically, Mr. Marin contends that plaintiff's failure to provide him with the marketing tools which he needed in order to satisfy his performance guarantees constitutes a prior material breach of plaintiff's obligation to cooperate with Mr. Marin and to act consistently with Mr. Marin's justified expectations and

with the parties' agreed common purpose, thereby excusing Mr. Marin from his performance guarantees. See *Rawson v. Conover*, 2001 UT 24, ¶ 44, 20 P.3d 876(a party must act consistently with the agreed common purpose and the justified expectations of the other party).

The Court of Appeals affirmed the trial court's rejection of Mr. Marin's defense, concluding that "[w]hile a covenant of good faith and fair dealing inheres in almost every contract, ... this covenant cannot be read to establish new, independent rights or duties to which the parties did not agree ex ante."¹ The court of appeals also agreed with the trial court's conclusion that the parol evidence rule barred the testimony which Mr. Marin offered to prove his claim.²

Mr. Marin respectfully submits that the court of appeals erred in its assessment his argument. Mr. Marin's testimony was not offered for the purpose of proving "new, independent rights or duties" or a "contemporaneous oral agreement." It was offered to show the parties' purpose, intentions and Mr. Marin's justified expectations, which, as discussed below, is in accordance with this Court's decisions in *Brown v. Moore*, 973 P.2d 950, 954 (Utah 1998); *St. Benedicts Dev. v. St. Benedicts Hosp.*, 811 P.2d 194, 200 (Utah 2001); and *Rawson v. Conover*, 2001

¹Addendum 1 at p. 3.

²Addendum 1 at p. 3.

UT 24, ¶ 44, 20 P.3d 876, as well as those of other panels of the court of appeals. See *Andolex Resources, Inc. v. Myers*, 871 P.2d 1041, 1048 (Utah App. 1994).

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S AWARD OF ATTORNEY FEES.

The trial court's award of attorney fees is unconscionable and unjustified. This is a very simple breach of contract case in which neither party conducted any discovery and which was decided on summary judgment. Nevertheless, the trial court awarded plaintiff \$43,903 in attorney fees. The court of appeals affirmed the trial court's award on the ground that Mr. Marin's objection to plaintiff's fee affidavit was filed seven days late and, therefore, his arguments with respect to the fee award "are waived on appeal."³

Mr. Marin respectfully submits that the court of appeals erred in affirming the trial court's award of attorney fees. "Waiver" is an intentional and voluntary relinquishment of a known right. See, e.g., *Gifis Law Dictionary* at p. 222. Mr. Marin may have filed his objection to plaintiff's fee affidavit seven days late. However, there is nothing which would support the conclusion that he did so intentionally, much less that he intentionally and voluntarily relinquished his right to appeal the attorney fee award.

³Addendum 1 at p.4.

Further, even if Mr. Marin's objection to plaintiff's fee affidavit was untimely, the Court of Appeals could still have considered the issue of fees because the trial court committed plain error and this case involves exceptional circumstances. *See, e.g., View Condominium Owners Ass'n v. MSICO*, 2004 UT App 104, ¶ 37, 90 P.3d 1042 (citing *State v. Brown*, 856 P.2d 358, 359-60 (Utah Ct. App. 1993)) (appellate courts will generally not consider an issue raised for the first time on appeal unless the trial court committed plain error or the case involves exceptional circumstances).

ARGUMENT

I. THE COURT OF APPEALS ERRED IN ITS ASSESSMENT OF MR. MARIN'S ARGUMENT THAT PLAINTIFF BREACHED THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

Plaintiff's Motion for Partial Summary Judgment is premised on Mr. Marin's breach of contract as alleged in the First Cause of Action set forth in plaintiff's Complaint. Specifically, plaintiff alleges that Mr. Marin breached the Agreement by failing to meet his "performance guarantees."

In opposing plaintiff's motion, Mr. Marin does not deny that he failed to meet his performance guarantees. It is Mr. Marin's contention that plaintiff's failure to provide him with the marketing tools which were necessary for him to satisfy his performance guarantees was a prior material breach of plaintiff's obligation of good faith and fair dealing which excused Mr. Marin

from further performance under the Agreement, and specifically excused him from his performance guarantees. See, e.g., *Holbrook v. Master Protection Corp.*, 883 P.2d 295, 301 (Utah App. 1994) (one party's material breach excuses the other party's further performance).

Under Utah law, an implied covenant of good faith and fair dealing inheres to all contractual relationships. See, e.g., *Rawson v. Conover*, 2001 UT 24, ¶ 44, 20 P.3d 876. In order to comply with its obligation of good faith and fair dealing,

"... a party must act consistently 'with the agreed common purpose and the justified expectations of the other party.' In analyzing for compliance with the covenant, **both the contract language and the course of dealings between the parties should be considered to determine the parties' purpose, intentions, and expectations.**"

Id. (quoting *St. Benedicts Dev. v. St. Benedicts Hosp.*, 811 P.2d 194, 200 (Utah 2001) (other citation omitted) (emphasis added); see also *Brown v. Moore*, 973 P.2d 950, 954 (Utah 1998) (same); and *Andolex Resources, Inc. v. Myers*, 871 P.2d 1041, 1048 (Utah App. 1994) (same). Particularly applicable to the case at bar, this means that "one party may not render it difficult or impossible for the other to continue performance and then take advantage of the nonperformance he has caused." *Zion's Properties, Inc. v. Holt*, 538 P.2d 1319, 1321 (Utah 1975); see also *Markham v. Bradley*, 2007 UT App 379, ¶ 18, 173 P.3d 865 (same); and *PDQ Lube Center, Inc. V. Huber*, 949 P.2d 792, 798 (Utah App. 1997) (same);

see generally *Gregorson v. Jensen*, 617 P.2d 369, 373 n.9 (Utah 1980) ("parties are obligated to cooperate with each other in good faith in the performance of a contract").

In his Affidavit submitted in opposition to plaintiff's Motion for Partial Summary Judgment (see paragraphs 12-19 of the Statement of Facts above), Mr. Marin offered testimony regarding the parties' course of dealings and conduct for the purpose of proving the parties' purpose, intentions and Mr. Marin's justified expectations. (R. 0126-0122) Mr. Marin's respectfully submits that his testimony is sufficient to establish issues of fact as to 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, whether plaintiff failed to act consistently with Mr. Marin's justified expectation that plaintiff would provide him with the marketing tools necessary in order for him to be able to satisfy his performance guarantees, and whether plaintiff made 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.

The court of appeals, however, affirmed the trial court rejection of Mr. Marin's defense on the basis that "[w]hile a covenant of good faith and fair dealing inheres in almost every contract, ... this covenant cannot be read to establish new,

independent rights or duties to which the parties did not agree ex ante.'"⁴ The court of appeals also agreed with the trial court's conclusion that the parol evidence rule barred the testimony which Mr. Marin offered to prove his claim: "we reject Marin's argument that the implied covenant of good faith and fair dealing can be used to incorporate extrinsic evidence of a contemporaneous oral agreement, where the parties' agreement was integrated and the alleged oral agreement was not part of 'the express covenants and promises of the contract.'" Addendum 1 at p. 3 (quoting *Seare v. University of Utah Sch. of Med.*, 882 P.2d 673, 678 (Utah Ct. App. 1994)).

Mr. Marin respectfully submits that the trial court's and the Court of Appeals' conclusions are erroneous. Mr. Marin's testimony was not offered for the purpose of proving "new, independent rights or duties" or a "contemporaneous oral agreement." It was offered to show the parties' purpose, intentions and Mr. Marin's justified expectations.

(A) Mr. Marin is not attempting to impose new, independent duties into the parties' Agreement.

The court of appeals was correct in recognizing this Court's ruling in *Oakwood Village, LLC v. Albertsons*, 2004 UT 101, ¶ 45, 104 P.3d 1226, that the covenant of good faith and fair dealing "cannot be read to establish new, independent rights or duties to

⁴Addendum 1 at p. 3.

which the parties did not agree ex ante.'"⁵ However, the court of appeals erred in its assessment of Mr. Marin's defense because it failed to reconcile that ruling with this Court's rulings in *Brown, St. Benedict's Development*, and *Rawson, supra*, that in analyzing for compliance with the covenant good faith and fair dealing trial courts should consider not just the contract language, but also the course of dealings and conduct of the parties in order to determine their purpose, intentions, and expectations.

In *Brown* the Court explained 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.**" 973 P.2d at 954 (citations omitted) (emphasis added). The *Brown* plaintiffs had purchased all of the stock of Western Heritage Thrift and Loan pursuant to an agreement which they entered into with the Utah Department of Financial Institutions (DFI). Because the plaintiffs were not infusing new capital sufficient to meet the minimum requirements under Utah law, "DFI told plaintiffs that the necessary additional capital could be supplied by the Utah Industrial Loan Guaranty Corporation's (ILGC) purchase of \$2,000,000 of 'net worth certificates' from Western Heritage, which DFI would recognize as

⁵Addendum 1 at p. 3.

cash equivalents for accounting purposes in meeting capitalization requirements.” 973 P.2d at 952. Approximately two years later, the ILGC became insolvent and, as a consequence, Western Heritage became a failing depository institution because it was no longer able to use the net worth certificates in calculating its operating capital. Following DFI’s seizure of Western Heritage due to its failure to maintain adequate capital, the plaintiffs filed suit claiming, inter alia, that “DFI breached the implied covenant of good faith and fair dealing by taking possession of Western Heritage before the lapse of a period sufficient to permit them to recover their investment. Plaintiffs assert[ed] that ... DFI was obligated to continue crediting the ILGC net worth certificates toward capital requirements imposed by State law.” 973 P.2d at 954.

The trial court granted summary judgment in DFI’s favor and this Court affirmed, explaining the analytical framework for its decision as follows:

In this case, **an examination of the contract language reveals no express obligation** on the part of DFI to allow plaintiffs to operate Western Heritage for a sufficient period to recoup their investment. Nor is there any language which guarantees that DFI will continue to count the net worth certificates toward capital requirements for any specific amount of time... **Thus, if plaintiffs are to defeat summary judgment, the course of dealings between the parties must disclose some other obligation, express or implied,** on the part of DFI which could give rise to a breach of the covenant of good faith and fair dealing.

Id. (emphasis added). Because it found nothing in the course of

dealings between the parties which supported the plaintiffs' defense, the Court affirmed the summary judgment order:

"Because no express or implied obligations of or representations by DFI indicated that DFI would recognize the net worth certificates regardless of the ILGC's financial condition, DFI's eventual decision to discontinue doing so cannot form the basis of a breach of the covenant of good faith and fair dealing. **A contrary holding would 'establish new, independent rights or duties not agreed upon by the parties.'**"

973 P.2d at 955 (citation omitted) (emphasis added).

In short, the *Brown* Court clearly recognized that: (1) a cause of action for breach of the implied covenant of good faith and fair dealing may arise from obligations or representations, express or implied, which are not found in the language of the contract itself; and (2) that a cause of action based upon obligations or representation not found in the language of the contract itself does not necessarily "establish new, independent rights or duties not agreed upon by the parties." See also, *St. Benedicts Dev., supra*, 811 P.2d at 200 (the Court examined the "parties' conduct" in finding that the plaintiff had stated a claim for breach of the implied covenant of good faith and fair dealing); and *Myers, supra*, 871 P.2d at 1048 (parties' "course of dealings" failed to establish a breach of the implied covenant of good faith and fair dealing).

Whether there has been a breach of the covenant of good faith and fair dealing is a factual issue, generally inappropriate for decision as a matter of law. *Republic Group,*

Inc. v. Won-Door Corp., 883 P.2d 285, 291 (Utah App. 1994).

Summary judgment is appropriate only where there are no disputed material facts and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c); *Brown v. Moore*, 973 P.2d 950, 953 (Utah 1998). "Because disposition of a case by summary judgment denies the benefit of a trial on the merits, any doubt concerning questions of fact, including evidence and reasonable inferences drawn from the evidence, should be resolved in favor of the party opposing the motion." *Beehive Brick Co. v. Robinson Brick Co.*, 780 P.2d 827 (Utah App. 1988).

In the case at bar, Mr. Marin respectfully submits that summary judgment was not appropriate because his testimony regarding the parties' course of dealing and conduct 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.

Because there is a dispute as to these material issues of fact, the court of appeals erred in its assessment of Mr. Marin's argument that plaintiff breached the implied covenant of good faith and fair dealing.

(B) The parol evidence rule is not implicated because the implied covenant of good faith and fair dealing inheres to all contractual relationships.

Also erroneous is the court of appeals' determination that the parol evidence rule barred Mr. Marin's testimony regarding the parties' course of dealings, conduct and justified expectations. The parol evidence rule has a "very narrow application," and operates only to exclude evidence of statements offered for the purpose of varying or adding to the terms of an integrated agreement. *Tangren Family Trust v. Tangren*, 2008 UT 20, ¶ 11, 182 P.3d 326 (quoting *Hall v. Process Instruments & Control, Inc.*, 890 P.2d 1024, 1026 (Utah 1995)). The covenant of good faith and fair dealing, however, inheres in every contract as a matter of law. See, e.g., *Oakwood Village, LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 45, 104 P.3d 1226. Accordingly, because the covenant was already part of the contract at issue in this case as a matter of law, it follows that Mr. Marin's testimony regarding the parties' purpose, intentions and expectations was not "offered for the purpose of varying or adding to the terms of" the contract. The parol evidence rule

does not, therefore, operate to bar Mr. Marin's testimony.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S AWARD OF ATTORNEY FEES.

(A) The trial court's award of attorney fees is unconscionable and plainly erroneous. The Court of Appeals' decision to affirm that award is in conflict with a number of Supreme Court decisions.

This is a very simple breach of contract case in which neither party conducted any discovery and which was decided on summary judgment. Nevertheless, the trial court awarded plaintiff \$43,903 in attorney fees. Mr. Marin believes that this amount is unconscionable and unjustifiable. The court of appeals, however, affirmed the trial court's award on the ground that Mr. Marin's objection to plaintiff's fee affidavit was filed seven days late and, therefore, his arguments with respect to the fee award "are waived on appeal."⁶

At the outset, the court of appeals' conclusion that Mr. Marin "waived" his arguments with respect to the issue of attorney fees is clearly erroneous. "Waiver" is an intentional and voluntary relinquishment of a known right. See, e.g., *Gifis Law Dictionary* at p. 222. Mr. Marin may have filed his objection to plaintiff's fee affidavit seven days late. However, there is nothing which would support the conclusion that he did so intentionally, much less that he intentionally and voluntarily relinquished his right to appeal the attorney fee award.

⁶Addendum 1 at p. 4.

Mr. Marin respectfully submits that the actual basis for court of appeals' decision is Mr. Marin's failure to preserve the issue of attorney fees for appeal. However, even if Mr. Marin's objection to plaintiff's fee affidavit was untimely, the court of appeals could still have considered the issue of fees because the trial court committed plain error and this case involves exceptional circumstances. See, e.g., *View Condominium Owners Ass'n v. MSICO*, 2004 UT App 104, ¶ 37, 90 P.3d 1042 (citing *State v. Brown*, 856 P.2d 358, 359-60 (Utah Ct. App. 1993)) (appellate courts will generally not consider an issue raised for the first time on appeal unless the trial court committed plain error or the case involves exceptional circumstances).

(1) The trial court failed to make findings of fact supported by the evidence and appropriate conclusions of law.

"An award of attorney fees must generally be made on the basis of findings of fact supported by the evidence and appropriate conclusions of law." *Cabrera v. Cottrell*, 694 P.2d 622, 624 (Utah 1985) (citing *Bangerter v. Poulton*, 663 P.2d 100, 103 (Utah 1983)) (other citations omitted). One of the issues before the Court in *Cabrera* was whether the trial court committed plain error in awarding attorney fees without making a finding of reasonableness. The Court upheld the award even though the trial court did not enter findings and conclusions separate from its order and judgment because the order and judgment itself

contained findings and legal conclusions, including a finding that the fee award was reasonable. 694 P.2d at 625.

In the case at bar, however, the trial court did not make any findings of fact or conclusions of law with respect to plaintiff's attorney fee request. And, unlike *Cabrera*, there is no finding of reasonableness in the Final Judgment.

(2) Plaintiff is not entitled to recover attorney fees related to its tort and other non-contract claims.

In Utah, attorney fees are recoverable only if authorized by statute or contract. *Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988) (citations omitted). In the case at bar, an award of attorney fees is authorized by paragraph 6.1 of the Agreement between the parties. (R. 10)

In its Complaint, however, plaintiff alleges six causes of action, entitled in order: (1) Breach of Contract; (2) Unjust Enrichment; (3) Quantum Meruit; (4) Fraud; (5) Breach of Implied Covenant of Good Faith and Fair Dealing; and (6) Negligent Misrepresentation. After the trial court granted summary judgment with respect to the breach of contract claim alleged in its First Cause of Action, plaintiff voluntarily dismissed its Second through Sixth Causes of Action. Accordingly, the only cause of action with respect to which plaintiff might be entitled to an award of attorney fees is the breach of contract claim alleged in the First Cause of Action.

The trial court granted summary judgment in plaintiff's favor on the breach of contract claim at the conclusion of the hearing held October 1, 2007. Yet, plaintiff seeks to recover tens of thousands of dollars in attorney fees incurred during the eight months after that date (R. 470-465), nearly all of which were related either to the tort and non-contract claims alleged in the Second through Sixth Causes of Action or to litigating "Defendant's Objection to Plaintiff's Proposed Form of Order" and "Plaintiff's Motion to Reconsider" upon which plaintiff did not prevail. (R. 392, 448)

In *Jensen v. Sawyers*, 2005 UT 81, 130 P.3d 325, the Court recognized not only that an award of attorney fees must be based upon "specific findings of fact," but also that the party requesting attorney fees must "categorize the time and fees expended for 'successful claims for which there may be an entitlement to attorney fees, (2) unsuccessful claims for which there may be an entitlement to attorney fees had the claims been successful, and (3) claims for which there is no entitlement to attorney fees.'" *Id.* at ¶132 (quoting *Foote v. Clark*, 962 P.2d 52, 54 (Utah 1998)).

Noncompliance with these requirements makes it difficult, if not impossible, for the trial court to award the moving party fees because there is insufficient evidence to support the award.

Id.

In the case at bar, not only did the trial court commit plain error by not making specific findings of fact, but it did not have sufficient evidence to support an award of attorney fees because plaintiff failed to categorize its fee request. (R. 492)

(3) Plaintiff is not entitled to recover attorney fees in connection with issues on which it did not prevail.

The trial court committed plain error by awarding plaintiff attorney fees in connection with matters on which it did not prevail. See *Foote v. Clark*, 962 P.2d 52, 57 (Utah 1998) ("the court should not reimburse counsel for time spent pursuing ungrounded and infeasible theories of recovery"); and *Gardner v. Madsen*, 949 P.2d 785, 792 (Utah Ct. App. 1997) (trial court should make adjustments to fee request so that the prevailing party "does not recover fees attributable to issues on which he did not prevail"). Plaintiff seeks thousands of dollars in attorney fees incurred in litigating "Defendant's Objection to Plaintiff's Proposed Form of Order" and "Plaintiff's Motion to Reconsider." (R. 470-465) The trial court, however, sustained Mr. Marin's objections to plaintiff's proposed form of order (R. 392) and denied plaintiff's Motion to Reconsider. (R. 448) Mr. Marin respectfully submits that it was plainly erroneous for the trial court to reimburse plaintiff for time spent on ungrounded and infeasible theories and upon matters on which it did not prevail.

(4) The award of attorney fees rewards inefficiency.

Calculation of the amount of a reasonable attorney fee is within the sound discretion of the trial court. *Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988). In determining the amount of a reasonable fee, the trial court may consider, inter alia, "the difficulty of the litigation, [and] the efficiency of the attorneys in presenting the case..." *Id.* (quoting *Cabrera v. Cottrell*, 694 P.2d 622, 625 (Utah 1983)). This was not a difficult case. The only issue which the trial court was required to determine in order to grant summary judgment was whether there is a genuine issue of fact as to whether plaintiff's prior material breach of the implied covenant of good faith and fair dealing excused Mr. Marin's performance under the Agreement. This was a relatively simple issue which should have required very little attorney time to address. It certainly should not have required tens of thousands of dollars. Accordingly, if plaintiff did spend that kind of time, it did so inefficiently and Mr. Marin respectfully submits that the trial court committed plain error by ordering him to pay for that kind of inefficiency.

(B) This Case Involves Exceptional Circumstances.

Finally, Mr. Marin respectfully submits that the following exceptional circumstances would have justified the court of appeals' consideration of the issue of attorney fees.

(1) Plaintiff failed to comply with Rule 7.

Plaintiff failed to comply with the time requirements of Rule 7, URCP, and should not be heard to complain of Mr. Marin's failure to do so. Plaintiff filed its Motion for Partial Summary Judgment on March 21, 2007. (R. 74) Mr. Marin timely filed his Response to Motion for Partial Summary Judgment and Counter-Motion for Partial Summary Judgment on April 4, 2007. (R. 119) Plaintiff, however, did not file its reply/response memorandum until August 13, 2007, nearly **four months late**. (R. 170)

Similarly, the Order granting plaintiff's Motion for Partial Summary Judgment was entered March 26, 2008. (R. 462) In accordance with Rule 7(f)(2), plaintiff should have served a proposed form of judgment within "fifteen days after the court's decision." The Proposed Final Judgment was not served until May 27, 2008, **44 days late**. (R. 505)

(2) The trial court did not proceed in accordance with Rule 7.

As the following chronology demonstrates, the trial court did not proceed in accordance with Rule 7, URCP.

1. The Order granting plaintiff's Motion for Partial Summary Judgment was entered March 26, 2008. (R. 462) That Order, however, was not a final judgment because it "adjudicat[ed] fewer than all [of plaintiff's] claims." See Rule 54(b), URCP.

2. Accordingly, in order to obtain a final judgment, on May 27, 2008, plaintiff filed the following documents with the trial court:

Motion for Order of Voluntary Dismissal of Plaintiff's Second, Third, Fourth, Fifth and Sixth Causes of Action

Order of Voluntary Dismissal of Plaintiff's Second, Third, Fourth, Fifth and Sixth Causes of Action

Proposed Final Judgment

Affidavit of Attorney's Fees and Costs

(R. 492, 502 and 505)

3. In accordance with Rules 6(a), 6(e), and 7(c)(1), *URCP*, Mr. Marin had until June 13, 2008, in which to file his memorandum in response to plaintiff's Motion for Order of Voluntary Dismissal of Plaintiff's Second, Third, Fourth, Fifth and Sixth Causes of Action.

4. Mr. Marin filed his objection to plaintiff's attorney fee affidavit and to the provision for attorney fees and costs included in the Proposed Final Judgment on June 11, 2008. (R. 499)

5. Mr. Marin timely filed his response to plaintiff's Motion for Order of Voluntary Dismissal of Plaintiff's Second, Third, Fourth, Fifth and Sixth Causes of Action on June 13, 2008. (R. 507)

6. Plaintiff then filed its Reply in Support of Plaintiff's Motion for Order of Voluntary Dismissal on June 23, 2008. (R.

510)

7. In the meantime, on June 12, 2008, the trial court prematurely entered the Order of Voluntary Dismissal of Plaintiff's Second, Third, Fourth, Fifth and Sixth Causes of Action and the Final Judgment. (R. 502, 505) It did so not only prior to the filing of Mr. Marin's response memorandum, but prior to the time when Mr. Marin's response memorandum was due, prior to the filing of plaintiff's reply memorandum, and without either party having filed a "Request to Submit for Decision" in accordance with Rule 7(d), *URCP*.

8. The Proposed Final Judgment does not contain a Rule 54(b) certification⁷ and, accordingly, was "subject to revision at any time before the entry of judgment adjudicating all of the claims and the rights and liabilities of all the parties." Rule 54(b), *URCP*. The Proposed Final Judgment was, therefore, subject to revision at any time prior to the entry of the Order of Voluntary Dismissal of Plaintiff's Second, Third, Fourth, Fifth and Sixth Causes of Action. Because Mr. Marin had until June 13, 2008, in which to file his memorandum in response to plaintiff's Motion for Order of Voluntary Dismissal of Plaintiff's Second, Third,

⁷"When more than one claim for relief is presented in an action ... the court may direct the entry of a final judgment as to one or more but fewer than all of the claims ... only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment." Rule 54(b), *Utah Rules of Civil Procedure*.

Fourth, Fifth and Sixth Causes of Action, and plaintiff then had until June 23, 2008 in which to file a reply memorandum, the earliest date upon which Rule 7, *URCP*, would have authorized the trial court to enter the Order of Voluntary Dismissal of Plaintiff's Second, Third, Fourth, Fifth and Sixth Causes of Action was June 23, 2008. The Proposed Final Judgment should, therefore, have been subject to revision under Rule 54(b) at least through June 23, 2008. Mr. Marin's objection to plaintiff's attorney fee affidavit and to the provision for attorney fees and costs included in the Proposed Final Judgment was filed 12 days prior to that date on June 11, 2008. The trial court could, therefore, have revised the Proposed Final Judgment in accordance with Mr. Marin's objection if it had proceeded in accordance with the requirements of Rule 7, *URCP*.

In short, because neither plaintiff nor the trial court proceeded in accordance with the requirements of Rule 7, it would not be reasonable to now hold Mr. Marin strictly to those requirements. Accordingly, Mr. Marin respectfully submits that this case involves exceptional circumstances under which the court of appeals could have and should have considered Mr. Marin's arguments with respect to the trial court's attorney fee award despite Mr. Marin's not having preserved the issue for appeal.

CONCLUSION

Based on the foregoing, 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 15th day of March 2010.



Scott B. Mitchell
Attorney for Petitioner

MAILING CERTIFICATE

Undersigned certifies that two copies of the foregoing were mailed this 15th day of March 2009 via first class U.S. Mail, postage prepaid, to the following:

Barnard N. Madsen
Scott D. Preston
FILLMORE SPENCER, LC
3301 North University Avenue
Provo, Utah 84604



Addendum 1

FILED
UTAH APPELLATE COURTS
SEP 24 2009

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

Young Living Essential Oils,)	MEMORANDUM DECISION
LC,)	(Not For Official Publication)
)	
Plaintiff and Appellee,)	Case No. 20080624-CA
)	
v.)	F I L E D
)	(September 24, 2009)
Carlos Marin,)	
)	
Defendant and Appellant.)	2009 UT App 272

Fourth District, Provo Department, 060402237
The Honorable Samuel D. McVey

Attorneys: Scott B. Mitchell, Salt Lake City, for Appellant
Barnard N. Madsen and Scott D. Preston, Provo, for
Appellee

Before Judges Thorne, Orme, and McHugh.

McHUGH, Judge:

Carlos Marin appeals from the trial court's order granting partial summary judgment in favor of Young Living Essential Oils, LC (Young Living). Marin had defaulted on the parties' contract by failing to meet certain "performance guarantees" detailed in the agreement. On appeal, Marin argues that the trial court erred by granting summary judgment in favor of Young Living. Marin also contests the trial court's award of attorney fees and costs to Young Living. We affirm.

"An appellate court reviews a trial court's legal conclusions and ultimate grant or denial of summary judgment for correctness, and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." Orvis v. Johnson, 2008 UT 2, ¶ 6, 177 P.3d 600 (citation and internal quotation marks omitted).

On appeal, Marin does not deny that he failed to meet the performance guarantees contained in the contract. Rather, Marin claims that the trial court erred in granting summary judgment because there was a material issue of fact relating to whether Young Living breached its obligation of good faith and fair

dealing. See generally Utah R. Civ. P. 56(c) (stating that a grant of summary judgment is proper where "there is no genuine issue as to any material fact"). In support of this claim, Marin relies on an affidavit he submitted in opposition to Young Living's Motion for Partial Summary Judgment. In his affidavit, Marin avers that Young Living failed "to provide him with the marketing tools [that] were necessary for him to satisfy his performance guarantees." Young Living counters that Marin's affidavit cannot raise a material issue of fact because it constitutes parol evidence offered to insert additional terms into the parties' written agreement.

The parol evidence rule "operates, in the absence of fraud or other invalidating causes, to exclude evidence of contemporaneous conversations, representations, or statements offered for the purpose of varying or adding to the terms of an integrated contract." Tangren Family Trust v. Tangren, 2008 UT 20, ¶ 11, 182 P.3d 326 (emphasis and internal quotation marks omitted). "Thus, if a contract is integrated, parol evidence is admissible only to clarify ambiguous terms" Id. In determining the admissibility of parol evidence the court must begin by "determin[ing] whether the agreement is integrated." Id. (internal quotation marks omitted).

An integrated agreement is "a writing . . . constituting a final expression of one or more terms of an agreement." Id. ¶ 12 (internal quotation marks omitted). "[W]hen parties have reduced to writing what appears to be a complete and certain agreement, it will be conclusively presumed, in the absence of fraud, that the writing contains the whole of the agreement between the parties." Id. (internal quotation marks omitted). The Utah Supreme Court has stated that "we will not allow extrinsic evidence of a separate agreement to be considered on the question of integration in the face of a clear integration clause." Id. ¶ 16.

Here, the agreement signed by the parties includes a provision titled "Entire Agreement," which reads, in part,

This Agreement constitutes the entire agreement between the Parties hereto pertaining to the subject matter hereof and supersedes all prior and contemporaneous agreements and understandings of the Parties, and there are no representations, warranties, or other agreements between the Parties in connection with the subject matter hereof except as specifically set forth herein.

Thus, Marin's agreement with Young Living was integrated because the parties signed a written contract including a clear integration clause. See id. Furthermore, Marin makes no claim that the language of the agreement was ambiguous. Therefore, the parol evidence rule prohibits the use of extrinsic evidence to vary or add terms to the parties' integrated agreement. See id. ¶ 18.

Marin argues that the parol evidence rule does not prohibit the introduction of evidence that Young Living breached the implied covenant of good faith and fair dealing. Marin reasons that "[b]ecause the covenant was already part of the contract at issue[,] . . . [his] testimony in support of his claim for breach of the covenant was not 'offered for the purpose of varying or adding to the terms of' the contract." "While a covenant of good faith and fair dealing inheres in almost every contract, . . . this covenant cannot be read to establish new, independent rights or duties to which the parties did not agree ex ante." Oakwood Vill. LLC v. Albertsons, Inc., 2004 UT 101, ¶ 45, 104 P.3d 1226. Rather, the covenant is "implied in contracts to protect the express covenants and promises of the contract." Seare v. University of Utah Sch. of Med., 882 P.2d 673, 678 (Utah Ct. App. 1994) (internal quotation marks omitted).

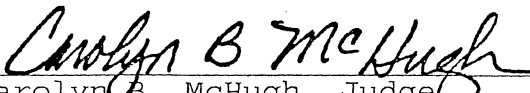
Marin reasons that Young Living breached the covenant of good faith and fair dealing because it failed to provide him promised marketing tools, but no obligation regarding marketing tools was made part of the written agreement. Therefore, we reject Marin's argument that the implied covenant of good faith and fair dealing can be used to incorporate extrinsic evidence of a contemporaneous oral agreement, where the parties' agreement was integrated and the alleged oral agreement was not part of "the express covenants and promises of the contract." Id.

Finally, Marin contests the trial court's award of attorney fees and costs to Young Living. Young Living counters that Marin waived his arguments on attorney fees and costs on appeal because his objection was not timely filed in the trial court. "To preserve an issue for appeal, the appellant must have raised a timely and specific objection before the trial court. We will not address an issue if it is not preserved or if the appellant has not established other grounds for seeking review." H.U.F. v. W.P.W., 2009 UT 10, ¶ 25, 203 P.3d 943 (citation and internal quotation marks omitted).

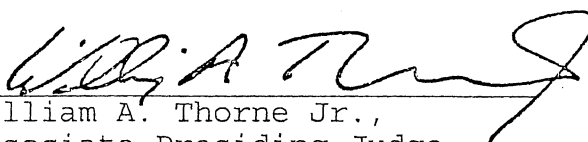
Rule 7(f)(2) of the Utah Rules of Civil Procedure instructs that "[o]bjections to [a] proposed order shall be filed within five days after service." Utah R. Civ. P. 7(f)(2). Young Living served its Proposed Final Judgment and Affidavit of Attorney[] Fees and Costs on May 27, 2008. Marin then had five days as

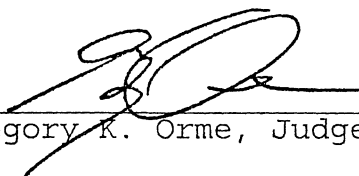
provided by rule 7(f)(2), see id., along with an additional three days following service by mail, see id. R. 6(e), to file his objection. Marin's objection was not filed until June 11, 2008, making it untimely, and his arguments, therefore, are waived on appeal.¹

Accordingly, we affirm.


Carolyn B. McHugh, Judge

WE CONCUR:


William A. Thorne Jr.,
Associate Presiding Judge


Gregory K. Orme, Judge

1. Marin argues that exceptional circumstances warrant our consideration of his arguments as to attorney fees and costs because during the course of the litigation Young Living also failed to comply with filing deadlines. However, Young Living's failings do not excuse Marin's untimely filing.

CERTIFICATE OF MAILING


I hereby certify that on the 24th day of September, 2009, a true and correct copy of the attached DECISION was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

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FOURTH DISTRICT, PROVO DEPT
ATTN: KRISTEN ROGERS
125 N 100 W BX 0470
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Judicial Secretary

TRIAL COURT: FOURTH DISTRICT, PROVO DEPT, 060402237
APPEALS CASE NO.: 20080624-CA

Addendum 2

FILED

MAR 21 2008

4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

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Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT, STATE OF UTAH

UTAH COUNTY, PROVO DEPARTMENT

YOUNG LIVING ESSENTIAL OILS, INC.,
a Utah corporation,

Plaintiff,

vs.

CARLOS MARIN, an individual,

Defendant.

ORDER

Case No. 060402237

Judge Samuel McVey
Division 1

Plaintiff Young Living Essential Oils, LC ("Plaintiff") is a Utah limited liability company. Defendant Carlos Marin ("Defendant") is an individual who resides in Miami, Florida. The matter is before the Court on the parties' cross-motions for partial summary judgment.

I. Undisputed Material Facts

The following undisputed facts are taken from the parties' pleadings with citations to the record omitted.

A. Valid Contract

After negotiations, Plaintiff, a Utah corporation, executed a written agreement (“Agreement”) with Defendant on 12 January 2005.

In their Agreement, Defendant expressly represented and warranted that he had “significant experience as a Distributor/Leader”, had “numerous contacts with potential Distributor/Leaders” whom he could “bring to the Company and sign as new distributors with the Company”, and had “successful, favorable experience in providing Services such as the duties as contemplated herein.”

Paragraph 18, the last paragraph of their Agreement directly above the signature blocks, is labeled “Entire Agreement” (underline in original) and states in part: “there are no representations, warranties, or other agreements between the Parties in connection with the subject matter hereof except as specifically set forth herein.”

B. Plaintiff’s Obligations

Under paragraph 4 of their Agreement, Plaintiff agreed to pay Defendant advance payments of

\$25,000 on execution of the Agreement (12 January 2005);

\$25,000 on 15 February 2005;

\$25,000 on 15 March 2005, and

\$25,000 on 15 April 2005.

According to their Agreement, these advances and other specified performance bonuses were to help Defendant devote “all his time and attention into [sic] recruiting additional

distributors underneath him and training them” and were expressly intended “to entice [Defendant] to quickly build an organization by devoting the necessary time to it. Also, [they] will provide him with a quick resource of cash to build the business.”

Under paragraphs 4 and 4.1, these advanced amounts were to be offset by any payments due Defendant for commissions and “Fast Cash” bonuses.

Under paragraph 4.3, Plaintiff gave Defendant a product credit of \$5,000 for January 2005, and \$5,000 for February 2005 “to be used for samples in attracting new Distributor/Leaders.”

C. Defendant’s Obligations

Under paragraph 3.3 of their Agreement, Defendant agreed to “devote his full time and attention to recruiting new Distributor/Leaders” to sell Plaintiff’s products.

Under paragraph 3.4 of their Agreement, Defendant agreed that he would meet the following performance guarantees of cumulative “auto ship” sales volume by the specified dates:

\$5,000 by 15 February 2005;

\$30,000 by 15 March 2005;

\$100,000 by 15 April 2005;

\$300,000 by 15 May 2005;

\$600,000 by 15 June 2005, and

\$900,000 by 15 July 2005.

Paragraph 6.1 of their Agreement provides for Defendant's payment of Plaintiff's "loss and damage" and "legal fees" arising from "contravention . . . of any of the terms and conditions imposed on [Defendant] pursuant to this Agreement."

D. Plaintiff's Performance and Defendant's Breach

On 12 January 2005, in connection with the execution of their Agreement, Plaintiff paid Defendant a \$25,000 advance.

On 15 February 2005, Defendant met his \$5,000 cumulative "auto ship" sales volume performance guarantee under paragraph 3.4 of his Agreement.

Accordingly, on 15 February 2005, Plaintiff paid Defendant another \$25,000 advance.

On 15 March 2005, Defendant had failed to meet his \$30,000 cumulative "auto ship" sales volume performance guarantee under paragraph 3.4 of his Agreement.

On 15 March 2005, Plaintiff paid Defendant another \$15,000 advance based on Defendant's representation that he would meet his 15 March 2005 performance guarantee of \$30,000 in cumulative sales volume by 15 April 2005.

On 15 April 2005, Defendant had failed to meet his 15 March 2005 \$30,000 (let alone his 15 April 2005 \$100,000) cumulative "auto ship" sales volume performance guarantee under paragraph 3.4 of his Agreement.

Through June 2006, Defendant had generated a grand total of less than \$36,000 in cumulative "auto ship" sales volume.

E. Damages

Plaintiff paid Defendant \$65,000.00 in advances.

In 2005 and 2006, Defendant earned a total of \$3,637.57 in commissions from Plaintiff.

Defendant never earned “Fast Cash” bonus payments.

Paragraph 4 of the Agreement states that the “monies advanced to [Defendant] will be offset by any payments due [Defendant] under the Fast Cash Program as calculated below. Also, these payments will be offset by any commission payments due [Defendant] each month as calculated by the standard commission payout plan. . . . If any of the advanced amounts are not repaid by the commission payouts or Fast Cash at the end of the guaranteed payments, these amounts will be deducted from any future commission payout”

II. Discussion

A. Legal Standards

1. Summary Judgment. Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. Rule 56; see also Billings ex. rel. Billings v. Union Bankers Ins. Co., 819 P.2d 803 (Utah 1991).

2. Contract Interpretation. “[I]nterpretation of a contract is a question of law.” Dennis Dillon Oldsmobile, GMC v. Zdunich, 668 P.2d 557, 561 (Utah 1983), citing Morris v. Mountain States Tel. & Tel. Co., 658 P.2d 1199 (Utah 1983). “A completely integrated agreement must be interpreted on its face.” Ford v. Am. Express Fin. Advisors, Inc., 98 P.3d 15 ¶ 28 (Utah 2004).

3. Material Breach Excuses Nonbreaching Party’s Further Performance. “The law is well settled that a material breach by one party to a contract excuses further performance by the nonbreaching party.” Holbrook v. Master Protection Corp., 883 P.2d 295, 301 (Utah App.

1994), citing, Saunders v. Sharp, 840 P.2d 796, 806 (Utah App. 1992); Wright v. Westside Nursery, 787 P.2d 508, 516 (Utah App. 1990).

4. Prejudgment Interest. Prejudgment interest may be recovered where the damage is complete, the amount of the loss is fixed as of a particular time, and the loss is measurable by facts and figures. Cornia v. Wilcox, 898 P.2d 1379, 1387 (Utah 1995). “Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.” Utah Code Ann. § 15-1-1 (2006).

B. Elements of Proof for a Breach of Contract Claim

To prevail on its breach of contract claim, Plaintiff must prove (1) a valid contract, (2) performance by Plaintiff, (3) breach by Defendant, and (4) damages. Bair v. Axiom Design, L.L.C., 20 P.3d 388, 392 ¶ 14 (Utah 2001).

Each of these elements is undisputed based on the parties’ submissions.

C. Defendant’s Claims

However, Defendant claims that his performance was excused because of Plaintiff’s prior material breach of an oral term by failing to provide “marketing tools” by a purported deadline. Defendant also claims that his assertions concern a breach of the covenant of good faith and fair dealing. At oral argument, Defendant’s counsel argued and directed the Court’s attention to the Restatement of Contracts, Second § 216, and to FMA Financial Corp. v. Hansen Dairy, Inc., 617 P.2d 327, 329 (Utah 1980) in support of Defendant’s position that the contract was not completely integrated.

Defendant's claims are without merit.

1. Breach of the Covenant of Good Faith and Fair Dealing

Defendant's claim of Plaintiff's breach of the implied covenant of good faith and fair dealing is misplaced. It is well settled that the implied covenant of good faith and fair dealing cannot be used to impose new, independent duties in a written agreement. Slicex, Inc. v. Aeroflex Colorado Springs, Inc., 2006 U.S. Dist. LEXIS 74234 n.1 ("The implied covenant of good faith and fair dealing is 'implied in contracts "to protect the express covenants or promises of the contract."' ... '[T]he doctrine of good faith and fair dealing does not serve to import new obligations into a contract. It merely controls how the obligations stated within the contract are to be performed.'").

2. The Parol Evidence Rule

Defendant's claim that Plaintiff breached a purported oral term necessarily implicates the parol evidence rule. It is well settled that "the [parol evidence] rule operates, in the absence of fraud or other invalidating causes, to exclude evidence of contemporaneous conversations, representations, or statements offered for the purpose of varying or adding to the terms of an *integrated* contract." Hall v. Process Instruments & Control, 890 P.2d 1024, 1026-27 (Utah 1995) (italics in original) citing inter alia Eie v. St. Benedict's Hosp., 638 P.2d 1190, 1192 (Utah 1981); Restatement (Second) of Contracts §§ 213-14 (1981).

Under the parol evidence rule, the Court must undertake a two-step analysis. First, is the parties' Agreement integrated? Second, did Defendant claim ambiguity or fraud?

a. Is the Agreement integrated? "[B]efore considering the applicability of the parol

evidence rule in a contract dispute, the Court must first determine that the parties intended the writing to be an integration. To resolve this question of fact, any relevant evidence is admissible.” Hall, 890 P.2d at 1026.

Based on all the relevant evidence submitted by the parties, the Court concludes as a preliminary matter that the parties intended their Agreement to be a complete integration and the final expression of their agreement.

The Court’s determination is based in part on the express integration provision directly over Defendant’s signature in the Agreement itself which Defendant has neither disputed nor explained. Although not conclusive, the Court finds this express provision particularly persuasive.

Further, the Agreement itself sets out in detail the rights and obligations of the parties, including various deadlines for their performance. It therefore begs the question: if, as Defendant contends, the purported term that Plaintiff breached was so critical to Defendant’s performance, why was it not included in the parties’ Agreement?

Finally, the email communications between Defendant and Plaintiff submitted to the Court are devoid of any reference by Defendant to Plaintiff’s breach of this purported critical term. The Court finds particularly persuasive an email exchange between Defendant and Plaintiff’s general counsel on February 3, 2005, two days after the deadline Defendant contends that Plaintiff was to provide promised “marketing tools”. Instead of complaining about how Plaintiff’s recent breach would prevent his further performance, Defendant represented that he could expand Plaintiff’s business into several foreign markets. Indeed, In the submissions before

the Court, there is no written notice of the purported breach to give Plaintiff the contractually-required 10-day opportunity to cure.

The Court notes that oral representations of additional terms have been accepted by other courts notwithstanding an integration clause in a written agreement. But those cases are most often in the context of a construction contract where the performance of the parties manifests their agreement or consent to “extras” beyond a written agreement. Therefore, those cases are distinguishable.

Further, Defendant’s assertions of Plaintiff’s representations lack foundation as to the circumstances including who made the purported representation or representations and when such representations were made.

In sum, based on all the relevant evidence submitted by the parties, the Court rejects Defendant’s assertions that the parties intended to be bound by terms not found in their written Agreement and concludes as a threshold matter that the parties’ Agreement was integrated.

b. Did Defendant claim ambiguity or fraud?

Nowhere in his pleadings or submissions to this Court did Defendant claim that the parties’ Agreement was ambiguous or that it was induced by fraud. On the contrary, he contended that the Agreement was a “valid contract” but that Plaintiff was the one who breached it.

Thus, in the absence of any claim of fraud or ambiguity, Defendant’s assertions offered for the purpose of adding to the terms of the parties’ integrated Agreement must be excluded. Hall, 890 P.2d at 1026-27.

As to Plaintiff’s breach of contract claim involving a product credit Plaintiff provided to

Defendant, Defendant's order of product in excess of that credit, and the amount due to Plaintiff, the Court finds that there is a dispute as to the material facts. Therefore, the Court denies any relief to Plaintiff on that portion of its breach of contract claim at this point in the proceedings.

Plaintiff's Remedy

Based on the undisputed facts and as a matter of law (and pursuant to the parties' Agreement), Plaintiff is entitled to the difference between the advances it paid to Defendant (\$65,000.00) and the commissions Defendant earned (\$3,637.57). Plaintiff is thus entitled to damages in the amount of \$61,362.43.

Because that damage amount was complete and fixed as of April 15, 2005 and is measurable by facts and figures, Plaintiff is also entitled to 10% prejudgment interest (simple not compounded) from April 15, 2005 through October 1, 2007, the date upon which the Court ruled that the Plaintiff is entitled to summary judgment.

Plaintiff is also entitled to post-judgment interest at the statutory rate commencing on the date this order is entered.


Because Plaintiff is the prevailing party herein, it is entitled under the Parties' Agreement to its attorney fees and costs. Since Plaintiff has outstanding claims that remain to be tried, the Court defers a ruling on the amount of Plaintiff's attorney fees and costs until the conclusion of the case and entry of a final judgment.

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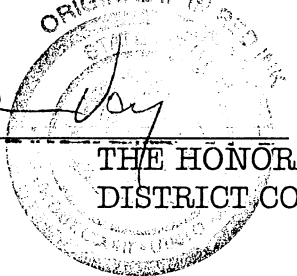
E. Conclusion

Accordingly, Plaintiff's Motion for Partial Summary Judgment is GRANTED in part and DENIED in part, and Defendant's Motion for Partial Summary Judgment is DENIED.

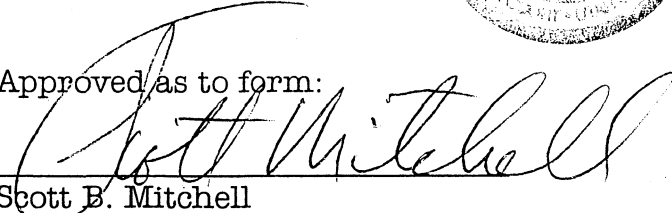
DATED this 26 day of March, 2007.



THE HONORABLE SAMUEL MCVEY
DISTRICT COURT JUDGE



Approved as to form:



Scott B. Mitchell
Attorney for Defendant

Addendum 3

FILED
JUN 12 2008

4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

Barnard N. Madsen (4626)
Scott D. Preston (11019)
FILLMORE SPENCER LLC
3301 North University Avenue
Provo, Utah 84604
Telephone: 426-8200
Fax: 426-8208

Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT, STATE OF UTAH
UTAH COUNTY, PROVO DEPARTMENT

YOUNG LIVING ESSENTIAL OILS, INC.,
a Utah corporation,

Plaintiff,

vs.

CARLOS MARIN, an individual,

Defendant.

~~PROPOSED~~ FINAL JUDGMENT

Case No. 060402237

Judge Samuel McVey
Division 1

WHEREFORE, having heard oral arguments on this matter, having considered pleadings, prior orders and argument of counsel and pursuant to the Court's Order granting Plaintiff's motion for partial summary judgment consistent with the Court's ruling on October 1, 2007, the Court hereby enters judgment as follows:

1. In favor of Plaintiff and against Defendant in the principle amount of **\$61,362.43**.
2. Prejudgment interest at 10% per year (simple not compounded) from April 15, 2005 through October 1, 2007 in the amount of **\$15,128.48**. (\$6,136.24 per year; \$16.80 per day for

two (2) years and 170 days.)

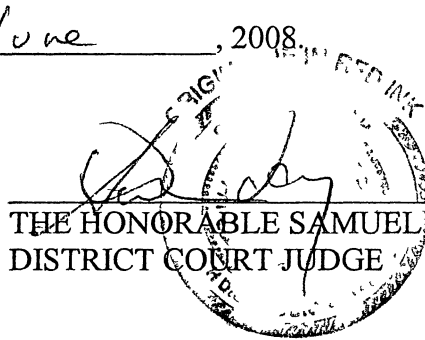
3. Post-judgment interest at the statutory rate of 5.42% from commencing March 26, 2008, the date Judgment is entered.

4. As the prevailing party and pursuant to the Parties' Agreement, Plaintiff is entitled to its attorney fees and costs in the amount of **\$45,502.43**. (*See Affidavit of Attorney Fees and Costs filed concurrently with this Proposed Final Judgment.*)

5. Total Judgment in the amount of **\$121,993.34**.

6. This Judgment shall be augmented in the amount of reasonable costs and attorney's fees expended in collecting said judgment by execution or otherwise as shall be established by affidavit, including the costs of appeal, pursuant to the contract at issue.

DATED this 12 day of June, 2008.

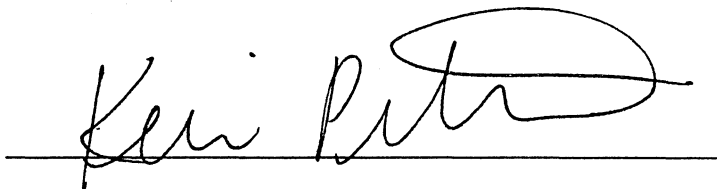


THE HONORABLE SAMUEL MCVEY
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the PROPOSED FINAL JUDGMENT to be mailed, first-class, postage prepaid, this 27 day of May, 2008, to the following:

Scott B. Mitchell
SCOTT B. MITCHELL, PC
2469 East 7000 South, Suite 204
Salt Lake City, UT 84121
Attorney for defendant

A handwritten signature in cursive script, appearing to read "Ken P. [unclear]", is written over a solid horizontal line. The signature is fluid and stylized, with a large loop at the end.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the ORDER to be faxed and mailed, first-class, postage prepaid, this 20 day of March, 2008, to the following:

Scott B. Mitchell
SCOTT B. MITCHELL, PC
2469 East 7000 South, Suite 204
Salt Lake City, UT 84121
Attorney for defendant

A handwritten signature in black ink, appearing to read "Ken B. Mitchell", is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.