

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

GMHV, LLC

v.

GETMYHOMESVALUE.COM, INC.

MARCH TERM, 2012

NO. 04026

COMMERCE PROGRAM

CONTROL NO. 13072282

DOCKETED

AUG 26 2013

C. HART
CIVIL ADMINISTRATION

ORDER

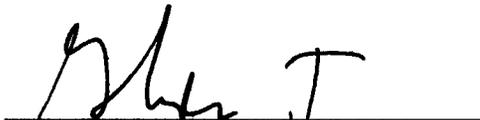
AND NOW, this 26th day of August, 2013, upon

consideration of the motion for summary judgment of defendant, Getmyhomesvalue.com, Inc., and any response thereto, it is hereby

ORDERED

that said motion is **GRANTED**.

BY THE COURT:



GLAZER, J

Ghmv, Llc, A Pennsylvan-ORDOP



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**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
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_____	:	
GMHV, LLC	:	MARCH TERM, 2012
	:	
v.	:	NO. 04026
	:	
GETMYHOMESVALUE.COM, INC.	:	COMMERCE PROGRAM
	:	
_____	:	CONTROL NO. 13072282

OPINION

GLAZER, J.

August 26, 2013

Before the court is the motion for summary judgment of defendant, Getmyhomesvalue.com, Inc. For the reasons set forth below, defendant’s motion is granted.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff, GMHV, LLC (hereinafter “GMHV”), commenced the present action on March 30, 2012 alleging: (1) breach of contract; (2) negligent misrepresentation; and (3) fraudulent/intentional misrepresentation. Defendant, Getmyhomesvalue.com, Inc. (hereinafter “the company”) is located in Lancaster, Pennsylvania and provided “lead generation services” for Realtors to identify prospective home buyers or sellers. Originally, Eric Levin (hereinafter “Levin”) inquired into purchasing the company. However, Levin felt the asking price was too high and decided to pursue an alternative route.

On July 29, 2009, Levin approached the company via email stating:

I have given a lot of thought to our situation and think I come up [sic] with a scenario that for you is all upside and no downside. First, I think you know how much I am interested in GMHV and even more working with you guys.

Under my current situation it would be very difficult for me to

commute to Lancaster on a regular basis. In fact, if I do ultimately buy the company I would most likely move it to my area. Bear in mind that my following proposal does not diminish my goal of buying the Company at some point. I admire your passion for the company but objectively at today's numbers your asking price is inflated. Frankly, if you can sell the company at your asking price I applaud you and advise you to not let go of that check.

My scenario is as follows. I open a Philadelphia location at my expense which includes rent, labor, phone, etc. I would hire a sales manager who can rotate between the two offices. We can split the cost of this manager if you choose. I would be risking any time and money to open the office here. There would be no financial expenditure on your part. It will still increase the value of your company to any potential buyer as your take will continue to grow. Needless to say, GMHV stays on the market if you so choose.

I cannot think of a downside to you as it puts more money in your pockets, increases the value of your company, and my ultimate goal of buying the company remains.

See defendant's motion for summary judgment, Appendix part 5, Exhibit 14. Levin entered into discussions with the company to form a business relationship in which Levin would establish a separate limited liability company called GMHV who would sell subscriptions for the company in the Philadelphia area.

On August 23, 2009, Levin inquired via email:

Steve,

I will defer to you. What can I expect sales to be in month 2-3 with 5 new salespeople? Please be conservative. Also, remind me again what the average length of an agent staying on with GMHV.

Thanks,

Eric.

See defendant's motion for summary judgment, Appendix part 6, Exhibit 18. In response, Steve Young (hereinafter "Young") emailed:

Here is the response to your question from Jim:

Depends on the sales people. We expect our sales reps to sell \$4K there [sic] second month on the floor. We are then expecting a \$500 per month increase for the next 6 months. Most sales reps have caps as to how much they will sell monthly. Unfortunately, we lose 50% of sales reps before the end of the first month. So month 2 should be +20K and month 3 should be +22K. I think this is what you needed if not rephrase the question.

Also, our subscriber retention per our reports is 6.88 months.

Respectfully,

Steve Young.

Id.

As a result of these discussions, a contract entitled “Sales and Marketing Agreement” (hereinafter “the agreement”) was prepared to formalize the discussion. The parties did not sign the contract but both parties agreed to move forward with the business relationship based upon the terms of the agreement. See plaintiff’s complaint, ¶ 11; defendant’s answer and new matter, ¶ 11. Under the agreement, the company was required to pay GMHV a percentage of the subscription fees that the company received directly from the Realtors who were sold the subscriptions by GMHV. Paragraph 6(c) of the agreement states the following:

(c) The Company shall receive all monthly Retention Payments under the Exclusive Agent Subscriptions. Within five (5) days of the end of each month, the Company shall remit to GMHV, by wire or electronic transfer, fifty percent (50%) of the Net Retention Payments received during the prior month, together with an accounting of all retention Exclusive Agent Subscriptions attributable to GMHV Sales during the prior month. For purposes of this Agreement, “Net Retention Payments” shall mean the monthly Retention Payments received by the Company as a result of new and ongoing Exclusive Agent Subscriptions attributable to GMHV Sales less any mutually agreed upon expenses incurred by the Company directly attributable to the increase in Exclusive Agent Subscriptions due to GMHV sales and marketing effort hereunder.

See plaintiff's complaint, Exhibit A.

However, the agreement also contained a clause which stated:

7. Limitation of Liability. NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY FOR ANY REIMBURSEMENT OR DAMAGES FOR LOST PROFITS, EXPENDITURES, INVESTMENTS OR COMMITMENTS, WHETHER MADE IN THE ESTABLISHMENT, DEVELOPMENT OR MAINTENANCE OF THE BUSINESS GOODWILL OF SUCH PARTY, OR FOR ANY OTHER REASON WHATSOEVER. UNDER NO CIRCUMSTANCES SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR SPECIAL, INCIDENTAL, INDIRECT, PUNITIVE OR CONSEQUENTIAL DAMAGES OF ANY KIND.

Id.

After a lack of success in sales of the subscriptions, GMHV terminated its sales force in March of 2010 and made the decision to close the business in March or April of 2010. Plaintiff then commenced the instant suit in which it alleges that defendant failed to pay plaintiff the fifty percent (50%) of the retention payments and, "as a result of the [d]efendant's material breach of the business agreement under which both parties were operating, the [p]laintiff sustained financial losses." See plaintiff's complaint, ¶ 26. Moreover, plaintiff alleges that it relied on Young's representation with regard to their sales and projected sales and therefore plaintiff is entitled to losses under the theory of negligent misrepresentation or fraudulent/intentional misrepresentation.

DISCUSSION

I. Standard of Review

Once the relevant pleadings have closed, any party may move for summary judgment. Pa. R.C.P 1035.2. "Pennsylvania law provides that summary judgment may be granted only in those cases in which the record clearly shows that no genuine issues of material fact exist and

that the moving party is entitled to judgment as a matter of law.” Rausch v. Mike-Meyer, 783 A.2d 815, 821 (Pa. Super. 2001). Further, granting summary judgment is appropriate when the evidentiary record shows the material facts are undisputed. McCarthy v. Dan Lepore & Sons Co., Inc., 724 A.2d 938, 940 (Pa. Super. 1998). The trial court must view the record in the light most favorable to the non-moving party. Rausch, 783 A.2d at 821. Moreover, summary judgment is properly granted when “an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action.” Young v. DOT, 560 Pa. 373, 375-376 (Pa. 2000) (explaining Pa. R.C.P. 1035.2(2)).

II. Breach of Contract

In Pennsylvania, three elements are necessary to properly plead a cause of action for breach of contract: “(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract, and (3) resultant damages.” CoreStates Bank, Nat’l Assn v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. 1999). Under Pennsylvania law, limitation of liability clauses are routinely enforced in contracts negotiated between sophisticated parties. Conomos, Inc. v. Sun Company, Inc., 831 A.2d 696 (Pa. Super. 2003). Absent unconscionability, limited liability provisions are binding on the parties that fashioned the terms of their agreement. Vasilis v. Bell of Pa., 409 Pa. Super. 396, 592 A.2d 52, 54 (Pa. Super. 1991). When construing agreements that involve clear and unambiguous terms, the court needs only to examine the writing itself to give effect to the parties understanding. Creeks v. Creeks, 422 Pa. Super. 432, 619 A.2d 754, 756 (1993).

Here, the language is clear and unambiguous. The clause clearly states, in capital letters, “NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY FOR ANY REIMBURSEMENT OF DAMAGE FOR ... ANY REASON WHATSOEVER. UNDER NO

CIRCUMSTANCES SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR SPECIAL, INCIDENTAL, INDIRECT, PUNITIVE OR CONSEQUENTIAL DAMAGES OF ANY KIND.” See plaintiff’s complaint, Exhibit A. Plaintiff seeks damages in excess of \$50,000.00 with punitive damages, costs, interest, and attorney’s fees. This court previously sustained preliminary objection striking plaintiff’s request for attorney’s fees and as to punitive damages under the breach of contract claim.

The court finds that the liability limitation clause is the subject of two business entities which fashioned the terms of their bargain as they saw fit. The court is bound to give effect to the meaning intended by the clause and thus the limitation of liability provision is valid. Plaintiff does not assert that the limited liability clause is unconscionable. Plaintiff merely addresses the clause by stating, “[t]he release language cited by the [d]efendant would not apply to a party’s breach of their contract or damages for a negligent or intentional misrepresentation.” See plaintiff’s memorandum of law in support of plaintiff’s response to defendant’s motion for summary judgment, pp. 12. Plaintiff does not provide any legal support for this statement and does not address it further. Therefore, pursuant to the limitation of liability, plaintiff’s claim for breach of contract is dismissed.

III. Fraudulent/Intentional and Negligent Misrepresentation

To prove intentional misrepresentation under Pennsylvania law, the plaintiff must establish by clear and convincing evidence: (1) a misrepresentation of a material fact; (2) scienter; (3) intention of the declarant to induce action; (4) justifiable reliance by the party defrauded upon the misrepresentation; and (5) damages to the party defrauded. Colaizzi v. Beck, 895 A.2d 36, 39 (Pa. Super. Ct. 2006). Unsupported assertions and conclusory accusations cannot create genuine issues of material fact as to the existence of fraud. Gruenwald v.

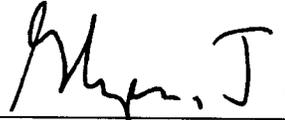
Advanced Computer Applications, Inc., 730 A.2d 1004, 1014 (Pa. Super. 1999). The intent element requires plaintiff to show a “deliberate intent to deceive.” Rohm v. Haas v. Cont’l Cas. Co., 566 Pa. 464, 477, 781 A.2d 1172, 781 A.2d 1172 (2001). Plaintiff relies on the email from Young that stated sales in for GMHV in, “month 2 should be +20K and month 3 should be +22K” to prove intentional misrepresentation. See defendant’s motion for summary judgment, Appendix part 5, Exhibit 14. Plaintiff asserts that defendant enticed plaintiff to enter into a business deal with the expectation that plaintiff would generate \$20,000 by the second month. However, plaintiff does not provide clear and convincing evidence that defendant knowingly made alleged false representations nor does plaintiff provide evidence of intent to deceive. Therefore, plaintiff has not satisfied its burden by clear and convincing evidence and the claim for fraudulent/intentional misrepresentation is dismissed.

Further, under Pennsylvania law, to establish a claim for negligent misrepresentation, plaintiff must prove: (1) a misrepresentation of material fact; (2) made under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act; and (4) which results in injury to a party acting in justifiable reliance on those misrepresentations. Bortz v. Noon, 556 Pa. 489, 729 A.2d 555 (1999). Levin acknowledged in his deposition that he understood sales were dependant on the salespeople he hired and that he had received the company’s supporting data which the sales projections for the company were based on. See defendant’s motion for summary judgment, Appendix part 2, pp. 147-151. This court finds that plaintiff has failed to produce evidence of facts essential to the cause of action for negligent misrepresentation.

CONCLUSION

Based on the foregoing, summary judgment is granted in favor of defendant, Getmyhomesvalue.com, Inc. and against plaintiff GMHV, LLC.

BY THE COURT:

A handwritten signature in black ink, appearing to read "J. Glazer", is written over a horizontal line.

GLAZER J.