SCOTT DAVIS, Plaintiff, v. OUTDOORPARTNER MEDIA, INC., Defendant.

CIVIL CASE NO. 1:08-CV-1506-JTC

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

2009 U.S. Dist. LEXIS 120929

March 19, 2009, Decided
March 19, 2009, Filed

COUNSEL: [*1] For Scott Davis, Plaintiff: David J. Hungeling, LEAD ATTORNEY, Law Office of David J. Hungeling, P.C., Atlanta, GA.

For OutdoorPartner Media, Inc., Defendant: James Joseph Ward, Jones Day-Atlanta, Atlanta, GA.

JUDGES: JACK T. CAMP, UNITED STATES DISTRICT JUDGE.

OPINION BY: JACK T. CAMP

OPINION

ORDER

This matter is currently before the Court on Defendant's motion to dismiss [# 3]. Defendants ask the Court to dismiss Plaintiff's unjust enrichment and bad faith claims. For the following reasons, the Court **DENIES** Defendant's motion.

I. Background [1]

1 The Court accepts the facts in the complaint as true and construes them in the light most favorable to Plaintiff as the nonmovant. Ambrosia Coal & Constr. Co. v. Pages Morales, 482 F.3d 1309, 1316 (11th Cir. 2007).

Plaintiff Scott Davis is a former shareholder of Intelligent Media Corporation ("Intelligent Media"). (Compl. P 4.) On August 10, 2006, Defendant OutdoorPartner Media, Inc. entered into a stock purchase agreement (the "Agreement") with Plaintiff and other shareholders of Intelligent Media. (Id. P 5.) Under the Agreement, Defendant agreed to purchase Plaintiff's stock in Intelligent Media for a specific price. (Id.)

The Agreement also provided that the selling shareholders [*2] of Intelligent Media would be entitled to "Additional Payments" according to a pre-determined schedule. (Id. P 6.) Under the Agreement, the Additional Payments were governed by the following provision:

> Additional Payments: Sellers will be entitled to receive additional contingent payment(s) consisting of Two Hundred Fifty Thousand Dollars ($ 250,000) or OutdoorPartner Media Shares (or a combination of the two), at the Buyer's sole discretion, for each year the Major Customer Contract is renewed or extended beyond its current term between the Company and the Major Customer, up to an aggregate of One Million Five Hundred Thousand Dollars ($ 1,500,000) any time after the Closing until December 31, 2008 (the "Additional Payment") and paid within 60 days of renewal; provided,

> however, that the renewal of the Major Customer Contract be on terms and conditions approved by the Board of Directors of the Company.

(Id. P 7.) On October 31, 2007, the transaction contemplated in the above portion of the Agreement occured - renewal of the "Major Customer Contract." (Id. P 8.)

On December 12, 2007, Defendant sent a letter to Plaintiff and three other former Intelligent Media shareholders confirming [*3] that "the Sellers are entitled to $ 1,250,000 of additional consideration." (Id. P 9.) The letter acknowledged that "the Purchase Agreement calls for this additional consideration to be paid before December 30, 2007." (Id.) Under the terms of the Agreement, Plaintiff was entitled to $ 111,566.11 of the $ 1.25 million in Additional Payments. (Id. P 10.)

Defendant also stated in the letter that it intended to pay the four Intelligent Media shareholders receiving the letter in shares of Defendant's stock, while it intended to pay the remaining Intelligent Media shareholders in cash. (Id. P 9.) The majority of the shareholders were paid their proportional share of the additional consideration in cash by the December 30, 2007 deadline. (Id. P 11.) However, Defendant never issued or delivered any shares of stock to Plaintiff by December 30, 2007. (Id. P 12.) Nor did Defendant explain why it chose to pay Plaintiff in stock while it paid other shareholders in cash. (Id.)

The Agreement provided that, if Defendant chose to pay the Additional Payments in the form of stock, an "Adjusted Share Price" would be used to calculate the number of shares the Intelligent Media shareholder would receive. [*4] (Id. P 13.) The Agreement defined "Adjusted Share Price" as "the lesser of (i) the weighted average market price of the [Defendant] Shares for the 20-day period ending on (and including) the 5th day prior to the issuance of the [Defendant] Shares and (ii) CDN $ 0.70." (Id.)

To calculate the Adjusted Share Price of the shares which were to be distributed in December 2007, Defendant used an "issuance date" of December 12, 2007. (Id. 14.) Thus, to calculate the weighted average market price of Defendant's shares for purposes of calculating the Adjusted Share Price, Defendant used a date range of November 12, 2007 to December 7, 2007. (Id.) On November 12, 2007, Defendant's share price was CDN $ 1.00. (Id.) By December 7, 2007, the share price had fallen to CDN $ 0.42. (Id.) Plaintiff alleges that Defendant scheduled the issuance of stock around this date range in order to take advantage of the much higher share prices at the beginning of the date range. (Id.) As a result, Defendant was able to calculate a higher Adjusted Share Price and issue fewer shares to Plaintiff. (Id.) This calculation resulted in an Adjusted Share Price of CDN $ 0.63 per share. (Id. P 14.)

According to Plaintiff, [*5] however, Defendant stated in a December 12, 2007 letter that they calculated the Adjusted Share Price to be CDN $ 0.70 per share. (Id. P 15.) Defendant also asserted in the letter that the shares were "issued" to Plaintiff on December 12, 2007. (Id. P 14.) However, according to Plaintiff, Defendant first attempted to deliver the shares to Plaintiff on March 6, 2008. (Id.)

After receiving this letter, Plaintiff protested Defendant's decision to treat him differently than most of the other Intelligent Media shareholders by paying Plaintiff in stock rather than in cash. (Id. P 16.) Plaintiff also protested the "issuance date" when he learned that the shares would not be delivered to him in a timely manner. (Id.) Lastly, Plaintiff protested the calculation of the Adjusted Share Price Defendant planned to use to determine the number of shares it planned to pay Plaintiff, since the Adjusted Share Price should have been the *lessor* of CDN $ 0.63 and CDN $ 0.70 per share. (Id.)

Plaintiff received an email from Defendant on February 5, 2008. (Id. P 17.) In that email, Defendant still used an "issuance date" of December 12, 2007, but Defendant conceded that the Adjusted Share Price should have [*6] been CDN $ 0.63 per share instead of CDN $ 0.70 per share. (Id.)

On March 6, 2008, Defendant offered to deliver Plaintiff 178,914 shares of Defendant's stock based upon an Adjusted Share Price of CDN $ 0.63 per share. (Id. P 18.) On that day, however, the actual price for Defendant's stock was CDN $ 0.30 per share. (Id. P 19.) According to Plaintiff, if Defendant used March 6, 2008 as the actual "issuance date," the Adjusted Share Price would have been CDN $ 0.296 per share and Plaintiff would have been entitled to 366,247 shares of Defendant's stock. (Id.)

On March 17, 2008, Plaintiff sent a demand letter to Defendant. (Id. P 21.) In the letter, Plaintiff requested

payment in full for the $ 111,566.11 Additional Payment. (Id.) Plaintiff also stated in the letter that Defendant's failure to pay would result in "interest [accruing] on the outstanding balance at the statutory rate of 1 1/2% per month and [that Plaintiff would] seek attorney's fees pursuant to O.C.G.A. § 13-1-11." (Id. P 22.)

On April 22, 2008, Plaintiff filed a Complaint against Defendant alleging numerous claims related to the Additional Payments. Plaintiff brought claims for breach of contract (Count 1), breach of the [*7] covenant of good faith and fair dealing (Count 2), unjust enrichment (Count 3), and attorney's fees and costs pursuant to O.C.G.A. §§ 13-1-11 and 13-6-11 (Count 4).

II. Motion to Dismiss Standard

The purpose of a Rule 12(b)(6) motion is to determine whether the plaintiff's complaint states a claim for relief. In considering a motion to dismiss, the Court must accept the allegations in the complaint as true and construe them in the light most favorable to the plaintiff. Ambrosia Coal & Constr. Co. v. Pages Morales, 482 F.3d 1309, 1316 (11th Cir. 2007); Powell v. United States, 945 F.2d 374, 375 (11th Cir. 1991). To survive a motion to dismiss, a complaint need not contain "detailed factual allegations," but must contain sufficient factual allegations to suggest the required elements of a cause of action. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007); Watts v. Fla. Int'l Univ., 495 F.3d 1289, 1295-96 (11th Cir. 2007). "[A] formulaic recitation of the elements of a cause of action will not do." Twombly, 127 S. Ct. at 1965. Nor will mere labels and legal conclusions withstand a 12(b)(6) motion to dismiss. Id. Ultimately, the complaint is required to contain [*8] "enough facts to state a claim to relief that is plausible on its face." Id. at 1974.

III. Analysis

Defendant moves to dismiss Plaintiff's claims for unjust enrichment (Count 3) and attorney's fees and costs under O.C.G.A. § 13-6-11 (Count 4). Defendant argues that the Court should dismiss Count 3 because Georgia law precludes an unjust enrichment claim when a contract exists. Defendant further argues that the Court should dismiss Count 4 because Plaintiff failed to allege facts sufficient to support a claim for bad faith or stubborn litigiousness under O.C.G.A. § 13-6-11. For the following reasons, the Court denies Defendant's motion.

A. Count 3 - Unjust Enrichment

Defendant argues that the Court should dismiss Count 3 because Georgia law precludes an unjust enrichment claim when a contract exists. Defendant is correct that, under Georgia law, "[r]ecovery on a theory of unjust enrichment . . . is only available 'when as a matter of fact there is no legal contract.'" Camp Creek Hospitality Inns, Inc. v. Sheraton Franchise Corp., 139 F.3d 1396, 1413 (11th Cir. 1998) (quoting Reg'l Pacesetters, Inc. v. Halpern Enter., Inc., 165 Ga. App. 777, 300 S.E.2d 180, 185 (1983)).

At this stage in the [*9] proceedings, the Court may consider only the Complaint and any attachments to the Complaint in determining whether an issue of fact exists as to the contractual relationship between the two parties. Until either party demonstrates that there is no genuine issue of fact concerning whether a valid contract existed between Plaintiff and Defendant, Plaintiff is entitled to plead a cause of action for breach of contract and alternatively plead a cause of action for unjust enrichment. As such, the Court **DENIES** Defendant's motion for summary judgment with respect to Count 3.

B. Count 4 - Attorney's Fees and Costs

Defendant argues that the Court should dismiss Count 4 because Plaintiff failed to allege facts sufficient to support a claim for bad faith or stubborn litigiousness under O.C.G.A. § 13-6-11. O.C.G.A. §. 13-6-11 provides that:

> The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.

O.C.G.A. §. 13-6-11. "'Stubborn litigiousness' [*10] refers to situations where 'a defendant forces suit where no bona fide controversy exists.'" Johnson v. Citimortgage, Inc., 351 F. Supp. 2d 1368, 1381 (N.D. Ga. 2004) (quoting Ostrom v. Kapetanakos, 185 Ga. App. 728, 730, 365 S.E.2d 849 (1988)) (Evans, J.). "'Bad faith,' in turn, is not simply bad judgment or negligence, but it imports 'a dishonest purpose or some moral obliquity, and implies conscious doing of wrong, and means breach of

known duty through some motive of interest or ill will.'" Id. (quoting Rapid Group, Inc. v. Yellow Cab of Columbus, 253 Ga. App. 43, 49, 557 S.E.2d 420 (2001)).

In the Complaint, Plaintiff alleges that Defendant acted in bad faith by: (1) paying some shareholders in cash and others in stock; (2) refusing to issue Plaintiff's shares of stock by the date required under the contract; (3) using an Adjusted Share Price that was more than double the actual value of the shares; (4) manipulating the timing and calculation of the Adjusted Share Price to achieve a higher Adjusted Share Price; (5) delaying the attempted delivery of the shares to Plaintiff; and (6) ignoring all efforts by Plaintiff to collect the debt that was owed. (Compl. P 35.) Taking these [*11] allegations as true, which the Court must do at this stage in the proceedings, Plaintiff pleaded facts sufficient to state a claim for bad faith "that is plausible on its face." Twombly, 127 S. Ct. at 1974. As such, the Court **DENIES** Defendant's motion for summary judgment with respect to Count 4.

IV. Conclusion

For the foregoing reasons, the Court **DENIES** Defendant's motion to dismiss [# 3].

SO ORDERED, this 19th day of March, 2009.

/s/ Jack T. Camp

JACK T. CAMP

UNITED STATES DISTRICT JUDGE