IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

YELLOW BOOK USA, a Delaware limited partnership	)	
Plaintiff ,	)	
v.	)	**C.A. No. 1999-02-046**
LAWRENCE M. SULLIVAN t/a SULLIVAN & BARTLEY,	)	
Defendant.	)	

Submitted: January 21, 2003

Decided: February 20, 2003

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DECISION AFTER TRIAL

This is a breach of contract action. Yellow Book USA ("Plaintiff") seeks to recover damages from Lawrence M. Sullivan t/a Sullivan & Bartley ("Defendant") as result of Defendant's alleged failure to pay fees incurred on a yellow pages advertising contract

("Contract"). Plaintiff seeks $12,500 as the balance due on the Contract, plus $10,875 in accrued interest and $4,675 in attorneys' fees.

Defendant denied liability for any contractual damages alleging that the contract was invalid and unenforceable, and asserted a counterclaim against Plaintiff alleging that Plaintiff breached the contract by failing to print the advertisement as promised, and seeking to recover $40,000 in out-of-pocket expenses and loss of profit.

Trial was held on September 13, 2002, and the Court reserved opinion.

Plaintiff's Closing Argument contends that 1) Defendant breached the contract by failing to pay for the advertisement as agreed under the Amended Contract ("Amendment"); 2) Plaintiff is entitled to contractual damages including the balance due on the Contract, interest accrued, and attorney's fees not exceeding 20% of the amount adjudged for principal and interest; 3) Defendant's defenses did not justify his failure to pay.

In support of its contention that Defendant has no justifiable excuse for his failure to pay, Plaintiff made the following arguments: 1) The Contract was not illusory but rather was a unilateral contract supported by requisite consideration of Plaintiff's performance- i.e. the act of publishing the advertisement as promised. 2) Defendant's claim of having been induced fraudulently to sign the Contract is without merit since it is incredible to believe how Defendant, a veteran attorney, could have signed the contract while critical terms were missing. Even if Defendant was fraudulently induced to sign the Contract without critical terms included, he nevertheless has ratified the Contract by subsequently making two initial payments under the Contract. 3) Defendant's contention that the Amendment was invalid because Jeff Cartwright ("Cartwright"), the individual who signed the Amendment on behalf of Yellow Book, was not an "authorized officer" is without merit and Defendant would be liable for double the amount of

damages on the Contract if the Amendment was invalid. Additionally, the issue of whether Cartwright is an "authorized officer" was resolved in Plaintiff's favor in the Court's denial of Defendant's Rule 41(b) motion to dismiss Plaintiff's breach of contract claim on the ground of an unauthorized signature. If the issue had not been resolved in denial of the motion, Cartwright would have been considered an "authorized officer" under the doctrine of apparent authority and by the fact that Defendant had actually relied on Cartwright's authority in his act of signing the Amendment.

As to Defendant's counterclaim, Plaintiff argued it is meritless and, in any event, the damages Defendant seeks are barred by the limitation of liability clause in the Contract. Plaintiff contends that when the parties signed the Amendment, it was implicit that Defendant would have to pay his outstanding balance before Plaintiff would publish his advertisements in the next year's directory. Even if Plaintiff were in breach of contract by failing to publish Defendant's advertisement in the following year's directory, Defendant would still be barred from any recovery of lost profit by the limitation of liability clause, made applicable to the Amendment by the term "renew" in Cartwright's letter.

Defendant filed a Closing Argument Memorandum contending: 1) Plaintiff cannot prevail by preponderance of the evidence since testimony of Mr. Berman was unreliable and incredible in light of several factual discrepancies. 2) The parol evidence rule is inapplicable to Defendant's testimony that he signed the application on September 30th at Berman's behest to 'get things rolling', and that he did not intend to enter into a binding contract with the Plaintiff before he reviewed the proofs. 3) No enforceable contract was formed with respect to the 1997 directory since there had never been a 'meeting of the minds' on the design of the advertisements. 4) Even if there had been an enforceable contract between the parties, Defendant

was excused from performance by Plaintiff's material breach. 5) Defendant never made an unqualified submission of the application because he had not approved the proofs of the proposed advertising. Therefore, Defendant argues, his counterclaim is not precluded by the limitation of liability clause in the Contract. The limitation becomes operative, if at all, only upon unqualified submission of the application. 6) Plaintiff has no basis to recover against Defendant since it failed to satisfy the condition precedent, the publication of Defendant's advertisement in its 1998 directory, for Defendant's payment of $12,500.00.

Plaintiff's Response to Defendant's Memorandum argued: 1) Defendant's argument that the application to advertise never ripened into an enforceable contract is irrelevant since Plaintiff's claim is based upon the Amendment validly entered between the parties thirteen months after the application. 2) Plaintiff's alleged material breach was no justification for Defendant's failure to pay since Plaintiff had already compensated Defendant for the alleged breach by giving him a 50% discount in advertisement charges as memorialized in the Amendment. 3) The express terms of the Amendment provided no agreement between the parties that Plaintiff's publication of Defendant's advertisement in the 1998 directory was a condition precedent to Defendant's payment of the outstanding balance owed on advertisement published in the 1996-1997 directory. 4) Defendant's contention that the Court erroneously excluded evidence relating to Defendant's counterclaim, must be rejected because precedents in this and other jurisdictions support the Court's exclusion of evidence relating to Defendant's counterclaim by giving effect to the limitation of liability clause in the Contract.

Defendant filed a subsequent Rebuttal Argument contending: 1) No contract was ever formed between the parties as result of Plaintiff's failure to perform as requested. 2) Even if a contract was formed, it is a contract of adhesion as evident in the language of the contractual

provisions. 3) The October 9, 1997 letter cannot relate back to a contract that never existed, and the term "renew" signified a renewal of business relationship not a renewal of the original contractual terms. 4) If the October 9, 1997 letter was to renew a pre-existing contract, it renewed a contract of adhesion, thus, the Court must interpret its terms strictly against Plaintiff. 5) No prejudgment interest should be awarded since the case is not a typical debt or contract case. If prejudgment interest were to be awarded, it should not exceed the statutory legal rate of interest at the time of trial. 6) Any award for late charge cannot exceed $421.01 which was the only amount of late charge ever assessed. 7) There is no evidence to support Plaintiff's assertion of ratification by Defendant.

Plaintiff submitted a Reply to Defendant's Rebuttal Argument contending that the two arguments contained therein: one on Defendant's contention that the contract between the parties was a contract of adhesion and the other on Defendant's position regarding Plaintiff's entitlement to recover prejudgment interest, were raised for the first time in Defendant's rebuttal. These arguments were not raised during trial nor mentioned in Defendant's opening summation, and Plaintiff had no opportunity to reply them. Thus, Plaintiff argues, the Court should not entertain them as they reflect a classic example of impermissible sandbagging tactic.

Based on the evidence adduced at trial, the Court finds the following relevant facts:

Defendant, Lawrence M. Sullivan, a Delaware attorney, signed up with Plaintiff's predecessor-in-interest, Reuben H. Donnelley ("RHD"), for placement of his law practice advertisements in the 1996-1997 Wilmington edition of the Donnelley Directory ("Directory"). On or about September 30, 1996, Defendant signed an application obligating him to pay for the advertisement specified in the application and in accordance with terms and conditions printed on the reverse side of the application (Plaintiff's Exhibit 1).

Pursuant to the application, RHD was to print a dozen or so specifically formatted advertisements of Sullivan's law practice in different sections of the Directory, and in turn, Sullivan was to pay a monthly fee of $3,231.00 to RHD for the duration of the publication of his advertisements.

Sullivan testified that the application signed was "for signature only", and he signed it with the understanding that he has no legal obligation to RHD for payment until he reviewed and approved the final proofs of advertisement provided by RHD.

After his advertisements were printed in RHD's 1996-1997 Directory, Sullivan made two monthly payments in March and April of 1997 and then stopped paying. RHD made several attempts to collect payments from Sullivan, and learned through its investigation that Sullivan was unsatisfied with the way his advertisements appeared in the 1996-1997 Directory.

Sullivan testified that the reason for his dissatisfaction was that the advertisements appeared different than what he had wanted and that, contrary to his expectations, RHD did not give him the final proofs for his approval before the advertisements were printed, as RHD had done in prior dealings with him. This was denied by RHD.

In an attempt to resolve Sullivan's complaints, RHD's area manager, Jeffery Cartwright, contacted Sullivan in October 1997 and offered him fifty percent off the entire outstanding balance due on his account. Sullivan accepted the offer by signing a letter dated October 9, 1997 (Plaintiff Exhibit 4), and agreed to "'renew' [his] Back Cover, Full Page and all relative guides offered in the 1997-1998 Wilmington Donnelley Directory."

After signing the letter, Sullivan did not make any payments on his account with RHD. Sullivan testified that it was his understanding that the parties agreed, in the letter he signed, that RHD's printing of his advertisements in the 1997-1998 Directory was a condition precedent to

his payments for the 1996-1997 Directory. No such condition was found in the express terms of the October 9th letter.

The present suit was filed because Plaintiff, Yellow Book USA, assignee of RHD, failed to collect payments from Sullivan on his delinquent advertisement account.

The Court has analyzed the facts found and concludes as follows:

The primary issue here is whether there was a valid and enforceable contract formed between the parties when Sullivan signed the RHD application on September 30, 1996. The Court finds that the application signed by Sullivan was a valid contract enforceable by law. Defendant's arguments that the contract was illusory since there was no meeting of the minds between the parties and that Sullivan was fraudulently induced to sign the application "to get the process started" were unconvincing. There is nothing in the record to dispute the fact that at the time the application was signed, Sullivan was present and had negotiated with RHD regarding the printing of his advertisement in the 1996-1997 Directory. Sullivan made some changes to the appearance and wording of his advertisements prior to his signing. Sullivan's expertise in the law precludes his argument that he signed a document without all the critical terms being present.

As to Sullivan's contention that he signed the application with no intention to enter into a legally binding contract and his testimony regarding the meaning of the phrase "for signature only" (Plaintiff Exhibit 1, Page 5) is not barred by the parol evidence rule under *Cochran v. Denton*, Del. Ch., 1991 WL 203128 (1991), the Court finds that the parties' differing testimony regarding the meaning of the phrase "for signature only" is admissible since the phrase on its face is "reasonably or fairly susceptible of different interpretations or may have two or more different meanings." *In re Explorer Pipeline Co*., Del. Ch., 781 A.2d 705, 713-714 (2001).

Defendant contends that the phrase "for signature only" meant that the application was signed for purpose of starting the process rolling and was to have no legal effect until Sullivan approved the final proofs of his advertisements. However, Plaintiff's testimony is that the phrase "for signature only" is an internal business marking for purpose of accurately processing and documenting jobs and has no bearing on the legal effect of the application.

Assuming that Defendant's proffered meaning of the phrase "for signature only" is the one intended by the parties at the time of his signing, it would make the type written language above his signature:

> THIS APPLICATION HAS BEEN SIGNED BY AN INDIVIDUAL AUTHORIZED TO LEGALLY BIND AND OBLIGATE THE ADVERTISER TO PAY FOR ALL ADVERTISING SPECIFIED ON THIS APPLICATION IN ACCORDANCE WITH THE TERMS AND CONDITIONS PRINTED ON THE REVERSE SIDE OF THIS CONTRACT AND SAID INDIVIDUAL BY THEIR SIGNATURE ACKNOWLEDGES THAT THEY HAVE RECEIVED A COPY OF THIS APPLICATION.

meaningless and without any legal effect. The Court finds that interpreting the phrase "for signature only" based on Defendant's contention would be contrary to Delaware law. *O'Brien v. Progressive Northern Ins. Co.*, Del. Supr., 785 A.2d 281, 287-288 (2001) (holding that contracts are to be interpreted in a way that does not render any provisions 'illusory or meaningless').

The Court further finds that even if Defendant had not intended to enter into a legally binding contract when he signed the application at issue, he nevertheless did ratify and accept the contract by making two monthly payments on the contract. Defendant's reliance on *Cochran* is misplaced since the party who argued non-existence of a legally binding contract in *Cochran* had conducted herself in ways that clearly defeat the other party's argument for existence of a mutual contract. Unlike the *Cochran* party, Sullivan made two monthly payments on his advertisement in the 1996-1997 Directory before he made the argument that the application he signed did not legally bind him for payment. "A party to a contract cannot silently accept its benefits and then

object to its perceived disadvantages." *Wright v. Wilmington Trust Company*, Del. Super., Slip Op., 1993 WL 1626508 at *3 (May 20,1993).

The Court finds and concludes that Defendant failed to honor his contract since after making two payments early in 1997, he did not make any further payments as required by the contract.

Defendant urges the Court to disregard the testimony of Plaintiff's witness, Lawrence A. Berman ("Berman"), regarding the facts surrounding the signing of the application at issue as incredible and unreliable, but the argument is inappropriate since the record has nothing in it to justify this finding.

The next critical issue is whether the October 9, 1997 letter signed by Cartwright and Sullivan legally amended certain rights of the parties under the original contract of September 30, 1996. Defendant contends that the October 9th letter was not a legally enforceable amendment to the contract since Cartwright was not an "authorized officer" of RHD under the law. The Court finds that Cartwright, as the general manager of RHD when he signed the letter, was in fact an authorized officer of RHD. Defendant's attempt to draw a legal distinction between an "officer" and a "general manager" is disingenuous.

Defendant further contends that RHD has materially breached the terms of the October 9th letter by failing to print his advertisements in the 1997-1998 Directory - the "agreed" condition precedent to his payment for the 1996-1997 Directory. On the face of the October 9, 1997 letter, the Court is unable to find any express or implied terms indicating the printing of Sullivan's advertisements in the 1997-1998 Directory as a condition precedent to his payment of the advertisement fees owed on the 1996-1997 Directory. The letter expressly gave Sullivan a fifty percent discount on the advertisement fees owed for the 1996-1997 Directory advertising,

and reduced his obligation to $12,500.01 (after taking account of the late charges and crediting Sullivan for payments made). In turn, Sullivan agreed to "renew" his advertisements in the 1997-1998 Directory. The Court finds that Defendant's contention that printing of his advertisements in the 1997-1998 Directory is a condition precedent to his payment on his delinquent account is unconvincing and contrary to the express terms of the letter agreement signed between the parties.

In his unsanctioned rebuttal Defendant argued that the September 30th application was a contract of adhesion, and the October 9th letter was an invalid amendment to a contract since the contract was not "renewed" legally and could not have been renewed since it was a contract of adhesion. Plaintiff urges the Court not to consider Defendant's contract of adhesion argument on the basis that the assertion represents counsel's "sandbagging tactic" and its consideration would disadvantage the Plaintiff since Plaintiff had no opportunity to respond to it. However, Plaintiff did respond to the arguments. The Court will address this argument.

The Court disagrees with Defendant that the September 30th application and resulting contract was a contract of adhesion. "An adhesion contract is a standardized contract written entirely by a party with superior bargaining power, leaving the weaker party in a 'take-it-or-leave-it' position." *Cubic Corp. v. Marty*, 185 Cal. App. 3d 438, 449 (Ct. App. 4th Dist. 1986). "In the characteristic adhesion contract, the stronger party has drafted the contract and given the weaker party no opportunity to negotiate its term and the weaker party may have no realistic opportunity to look elsewhere for a more favorable contract, but must adhere to the standardized agreement." *Id.* However, a contract is not adhesive when the party claiming adhesion had the requisite experience in dealing in this type of contract, and was free to walk away from it and not deal with the other party to the contract, or was free to bargain for better terms. *Progressive*

International Corp. v. E.I. Du Pont Nemours & Co. and L.J. Hanna, Inc., Del.Ch., 2002 WL 1558382, at *1. (July 9, 2002).

Sullivan, as an attorney, was not the weaker party in negotiation with RHD. Since he has dealt with RHD for many years for advertising his law practice, he cannot claim that he was unfamiliar with the process of signing a RHD advertisement contract. Evidence showed that Berman had discussed the terms of the contract with Sullivan, and allowed Sullivan to make changes on the specifics of his advertisements prior to their publication. The Court does not see any reasons why Sullivan, if he was unhappy with terms in the contract, would not simply request an amendment to them or decline the contract. The Court finds no merit in Sullivan's argument that he was induced to sign an adhesive contract.

The October 9th letter providing Sullivan a fifty-percent discount on his 1996-1997 advertisement account with RHD is further evidence that Sullivan had the power of bargaining for the terms of his advertisement contract. Thus, Sullivan's claim that the October 9th letter is also adhesive fails.

On the issue of damages, the Court finds that Plaintiff is entitled to recover the contractual amount of discounted advertisement fees and late fees assessed against Sullivan for his failure to make timely payment for the advertisements published in the 1996-1997 Directory. Plaintiff is also entitled, as a matter of right, to pre-judgment interest accrued from the date payment was due RHD.

As to Defendant's counterclaim, the Court reaffirms its decision denying Defendant the right to introduce evidence of lost profits at trial as such evidence is barred by the limitation of liability clause in the Contract (Plaintiff Exhibit 1, page 6). The Court finds that the limitation of liability clause is enforceable because it is within the parties' contractual intent since Sullivan

presented no evidence indicating his lack of intent to be bound under the clause at the time he signed the application. *Ed Fine Oldsmobile, Inc. v. Diamond State Telephone Company*, Del. Supr. 494 A.2d 636 (1985); *Woloshin v. Diamond State Telephone*, Del. Ch., 380 A.2d 982 (1977). Defendant's counterclaim is DENIED.

Judgement is entered in favor of the Plaintiff as follows: the principal amount of $12,500, the balance due on Defendant's 1996-1997 advertisement account; pre-judgment interest on the principal amount at the legal rate in effect on the date of this opinion from October 9, 1997 to the date of this opinion; late fees under the contract of $421.01; attorney's fees at 20% of the amount of the principal judgment and interest. Post-judgment interest at the legal rate will accrue. Costs are assessed against Defendant.

Counsel for Plaintiff shall prepare an order form detailing the awards specified in this opinion and shall attach an explanation of calculation and shall submit it to the Defendant who shall approve that proposed order as to form or shall detail specifically any objections to the amounts in the order.

IT IS SO ORDERED.

J., Fraczkowski[1]

[1] Sitting by appointment pursuant to Del. Const., Art IV, §38 and 29 Del.C. §5610.