

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GNames Advantage, L.P. :
v. :
CPC Associates, Inc. : NO. 00-CV-4032

MEMORANDUM and ORDER

McLaughlin, J.

November ____, 2002

CPC Associates ("CPC") and Acxiom Corporation ("Acxiom") entered into a contract to license the use of compiled lists of names for direct marketing purposes. Gnames Advantage ("Gnames") claims that it is due a broker's commission of 20 percent of the contract's revenue.

Gnames has sued CPC claiming breach of contract and unjust enrichment/quantum meruit. CPC moves for summary judgment on both counts, and Gnames on the breach of contract claim. The Court grants CPC's motion and denies Gnames' motion on the breach of contract count, and denies CPC's motion on the unjust enrichment/quantum meruit count.

I. Undisputed Facts

CPC is a new resident marketing company. It compiles a list of moving families monthly in order to prepare direct marketing for its clients to these households, essentially renting or "selling" its list. The list is used to provide its

clientele in the direct mail industry with mailing and computer services. Its president is Dave Lewis. Acxiom integrates different types of data about people from various sources to create consumer profiles about them that are tailored to its customers' needs. It gathers and buys lists of data to integrate into the profiles it sells. Donald Hinman is an employee of Acxiom. Hinman Depo. at 8-12; Lewis Depo. at 12-14.

Gnames does both list management and list brokerage work; Robert Perez is one of its co-presidents. As a broker, it sells the compiled lists created by list sellers to list buyers for a commission. As a manager, it is a middle man between a list seller and the list brokers, coordinating the brokers' activities. Hinman Depo. at 48-49; Lewis Depo. at 24, 26-28; Perez Depo. at 7, 10, 12, 17-18.

Gnames acted as CPC's list manager from 1992 to 1998 under a written contract. Gnames was paid by commission as CPC's list manager; it received payments due CPC for list rental, took about 10 percent of every payment, and gave the rest of the money to CPC. While Gnames was CPC's list manager in early 1997, Mr. Perez introduced Mr. Lewis to Mr. Hinman; the parties discussed how CPC's list might be used to update a particular file Acxiom had, but no agreement was reached. CPC terminated Gnames as its list manager on May 31, 1998. Lewis Depo. at 21-23, 28-30, 79-81, 96-98; Perez Depo. at 40-41, 120-21.

Sometime during or after June 1998, Mr. Perez arranged a meeting among Mr. Lewis, Mr. Hinman, and himself. The meeting lasted about 30 minutes. The parties discussed the possibility of CPC licensed its list to Acxiom; such a license would grant the unlimited use of a list for a specified amount of money rather than the typical list rental where a customer pays CPC per use. CPC had not licensed the use of its list before. Lewis Depo. at 79-80, 93-94, 108-13; Perez Depo. at 88-90.

After June 1998, Mr. Perez set up another conference among himself, Mr. Lewis and Mr. Hinman. During this conference, Mr. Lewis spoke of his concerns about how the licensing agreement with Acxiom might conflict with CPC's contractual obligations to the sources of its data. The parties also discussed pricing for the first time. Lewis Depo. at 113-14; Perez Depo. at 92, 95-96.

The final meeting among all three of them took place in October 1999 in Toronto at a direct marketing conference. It lasted about 30-60 minutes, during which further negotiations around Acxiom using CPC's list took place, particularly about the payment structure. Gnames also facilitated approximately five to seven telephone calls between CPC and Acxiom during the time the above meetings took place. Lewis Depo. at 110-14, 148-49, 153-54; Perez Depo. at 67-69, 86, 88-92, 101, 192-93.

Subsequent to the Toronto meeting, CPC and Acxiom continued to negotiate without Gnames involved. CPC and Acxiom

entered into the Data Supply Agreement in December 1999. The agreement marked the first time that CPC gave another company license to use its list on an ongoing basis. CPC and Acxiom began performing under it in January 2000. Hinman Depo. at 78-80, 83; Lewis Depo. at 157-59.

The Data Supply Agreement requires Acxiom to pay CPC set fees in exchange for unlimited amounts of particular allowed uses of specified data from CPC. Per thousand sets of CPC data that are added to Acxiom products, Acxiom must pay CPC a set fee; the fee increases each of the five years that the agreement covers. Exhibit A, Opposition to CPC's Motion for Summary Judgment.

From the last meeting in October 1999 through January 2000, neither Mr. Perez nor anyone else from Gnames had any contact with CPC or Acxiom. In February 2000, after learning that CPC had signed an agreement with Acxiom, Mr. Perez sent Acxiom 24 purchase orders. Mr. Hinman returned the orders to Gnames stating that they were inappropriate for this transaction between CPC and Acxiom. Hinman Depo. at 85-87; Lewis Depo. at 158; Perez Depo. at 132; Exhibits I and J, Motion of CPC for Summary Judgment.

Mr. Perez then called Mr. Lewis, claiming that Gnames was due a broker's commission of 20 percent of the agreement's revenue. Mr. Lewis disagreed, stating that Gnames did not act as

a broker. Mr. Perez then sent CPC purchase orders virtually identical to those sent to Acxiom. CPC sent the purchase orders back. Mr. Perez sent a third set of orders out to CPC's then-list manager, Getko Direct, which also returned them to Gnames. Lewis Depo. at 164; Perez Depo at 134-36, 179-81.

After talking with Mr. Hinman, Mr. Lewis offered Gnames 10 percent of the agreement's first-year revenues; he believed this fee was appropriate as a gratuity because Mr. Perez had facilitated the negotiation process. Mr. Perez did not accept. Lewis Depo. at 166, 168-69.

II. Analysis

Gnames claims that it had a contract with CPC which CPC breached when it refused to pay Gnames a commission of 20 percent of the revenue of the Data Supply Agreement between CPC and Acxiom. Alternatively, Gnames claims that CPC was unjustly enriched by its services in connection with the negotiations of the contract between CPC and Acxiom. The Court finds that no reasonable fact finder could find a contract on this record so it will grant CPC's motion for summary judgment on the contract claim and deny Gnames' motion. The Court finds that there are disputed issues of material fact on the unjust enrichment claim so it will deny CPC's motion on this claim.

A. Contract Claims

In its second amended complaint, the plaintiff alleged breach of an express oral contract. In its motion for summary judgment and at oral argument, it argued a theory of unilateral contract. Neither theory is viable on this record.

1. Oral bilateral contract

To establish an oral contract for services, Pennsylvania law requires clear and precise evidence of an oral contract by which both parties manifested an intent to be bound, for which both parties gave consideration, and which contains sufficiently definite terms. Martin v. Safeguard Scientifics, Inc., 17 F. Supp. 2d 357, 368 (E.D. Pa. 1998). There must be a meeting of the parties' minds on the essential elements of their agreement. Courier Times, Inc. v. United Feature Syndicate, Inc., 445 A.2d 1288, 1295 (Pa. Super. 1982).

There is no evidence that CPC promised Gnames that CPC would provide Gnames with any payment if Acxiom licensed the new residents list, or that CPC solicited Gnames' services regarding the Data Supply Agreement. Mr. Perez stated that he and Mr. Lewis never discussed Gnames' status or compensation with respect to the CPC-Acxiom transaction. Perez Depo. at 226-28. Mr. Perez stated that he "presumed" that Gnames was entitled to a 20 percent list brokerage fee for the Data Supply Agreement based

upon alleged "prior dealings" or "industry custom."

Neither "prior dealings" nor "industry custom" can substitute for mutual agreement by the parties on all essential terms of the contract. With respect to prior dealings between the parties, Gnames had never been involved in a transaction with CPC that was like the Data Supply Agreement. The Data Supply Agreement spans five years and allows for unlimited use of the data by Acxiom for a variety of purposes. Mr. Perez acknowledged that he had never worked on something like the agreement between CPC and Acxiom before. Perez Depo. at 140-42, 160.

With respect to industry custom, Gnames proffered the report of an expert who discussed the role of brokers in the direct marketing industry and opined that industry-wide standards entitle a broker to a 20 percent commission on an entire contract for bringing the list user and list owner together alone. An expert report, however, cannot substitute for evidence of an agreement by the defendant to the essential terms of the contract. The report, itself, states that the method and amount of payment in the industry varies.

2. Unilateral contract

To prove a unilateral contract, the plaintiff must show that "one party made a promissory offer, which calls for the other party to accept by rendering performance." Bauer v.

Pottsville Area Emergency Med. Serv., 758 A.2d 1265, 1269 (Pa. Super. 2000). A unilateral offer must contain "some language of commitment or some invitation to take further action without further communication." Bourke v. Kazaras, 746 A.2d 642, 644 (Pa. Super. 2000) (quoting Restatement of Contracts § 26 cmt. b (1981)). Acceptance of the offer can be evaluated in the context of the parties' course of conduct. Accu-Weather v. Thomas Broadcasting System, 625 A.2d 75, 78 (Pa. Super. 1993).

The plaintiff contends that the defendant's rate cards constituted unilateral offers and that it accepted one of these offers by its performance. Gnames proffers two rate cards as evidence of such an offer. The first, the Getko card, was published from February 1999 through February 2000, and it is for CPC's new mover file. Its terms require brokers to ensure that there will be a "sample mailing piece" and that the list is sold for "one time use only." It also states that a broker's commission will be 20 percent. The second, the Novus card, was published in April 2001 and is also for CPC's new residents' list. It requires a list rental agreement and sample, and also provides for a 20 percent commission on any contract. Exhibit D, Gnames' Motion for Summary Judgment; Perez Affidavit ¶ 41-44, 49.

A threshold problem with the plaintiff's use of these rate cards as the offer is that there is no evidence that these rate cards were even in existence when Gnames began performing

under the alleged contract. Nor is there any evidence that the plaintiff relied on these or any other rate card. Without evidence that the plaintiff relied on a specific rate card, there is no way for a fact finder to determine the terms of the offer and whether the plaintiff performed under the rate card.

In addition, the Getko rate card does not make a clear statement that a party will be paid for creating a rental agreement without further communication; the Novus card explicitly requires an agreement with CPC before undertaking any attempted rentals. Thus, it is not clear that further action without communication with CPC or its list manager would entail payment for the first rate card. It is clear that action without communication resulting in a list agreement would not entail payment under the second rate card.

Assuming that the first rate card was an offer, the plaintiff cannot establish that it met the terms outlined in the card. The terms were to broker an agreement with a list buyer that provided CPC with a sample mailing piece and assured CPC that the rented data would be used on a one-time basis. The Data Supply Agreement called for data to be used multiple times and a sample mailing piece is meaningless in this context.

B. Unjust enrichment

Unjust enrichment requires that the plaintiff confer

benefits on the defendant, that the defendant appreciate the conferred benefits, that acceptance of these benefits occurred under circumstances making it inequitable for the defendant to retain them without payment, and that the plaintiff present proof of damages. USA Machinery Corp. v. CSC Ltd. et al., 184 F.3d 257, 265 (3d Cir. 1999); Meehan v. Cheltenham Twp., 189 A.2d 593, 596 (Pa. 1963). There is evidence that the plaintiff conferred some benefits on the defendant. The facts around the defendant's acceptance of these benefits are in dispute, so summary judgment cannot be granted on this claim.

An appropriate order follows.

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 CPC Associates, Inc. :

ORDER

AND NOW, this _____ day of November, 2002, upon consideration of Defendant's Motion for Summary Judgment (Docket #33), the Plaintiff's Opposition thereto, and Defendant's Reply, as well as the Plaintiff's Motion for Summary Judgment (Docket #39) and the Defendant's Opposition thereto, it is hereby Ordered and Decreed that Defendant's motion is Granted in part and Denied in part. It is Granted with respect to the contract claim and Denied with respect to the unjust enrichment claim. It is

further Ordered that the Plaintiff's motion is Denied.

BY THE COURT:

MARY A. MCLAUGHLIN, J.