SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA

(ENDORSED)
FILED
APR 13 2007
KIRI TORRE
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
ULATE
BY _____ DEPUTY

DVD COPY CONTROL ASSOCIATION, INC., PLAINTIFF
v.
KALEIDESCAPE, INC.
CASE NO. 1-04-CV 031829

ADDENDUM TO STATEMENT OF DECISION

This matter was tried to the court over a period spanning seven days. For reasons stated in detail on the record, the court granted DVD CCA's motion for nonsuit on Kaleidescape's cross-complaint for breach of contract and breach of the implied covenant of good faith and fair dealing.

Upon stipulation of counsel, the court issued its proposed statement of decision on plaintiff's claim for breach of contract. As agreed, except as may be dealt with in writing by the parties [pursuant to the statutes and rules governing statements of decision], the proposed statement of decision will constitute the statement of decision. Thus, except as here modified, the court adopts the March 29, 2007 oral statement of decision as the statement of decision. A copy of the transcript, previously provided to counsel, is attached to this addendum.

This addendum addresses plaintiff's request for statement of decision filed on April 6, 2007. For reasons explained herein, the court is of the opinion that the oral statement of decision is complete and unambiguous on issues raised by plaintiff. Nonetheless, the court further addresses the issues raised to make it abundantly clear that there are no ambiguities or omissions.

1. Whether the CSS General Specifications are CSS Technical Specifications under the License Agreement.

The court stated in its oral statement of decision" "Well, I conclude that no part of exhibit 156 specifically calls out in clear words the general specifications. So it ... from the text of Exhibit 156 alone is not part of the contract. But, of course, that begins the discussion. It does not end it." The court went on to explain, based on all the evidence presented, and applying the rules of contract interpretation and construction, the general specifications were not part of the contract. It also explained why, even if the general specifications were part of the contract [an assumption directly contrary to the court's finding], it did not impose obligations upon defendant which were sufficiently clear and definite to support plaintiff's only claims – for specific performance and injunctive relief.

2. Whether or not the contract was "reasonably susceptible" to the interpretation urged by DVD CCA (i.e. that the CSS General specifications were CSS Technical Specifications and therefore part of the Agreement).

This never was a contested issue. It is true that Kaleidescape filed a trial brief on March 20, 2007 [Supplemental Trial Brief Re Lack of Incorporation of CSS General Specifications Into The CSS License Agreement], the day before opening statements and the administration of the oath to the first witness, which concluded, at page 4: lines 12-13, "Any evidence or argument regarding the CSS General Specifications should be excluded at trial because they are not part of the parties' contract." It is equally true that neither party ever moved to exclude or strike testimony of witnesses, and the court heard and considered all the proffered evidence on plaintiff's claims.

The court was never asked to and never did apply the old, and largely discredited, "face of the document" or "plain meaning" test in order to exclude any proffered evidence. The whole trial was conducted in recognition of and in accordance with the well recognized rule stated in PG& E v. G.W. Thomas Drayage & Rigging Co. (1968) 69 C2d 33, 41: Extrinsic evidence offered to interpret or explain the meaning of a written instrument is not made inadmissible by the parol evidence rule if the wording of the written instrument, in light of all the circumstances shown by the evidence introduced by the parties, is reasonable susceptible of the meaning of interpretation contended for by the party-proponent of the extrinsic evidence.

Although the court does not think it is necessary to do so, the court does modify the oral statement of decision to make clear that, after a full consideration of the evidence and argument in the case, and after considering all the briefs filed in the matter, the court

found the legal analysis set forth in defendant's Supplemental Trial Brief Re Lack of Incorporation of CSS General Specifications Into The CSS License Agreement, filed March 20, 2007, and defendant's Brief on Determining the Writing of the Contract, filed March 27, 2007, persuasive. The court does not "adopt" the briefs. Obviously, the court did not exclude any evidence.

3. Whether the CSS General Specifications are CSS Technical Specifications and therefore a part of the Agreement as a matter of law based on Kaleidescape's judicial admission.

The request comes with a history, as the court will explain in detail. The court is of the opinion that the request, the arguments set forth therein, and the brief filed April 2, 2007 [ordered stricken by the court that same day], are very misleading as that word is commonly understood – "to lead into the wrong direction, to lead astray, to lead into error (of judgment); deceive or delude" Business and Professions Code 6068(d) and Rule of Professional Conduct 5 (B) counsel against misleading.

The court is very disappointed. If lead counsel for plaintiff, upon reading the submission referenced above, and upon considering this addendum to statement of decision, is of the same opinion, the court would greatly appreciate receiving a letter from counsel, copy to defendant's counsel, acknowledging that fact. The court makes this suggestion and request because of the great respect it had for all counsel in this matter. The court accords great weight, based upon experience with counsel at trial, to the presumption that counsel would never intentionally mislead the court away from a proper analysis and judgment in this or any other matter. Such a letter would be in accord with that presumption.

The court has reviewed trial notes and transcripts, all exhibits, and all trial briefs. The court finds that the first reference to plaintiff's request for admission 26 and the response thereto, was put forth in the brief filed April 2, 2007 [hereafter "stricken brief"], which was presented for filing four days after counsel submitted the matter for decision and the court rendered its oral proposed statement of decision. After the court announced its proposed statement of decision, the court took a recess so that the team of trial counsel could confer and confer with counsel. The court announced that it would resume the bench in order to respond to any request to cure any ambiguity or omission. After the recess, the court inquired, "Is there anything else you require?" Lead counsel for plaintiff responded, "Not at this moment, your honor." The court gave a further opportunity to respond to any request. There being none, court adjourned.

Plaintiff's April 2, 2007 filing was stricken for obvious reasons, some of which were stated in the order. It was, in essence, an ex parte communication. The fact that it was served on the opposing counsel, does not alter that fact. No advance notice was given to counsel. It invited the court to consider reopening the case with no opportunity for

opposing counsel to be heard. It did not relate to any pending motion or hearing date. It was stricken, because it was not filed in accordance with law.

The stricken brief does not expressly admit the obvious – that there had been no reference at any time before or during the trial, or at any time until after the matter was submitted and decided, to a purported request for admission and response. The documents, to this day, have not been submitted to the court in the manner provided for in law.

The stricken brief, at page 5:1-5, states: "It should be noted that DVD CCA does not seek to reopen the case to consider additional evidence. As noted above, California law is clear that the admission made by Kaleidescape 'need not (and should not) be offered as evidence,' Valerio, 103 Cal. App. 4th at 1271, because it is a judicial admission and not evidence.'"

Not one word on the cited page refers to requests for admissions and the responses thereto. Quoting from the page, as plaintiff did at page 4 of the stricken brief, "the admission of fact in a *pleading* is a 'judicial admission.' And again, from the cited page, "The law on this topic is well settled by venerable authority. Because an admission in the *pleading* forbids the consideration of contrary evidence, any discussion of such evidence is irrelevant and immaterial. [Citation omitted]. When a trial is had by the Court without a jury, a fact admitted by the pleadings should be treated as "found." ... [Emphasis in italics added].

The stricken brief, at the place cited, contains circular reasoning, or reasoning that begs the question. It sets forth a black letter rule not connected to any fact in the case. That is because answers to requests for admissions are not pleadings. CCP 420 provides, "The pleadings are the formal allegations by the parties of their respective claims and defenses for the judgment of the case." CCP 422.10 provides, "The pleadings allowed in civil actions are complaints, demurrers, answers, and cross complaints." No other pleading are permitted. Chamberlain v. Loewenthal (1902) 138 C. 47, 49. Kaleidescape's answer to plaintiff's complaint, filed on June 1, 2005, in addition to setting forth affirmative defenses, states, at page 1, lines 103, "General Denial. Defendant Kaleidescape, Inc. ('Kaleidescape') denies each and every allegation of plaintiff' DVD Copy Control Association's ('DVD CCA') Complaint."

This misdirection, plus more, as described, evokes the haunting words of Marvin Gaye's 1971 Motown hit, "What's Going On/What's Happening Brother."

The court will now turn to a consideration of the papers as they relate to the use of requests for admissions. Plaintiff simply refers to a purported request for admission and a purported response thereto. Purported copies of those documents, dates in November and December, 2006, are attached to the stricken brief. In combination, the stricken brief and plaintiff's request for statement of decision, advance the bold proposition that, "The law is clear that a trial judge has no discretion to disregard a party's admission." Why is this proposition advanced in this way? Why does plaintiff omit and fail to deal with facts and

law relevant to its argument? Since a statement of decision sets the stage for appellate review, one can infer the answer. This way of proceeding is a shortcut which does not advance the interests of justice, or, in the court's opinion, advance the interests of the plaintiff.

Plaintiff makes no mention of the fact and the law that, "Discovered matter is subject to all the usual rules of evidence." California Judges Benchbook, Civil Proceedings, Trial (1997) section 5.56 – Introduction of Discovered Matter. As substantive evidence at trial, an adverse party's responses to requests for admission may be read into the record against that party. If an admission conclusively establishes a fact, any contrary evidence is inadmissible. This objection can be anticipated and resolved in advance. These issues can often be addressed through utilization of motions in limine. Civil Proceedings, sections 6.48, 6.49.

It is true that a party may move to reopen a case to introduce additional evidence, and this can be done anytime before judgment. As noted above, however, plaintiff has made it clear that plaintiff "does not seek to reopen the case to consider additional evidence." Stricken brief, page 4: 1-2. There may be good reasons for this decision, which, in order to maintain a true record for any appellate review, the court will recite.

Sometime during the trial day of March 27, 2007, plaintiff filed a document entitled, "Plaintiff DVD Copy Control Association, Inc.'s Trial Brief Re Liability and Equitable Remedies." Upon reviewing the document, counsel for Kaleidescape, on the morning of Wednesday, March 28, 2007, asked for a chambers conference. All four members of plaintiff's trial team, and, as the court recalls, the three counsel for defendant were invited in to chambers, and all attended the conference. The court and counsel were in close proximity, each was in a position to hear the other. When the court addressed a comment to counsel, each responded appropriately, as if they had heard what the court stated.

Defense counsel objected that plaintiff's brief asserted a third breach of contract, at page 9:20 through page 10: line 16, which ran contrary to lead counsel's express representations in opening statement. The court entered into an exchange with counsel. Points were made which would have been placed on the record had any counsel so requested. Instead, lead counsel for plaintiff elected to withdraw the assertion. Accordingly, minutes later, upon confirmation of the withdrawal on the record in open court, the court endorsed in the margin on page 9, "The claim and contention set forth at paragraph 3, page 9 line 20 through page 10 line 16 was formally withdrawn by William Sloan Coats, counsel for plaintiff, in open court, in the presence of the parties and counsel, on the morning of Wednesday, March 28, 2007, all as shown in the record and as taken down by the court reporter."

During the chambers conference, and in forecasting arguments that plaintiff's counsel might have made had he elected to proceed on record, lead counsel initially stated he wanted to assert this third breach of contract, because he had first learned at trial that defense counsel took the position that the general specifications were not part of the

contract. The court responded that surprises can happen, and that trial counsel usually use discovery tools, such as, but not limited to, fact and contention interrogatories, to avoid surprise. The court made clear that plaintiff was free to ask leave to amend his complaint or claim if he chose to do so. As stated above, counsel elected, instead, to withdraw the claim.

A similar decision had been made by defense counsel, after conference on the first day of trial. Counsel elected not to proceed with a motion to augment his expert witness designation. Instead, defense counsel elected to proceed without the desired expert witnesses.

The plaintiff's trial counsel who subscribed the purported request for admission 26 was present in chambers when the conference occurred on the morning of March 28, 2007. These background facts are relevant for a number of reasons. Plaintiff had an opportunity to move to reopen the case to present further evidence. Instead, as noted above, plaintiff elected to forego that opportunity. Although the court would have had discretion to reopen the case to receive further evidence, had plaintiff decided to advance such a motion, such a motion must be supported by a showing of good cause and due diligence.

The court has no idea what plaintiff would have put forth had it made such a motion. Would counsel have stated that the request for admission answers were newly discovered? It appears unlikely since the purported answers were allegedly executed on December 29, 2007, and there is no suggestion that they were not served on plaintiff's counsel at about that time. Would plaintiff's counsel have asserted that the failure to make any reference to the purportedly relevant request for admission and the response thereto during trial was a result of mistake, inadvertence, surprise, or excusable neglect? Perhaps that is unlikely in light of the colloquy at the March 28, 2007 chambers conference. The court might have required declarations under penalty of perjury from each member of plaintiff' trial team on any issue presented on a motion to reopen.

Without more, it appears possible that the failure to use the request for admission and response thereto is the result of a strategic decision or because there was nothing in the request and answer that was helpful to plaintiff. Absent more, and plaintiff elected not to submit more, it would appear that plaintiff has waived any right or claim to present evidence in the form of a request for admission and response thereto, and that, under the circumstances, it should be estopped to argue any request related to a purported request for admission and response for any purpose.

If plaintiff had moved to reopen, and if the court had indulged every inference in favor of granting relief based, for example, on a claim of excusable neglect, then the court would have been presented with the issue – what to do with the purported request and admission. Code of Civil Procedure section 2033.410 (a) provides: "Any matter admitted in response to a request for admission is conclusively established against the party making the admission in the pending action, unless the court has permitted withdrawal or amendment of that admission under Section 2033.300." Section 2033.300 provides: (a) A party may withdraw or amend an admission made in response to a request for admission

only on leave of court granted after notice to all parties." (b) The court may permit withdrawal or amendment of an admission only if it determines that the admission was the result of mistake, inadvertence, or excusable neglect, and that the party who obtained the admission will not be substantially prejudiced in maintaining that party's action or defense on the merits."

If the court had been called upon, which he has not, to grant relief to plaintiff, would it not be called upon equally to grant relief to defendant, especially since it appears that the whole case was presented by both sides as one which called for the presentation of evidence so that the court could properly interpret and construe the contract? In light of the whole record before the court, it appears likely that any reference, post trial and post determination, to pretrial discovery, is merely an afterthought.

Assuming, arguendo, that a request had been made to reopen, that the request had been granted, that the court had denied defense counsel's request to withdraw or amend a purported admission, and the court considered such admission, the court would have had to perform another task. The court would have heard argument as to whether the purported admission was subject to interpretation, and, if so, how the court should interpret the purported admission – based on a consideration of all that had been presented at trial. These arguments and hypotheses become highly attenuated, of course, because plaintiff never undertook to reopen – indeed, plaintiff made it clear that it was not doing so.

If the court had been called upon to exercise its discretion to consider the purported request for admission and response, its ruling would have been subject to review for abuse of discretion. One of the essential attributes of abuse of discretion is that it must clearly appear to effect injustice. The court would have considered all arguments, had then been made, but it is difficult to contemplate an injustice in considering all the evidence as distinguished counsel chose to present it, urging voluntary resolution by the parties, and, upon being informed that a decision was required, deciding the case.

Many parts of the statement were accepted without objection. Those include the court's determination that, even if the general specifications were part of the contract, the provisions of the general specifications were not definite or clear enough to be place obligations on defendant or to be enforced; that the claimed damage was hypothetical, contingent, academic, and not clearly established – certainly not to the degree to support equitable relief requested by plaintiff; that is was not necessary to rule on defendant's copyright defenses or to determine whether copyright law was applicable – that it was sufficient to decide, as a matter of state law, that nothing defendant did, as shown by the evidence, was unfair. In sum, the court accepted this case as a breach of contract case as urged by plaintiff' counsel, received all the evidence put forth, considered it carefully, and determined that plaintiff did not carry its burden of proof on the substantial controverted issues at trial. Likewise, the court heard full argument on cross-complainant's offer of proof and granted DVD CCA's motion for nonsuit on Kaleidescape's cross-complaint.

This has been an extended presentation, because the court is of the opinion, as expressed, that the post determination submission by defendant, would have had the effect, unless corrected, of giving a false and misleading impression of what happened at trial. By suggesting a desired remedy [reopening] while at the same time eschewing that same relief, defendant appeared to try to have its cake and eat it, too. The court is used to having its determinations reviewed, here heavily fact and evidence based considerations usually deferred to by appellate courts, but it expects any review to be based on the true record. The court is encouraged that, subject to the right of the trial court, to grant relief for default, relief never sought here, the doctrines of waiver, estoppel, and invited error are said to alive and well in reviewing courts.

The court understands that the post trial submissions are executed by trial associates. The court respects each attorney for the parties. The court renews the invitation to lead counsel to review the papers, and, if it agrees with the court concerning its criticisms of these presentations, an acknowledgment would be graciously and respectfully received. If lead counsel does not agree with this criticism, no response is requested or desired. In any event, if the parties will not come to agreement, they may of course press ahead with litigation in this or any reviewing court.

April 13, 2007

Leslie C. Nichols

LESLIE C. NICHOLS
JUDGE OF THE SUPERIOR COURT