Motions, Pleadings and Filings

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United States District Court,
D. Maryland, Southern Division.
Robin M. SALMON and Keith Solomon, Plaintiffs,
v.
CABLE & WIRELESS USA, INC., Defendant.
No. Civ.A. AW-01-394.

Filed Feb. 9, 2001.
Terminated March 18, 2003.
Last filing March 18, 2003.

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Steven W. Ray, Ray and Isler PC, Vienna, VA, Lead Attorney, Attorney to be Noticed, representing Cable & Wireless USA, Inc., (Defendant).

Eric Steele, Davis and Steele, Washington, DC, Lead Attorney, Attorney to be Noticed, representing Keith Solomon, (Plaintiff).

ORDER

WILLIAMS, J.

***1** For the reasons stated in the accompanying Memorandum Opinion, dated March *18th*, 2003, IT IS this *18th* day of March, 2003, in the United States District Court for the District of Maryland ORDERED THAT:

1. Defendant's Motion for Summary Judgment [36-1] BE, and the same hereby IS, GRANTED;
2. That the Case BE, and the same hereby IS, CLOSED;
3. The Clerk of the Court transmit copies of the Memorandum Opinion and Order to all counsel of record.

MEMORANDUM OPINION

Pending before the Court is Defendant Cable & Wireless USA, Inc.'s Motion for Summary Judgment [36-1]. The Motion and Oppositions to the Motion have been fully briefed and are now ripe for review. The Court has reviewed the pleadings and the applicable law and has determined that no hearing is deemed necessary. *See* D. Md. R. 105(6). For the reasons stated below, the Court will GRANT Defendant's Motion for Summary Judgment and will CLOSE this case.

FACTUAL BACKGROUND

Plaintiffs Robin M. Salmon and R. Keith Solomon ("Plaintiffs") are former employees of Defendant Cable and Wireless USA, Inc., ("Defendant"). Defendant is a telecommunications service company that provides business with worldwide voice, data and Internet access. Robin Salmon worked as a Major Account Manager I, serving as an account representative from June 14, 1999 until her resignation on June 8, 2000. Ms. Salmon's duties included new and existing customer sales. Keith Solomon worked as a district sales manager from June 14, 1999 until his resignation on May 19, 2000. Mr. Solomon was responsible for overseeing the account representatives assigned to the Rockville, Maryland office. In addition to their salaries, Plaintiffs were eligible for commissions and bonuses per the company compensation plans.

The dispute in this case arises out of a purported sale of Internet services that Ms. Salmon made to IBM, an existing customer. The sale involved an OC-3 circuit, which provides access to a large amount of Internet connectivity. Pursuant to this sale, Defendant's marketing department informed Ms. Salmon that she could offer IBM the standard 5% term discount on a two-year agreement, or for valued customers, up to 25% on a one year term, 30% off a two-year term, and 35% off a three-year term. Ms. Salmon subsequently offered IBM a 25% discount off Defendant's standard two-year term. Consistent with its standard pricing and discounts applicable to OC-3 circuits, Defendant billed IBM the minimum monthly charge of $40,500. IBM, however, refused to pay, asserting that Ms. Salmon had represented that it would pay only $8,000 monthly. After accruing

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$569,483.87 in unpaid fees from IBM, Defendant disconnected the IBM account and did not pay bonuses on the IBM account.

Plaintiffs filed a Complaint alleging that Defendant engaged in unlawful race discrimination and breached its compensation and bonus plan by withholding commissions and bonuses due under the plan. Specifically, Plaintiffs alleged that Defendant breached its compensation plan by failing to pay commissions on the IBM sale and discriminated against them on the basis of their race. In their Second Amended Complaint, Plaintiffs alleged (1) breach of contract; (2) Montgomery County Human Relations Act--disparate treatment; (3) Civil Rights Act of 1866--disparate treatment; and (4) Title VII of the Civil Rights Act of 1964--disparate treatment. Defendants filed a Motion for Summary Judgment on all claims in Plaintiffs Second Amended Complaint. In footnote two of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment, Plaintiffs moved to dismiss all claims against Defendant, stating "The plaintiffs hereby move to dismiss their race discrimination claims and their remaining contract claims." Also, in their Opposition, Plaintiffs add a new claim for breach of "Plaintiffs' Third Party Beneficiary Rights." In their Reply to Plaintiff's Opposition, Defendants contend that Plaintiffs' Opposition is untimely and that Plaintiffs cannot establish that they are intended beneficiaries of any contract between IBM and Defendant. [FN1] The Court shall include additional facts in the discussion.

FN1. The Court denied Defendant's Motion to strike Plaintiffs' Opposition.

STANDARD OF REVIEW

***2** Under Rule 56 of the Federal Rules of Civil Procedure, courts grant summary judgment when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. *See* *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d. 202 (1986); *Haavistola v. Community Fire Co. of Rising Sun, Inc.,* 6 F.3d 211, 214 (4th Cir.1993). The court must "draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded a particular evidence." *Masson v. New Yorker Magazine,* 501 U.S. 496, 520, 111 S.Ct. 2419(1991) (citation omitted).

Even though the evidence of the of the non-moving party is to be believed and all justifiable inferences drawn in his favor, a party cannot create a genuine dispute of material fact through mere speculation or compilation of inferences. *See* *Deans v. CSX Transportation, Inc.,* 152 F.3d 326, 330-31 (4th Cir.1998); *Runnebaum v. Nationsbank of Md., N.A.,* 123 F.3d 156, 164 (4th Cir.1997); *Beale v. Hardy,* 769 F.2d 213, 214 (4th Cir.1985). Accordingly, the claimant must proffer sufficient proof, in the form of admissible evidence to carry the burden at trial. *See* *Celotex Corp., v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Mitchell v. Data General Corp.,* 12 F.3d 1310, 1316 (4th Cir.1993). In the absence of contradictory evidence showing a genuine dispute as to material fact, the moving party is entitled to judgment as a matter of law. *See* *Celotex Corp. v. Catrett,* 477 U.S. at 324.

For the purposes of summary judgment, a genuine dispute exists if a reasonable jury could return a verdict for the nonmoving party. *See* *Liberty Lobby,* 477 U.S. at 248. While the nonmoving party must do more than merely raise some doubt as to the existence of a material fact, the moving party ultimately bears the burden of demonstrating the absence of all genuine issues of material fact. *See* *Celotex Corp.,* 477 U.S. at 324; *Matatsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587-88 (1986). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action." ' *Celotex Corp.,* 477 U.S. at 327 (quoting Fed.R.Civ.P. 1).

ANALYSIS

Upon dismissal of all the Title VII and Human Rights Act discrimination claims, Plaintiffs' sole claim against Defendant is an action for breach of contract. Specifically, in their Opposition to Defendant's Motion for Summary Judgment, Plaintiffs allege for the first time that Defendant violated the Plaintiffs' third party beneficiary rights by unilaterally breaching its contract with IBM.

As mentioned above, Plaintiffs have raised for the first time the third party beneficiary theory in their Opposition to Defendant's dispositive motion for summary judgment. Defendant opposes this Court's consideration of that theory because it is absent from the amended complaint. Because Plaintiffs may not amend their complaint in their Opposition to Defendant's Motion for Summary Judgment, *see* *Shanahan v. City of Chicago,* 82 F.3d 776, 781 (7th Cir.1996), it must be determined whether Plaintiffs

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must move to amend their complaint before a claim for unjust enrichment may be maintained. *See* Nat'l Fed'n of the Blind. Inc. v. Loompanics Enters., Inc., 936 F.Supp.1232, 1243 (D.Md.2002) (permitting plaintiff to raise theory of contributory infringement in its opposition to defendant's motion to dismiss because the defendant suffered no unfair prejudice); *Elmore v. Corcoran,* 913 F.2d 170, 173 (4th Cir.1990)(district court erred in deciding a case "on an issue that was not pleaded, briefed, argued, or factually substantiated in a purposeful way by the litigants, nor impliedly admitted into the pleadings by consenting defendants").

*3 Under Federal Rule of Civil Procedure 8(a), a claim must, at a minimum, contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). Such a statement is sufficient if it "give[s] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957). The focus of the notice afforded the defendant is on the factual, not the legal, basis of the plaintiff's claim. Notice of the underlying facts is sufficient if the complaint sets forth the circumstances, occurrences, and events which, if proven, would entitle the claimant to the relief sought. *See Gilbane Bldg. Co. v. Federal Reserve Bank of Richmond,* 80 F.3d 895, 900 (4th Cir.1996). Where unfair prejudice would result, a claimant is not deemed to be "entitled" to the relief. *See Albemarle Paper Co. v. Moody,* 422 U.S. 405, 424, 95 S.Ct. 2362, 2374-75, 45 L.Ed.2d 280 (1975).

In the instant case, Defendant has had an opportunity to respond to the merits Plaintiffs' third party beneficiary theory in its reply memoranda. "Admittedly, this single opportunity does not match the two opportunities it would have had if [Plaintiffs] had raised the theory in [their] initial complaint ..." *Loompanics Enters.,* 936 F.Supp. at 1243. Moreover, Defendant has advanced arguments on the merits and has not argued that it would be unfairly prejudiced. *See Loompanics Enters.,* 936 F.Supp. at 1244. For these reasons, Plaintiffs need not move to amend its complaint to specifically state a claim for unjust enrichment, and the Court now addresses directly Plaintiffs' third party beneficiary theory. Plaintiffs allege that they are third party beneficiaries because (1) they negotiated the contract with IBM on behalf of the defendant and (2) defendant reasonably expected that plaintiffs would inure substantial commissions from the IBM contract pursuant to the commission plans. Defendant, on the other hand, contends that (1) the contract was intended to benefit both Defendant and IBM, and (2) the fact that a third party salesperson would be incidentally benefitted by eligibility for sales commissions does not entitle that salesperson to third party beneficiary remedies.

"Ordinarily, 'a third party beneficiary contract arises when two parties enter into an agreement with the intent to confer a direct benefit on a third party, allowing the third party to sue on the contract despite the lack of privity." ' *Holzman v. Blum,* 125 Md.App. 602, 726 A.2d 818, 829 (Md.App.1999) (quoting *Flaherty v. Weinberg,* 303 Md. 116, 492 A.2d 618 (Md.1985)); *see also Merrick v. Mercantile-Safe Deposit & Trust Co.,* 855 F.2d 1095, 1100 (4th Cir.1988); *Lumpkins v. United States,* 212 F.Supp.2d 464, 469 (D.Md.2002); *Century Bank v. Makkar,* 132 Md.App. 84, 751 A.2d 1, 6 (Md.App.2000). [FN2] To establish the existence of the requisite duty under this theory, the non-party plaintiff must show that a party actually intended to benefit him, and that the promisee's intent to confer upon him this benefit "was a direct purpose of the transaction or relationship." *Flaherty,* 303 Md. at 130-31. *See also Merrick,* 855 F.2d at 1100; *Marlboro Shirt Co. v. American District Telegraph Co.,* 196 Md. 565, 569, 77 A.2d 776 (1951) ("It must clearly appear that the parties intended to recognize him as the primary party in interest and as privy to the promise. An incidental beneficiary acquires by virtue of the promise no right against the promisor or the promisee."). [FN3]

FN2. While it is not essential to the creation of a right in the third-party beneficiary that he be identified when a contract is made, in order for him to recover on that contract "it must clearly appear that the parties intended to recognize him as the primary party in interest and as privy to the promise." *Marlboro Shirt Co ., Inc. v. American Dist. Tel. Co.,* 196 Md. 565, 77 A.2d 776, 777 (1951); 2 Williston on Contracts, § § 378 at pp. 954-56 (3rd ed.1959).

FN3. *See also E.B. Harper & Co., Inc. v. Nortek, Inc.,* 104 F.3d 913, 920 n. 4 (7th Cir.1997); *see also Timmis v. Sulzer Intermedics, Inc.,* 157 F.Supp.2d 775, 777-78 (E.D.Mich.2001) (stating that a commissioned sales representative is not a third party beneficiary to a sales contract); *In re Merry-Go-Round Enters., Inc.,* 218 B.R.361, 366 (D.Md.1998) (noting that a real estate broker is not a third party beneficiary to a trust agreement).

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*4 Here, Plaintiffs argue that they are third party beneficiaries because they are specifically named in the purchase order and letter of intent. Defendant counters that Plaintiffs are not mentioned in the body of the purchase nor in the letter of intent. In fact, Plaintiffs are merely mentioned in the named documents as contacts for Defendant. Defendant argues further that Plaintiffs' rights to remuneration for the IBM sale did not arise in any way from the documents and that Plaintiffs' compensation plans superseded all other oral or written compensation agreements. *See Rotter v. Cambex Corp.,* 1994 U.S. Dist. LEXIS 1780 (N.D.Ill.1994). Defendant maintains that Plaintiffs are merely incidental beneficiaries to the contract between Defendant and IBM. An incidental beneficiary acquires by virtue of the promise no right against the promisor or the promisee. *See* Merrick, 855 F.2d at 1100.

"In order to recover it is essential that the beneficiary shall be the real promisee; i.e. that the promise shall be made to him in fact, though not in form. It is not enough that the contract may operate to his benefit. It must clearly appear that the parties intend to recognize him as the primary party in interest and as privy to the promise." *Marlboro Shirt Co.,* 196 Md. at 569; *see also* *Hamilton v. Board of Education,* 233 Md. 196, 199-200, 195 A.2d 710 (1963). Other than their bare conclusory assertions and self-serving "declaration of material facts in genuine dispute," Plaintiffs fail to allege any facts that would establish that they were an intended third party beneficiary to the contract between Defendant and IBM. There is no indication in the contract between Defendant and IBM that Plaintiffs were an intended beneficiary of the agreement. Plaintiffs have failed to set forth any evidence that it was intended as a third party beneficiary of any agreement between Defendant and IBM. *See Lumpkins,* 212 F.Supp. at 469. An examination of the contract reveals only an agreement between Defendant and IBM for "Direct Connect Internet Services." Pl.Ex. 3. There is no suggestion anywhere that the parties intended their agreement to confer a benefit on Plaintiffs. *See id.* at 469.

Even if this Court accepts that Plaintiffs might have derived some benefit from the agreement, Plaintiffs were at most incidental beneficiaries. *See Makkar,* 132 Md. at 93. Since Plaintiffs have set forth no legal or factual basis for their claim under a third party beneficiary status, the Court will grant Defendant's Motion for Summary Judgment.

CONCLUSION

For all of the reasons stated above, the Court will grant Defendant's Motion for Summary Judgment [36-1]. An Order consistent with this Opinion will follow.

Not Reported in F.Supp.2d, 2003 WL 1730413 (D.Md.)

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- 8:01cv00394 (Docket) (Feb. 09, 2001)

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