
**STATE OF NEW YORK
COURT OF APPEALS**

CHARLES E. COLLINS III,

Plaintiff-Appellant,

-against-

Motion No. 2013-546

YODLE, INC., SCOTT LONG, and BRAD LEITCH,

Defendants-Respondents.

**DEFENDENTS-RESPONDENTS' BRIEF IN OPPOSITION TO
PLAINTIFF-APPELLANT'S MOTION FOR LEAVE TO APPEAL**

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PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted on behalf of Defendants-Respondents Yodle, Inc., Scott Long, and Brad Leitch (collectively “Yodle”) in opposition to Plaintiff-Appellant’s (“Appellant”) motion for leave to appeal to the Court of Appeals from the Order of the Appellate Division, Third Department, unanimously affirming the judgments of the Supreme Court, Rensselaer County, denying Appellant’s motion to compel discovery and dismissing his Complaint against Respondents in its entirety. *See* Appellant’s Supporting Affidavit (“App. Aff.”), Ex. 1.

Contrary to Appellant’s contentions, this case does not merit review by the Court of Appeals. *See* 22 N.Y.C.R.R. § 500.22(b)(4). The Appellate Division’s decision does not raise a novel issue, or one of statewide public importance, or present a conflict with a prior decision of this Court, or another Department of the Appellate Division. Rather, the Appellate Division’s decision is consistent with well-established precedents of this Court, and will have no application beyond the parties to this case. Accordingly, Appellant’s motion for leave to appeal should be denied.

STATEMENT OF FACTS

On April 8, 2012, Appellant, who is a seasoned and accomplished *pro se* litigator (R. 334c-334at), entered into a contract with Yodle whereby Appellant agreed to pay Yodle a monthly Management Fee and a monthly Advertising Budget Fee for a period of three months in consideration of Yodle’s setting up and designing an internet advertising campaign for Appellant’s divorce preparation business (R. 225-229).¹ The Contract authorized Yodle to create a mirror image of Appellant’s website, albeit with a slightly different telephone number and email address, in order to track the calls and emails generated by Yodle’s internet advertising campaign and distinguish

¹ References to the Appellate Division record shall hereinafter be R. ____.

those from calls and emails generated by Appellant's own marketing efforts. It also provided, among other provisions, that (1) the monthly fees "are automatically charged, in advance, and are not refundable," (2) that "Yodle's maximum liability arising out of or relating to the agreement, whether the cause of action arises in contract, tort, or otherwise, shall not exceed the amounts paid by Customer to Yodle," and (3) that "any balance remaining in the advertising budget at the end of the month will be rolled-over to the next month" (R. 225-228). Less than three weeks after the parties entered into the Contract – and after Yodle spent time and resources creating Appellant's advertising campaign – Appellant sought via email to cancel the Contract, allegedly, due to unanticipated automobile expenses (R. 47).

Yodle, as was its right, refused to accept Appellant's unilateral attempt to cancel the Contract, and continued to perform all of its obligations under the Contract up until Appellant obtained a temporary restraining order from Supreme Court, signed by Justice Hummel ordering Yodle to stop advertising on behalf of Appellant (R. 34-35). Throughout the duration of the Contract, Appellant had paid Yodle a total of \$1,638, consisting of the separate Management Fee and Advertising Budget Fee for the months of May and June, 2010 (R. 198-199, 339-347). Of the \$1,500 Appellant had paid to Yodle in monthly Advertising Budget Fees, Yodle had debited \$474.31 from Appellant's Advertising Budget account, and had rolled-over Budget Account balances from May, to June, to July, resulting in a balance of \$1,025.70, which continued to remain in Appellant's Advertising Budget account (R. 199, 339-347).

Toward the end of the three-month term, Appellant brought this frivolous *pro se* action against Yodle vaguely alleging claims sounding in breach of contract, fraud, violations of the anti-racketeering law and various criminal and consumer protection laws (R. 34-44). In his Complaint, Appellant also alleged that Yodle's advertising campaign amounted to a "scam" (R. 36, 43).

Although he failed to establish any potential damages other than the \$1,638 in contractual fees he paid to Yodle, Appellant twice refused Yodle's offer of a full refund of the \$1,638, and instead repeatedly insisted that Yodle pay him a lump sum payment of \$5,000,000 and a lifetime annuity of \$78,000 to make his lawsuit go away (R. 34-44, 334-a).

While the parties were engaged in discovery, and after Yodle had already responded in good faith to Appellant's first set of discovery demands, Appellant moved for an order compelling Respondents to respond to his discovery requests. Respondents opposed Appellant's motion to compel, and cross-moved for summary judgment dismissing Appellant's Complaint in its entirety, for an order striking Appellant's second set of discovery demands, and for sanctions.

DECISION BELOW

In Decisions and Orders, dated September 14, 2011 and February 2, 2012, respectively, the Supreme Court denied Appellant's motion to compel discovery, and granted Respondents' cross-motion and subsequent motion for summary judgment dismissing Appellant's Complaint in its entirety (6-22, 27-29). The Appellate Division unanimously affirmed the judgments of the Supreme Court in a Memorandum and Order entered on April 11, 2013. *See App. Aff., Ex. 1.*

First, the Appellate Division upheld the Supreme Court's decision to dismiss the action against Respondents Brad Leitch and Scott Long for lack of personal jurisdiction because their limited contact with Appellant did not amount to a "purposeful invocation of the privileges of conducting business" in New York. *See id.* at 2. Next, the Appellate Division determined that the Supreme Court properly exercised its discretion in denying Appellant's motion to compel discovery because Appellant had failed to establish that the Respondents' responses to the first set of interrogatories were insufficient, or that the second set of interrogatories sought "material and necessary" information. *See id.* at 3.

With respect to the merits, the Appellate Division agreed with the Supreme Court that Respondents satisfied their burden of establishing a prima facie entitlement to summary judgment, and that Appellant's opposition to the motion consisted of nothing more than conclusory, unsupported allegations. *See id.* Because Appellant failed to demonstrate the existence of a triable issue of fact, the Appellate Division properly affirmed the Supreme Court's decision to grant summary judgment and to dismiss in its entirety Appellant's Complaint against Respondents.

Finally, the Appellate Division determined that Appellant's argument that he did not consent to the terms and conditions of the Contract was made for the first time on appeal, and therefore was not properly before the court. *See id.* at 3 n.2.

STANDARD OF REVIEW

The Court of Appeal's powers of review upon a motion for leave to appeal are limited. The Court "shall review questions of law only." N.Y. C.P.L.R. § 5501(b). Leave to appeal should be granted only in limited circumstances, such as when "the issues are novel or of public importance, present a conflict with prior decisions of [the Court of Appeals], or involve a conflict among departments of the Appellate Division." 22 N.Y.C.R.R. § 550.22(b)(4). *See also* N.Y. Const. Art. VI § 3(6) (permissive appeals should be allowed only when required "in the interest of substantial justice").

ARGUMENT

APPELLANT PRESENTS NO ISSUE WARRANTING REVIEW BY THIS COURT

Contrary to Appellant's contentions, the Appellate Division correctly affirmed the Supreme Court's decision to grant Respondents' cross-motion and subsequent motion for summary judgment dismissing Appellant's Complaint in its entirety. Consistent with well-established precedent, the

Appellate Division determined that Respondents satisfied their burden of establishing a prima facie entitlement to summary judgment on Appellant's claims, and that Appellant failed to submit any admissible evidence to sufficiently rebut that showing. None of the issues determined in the Appellate Division's decision are novel or of public importance, or present a conflict with a prior decision of this Court or any other Department of the Appellate Division. Rather, this case only involves ordinary contract and tort issues – which the lower courts decided in accordance with well-settled law. Thus, in light of the absence of any reason to grant the motion for leave, Appellant's motion should be denied.

A. Dismissal of Appellant's Breach of Contract Claim

As set forth in the Appellate Division's decision, Respondents established that Appellant agreed to the terms and conditions set forth in the Contract. *See* App. Aff., Ex. 1 at 3. Under those terms and conditions, Yodle was authorized to create a mirror image of Appellant's website (with a slightly different telephone number and email address) in order to track the calls and emails generated by Yodle's internet advertising campaign and to distinguish those from calls and emails generated by Appellant's own advertising. Yodle was also authorized to charge Appellant's credit card, in advance, for the agreed upon amounts for the duration of the Contract.² *Id.* Respondents also established that Appellant was not entitled to recover for breach of contract because Respondents fully performed all of their obligations under the Contract, while Appellant failed to fulfill his obligations. Appellant did not offer any evidence – beyond conclusory, unsupported allegations – to create a genuine issue of material fact with respect to his breach of contract claim.

² The Appellate Division rejected Appellant's claim that he did not consent to the terms and conditions of the Contract, as it was raised for the first time on appeal and was not properly before the court. *See* App. Aff., Ex. 1 at 3 n.2.

Moreover, many of his unsupported allegations were directly contradicted by the factual evidence in the record. Based on a review of the evidence in the record and the application of well-settled precedent, the Appellate Division correctly upheld the Supreme Court's decision to grant summary judgment in favor of Respondents on Appellant's breach of contract claim. *See App. Aff.*, Ex. 1 at 1-3.

Summary judgment was also warranted because Appellant failed to establish the element of damages. *Lexington 360 Assoc. v. First Union Nat'l Bank of North Carolina*, 234 A.D.2d 187, 189 (1st Dept. 1996). In its Decision and Order, dated September 14, 2011, the Supreme Court determined that, even assuming there had been a breach of contract by Respondents (without making any such finding), "the best position plaintiff could have been in was the same position he was in prior to being contacted by Yodle or paying any money to Yodle" (R. 21). Thus, the Supreme Court expressly limited any potential recovery by Appellant on the breach of contract claim to \$1,638 – the amount of money he paid to Yodle.³ Thereafter, Appellant withdrew the demand in his Complaint for a full refund of the money he paid to Yodle (R. 667). Due to Appellant's withdrawal of the only damages he could recover on his breach of contract claim, including nominal damages, the Supreme Court correctly dismissed that claim, holding that Appellant "waived his right to the limited damages he could recover, [and] there are no damages remaining to his claim" (R. 28).

B. Dismissal of Appellant's Fraud Claim

Respondents were entitled to summary judgment on Appellant's cause of action for fraud because Appellant did not establish, or even allege, that Respondents violated a legal duty

³ Aside from the fact that Appellant failed to establish damages above and beyond what he paid to Yodle, he explicitly waived any right to recover any damages emanating from the Contract. The limitation of liability clause contained in the Contract is fully enforceable and binding on Appellant. *Rector v. Calamus Grp., Inc.*, 17 A.D.3d 960 (3d Dept. 2005).

independent of the Contract. See *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 389 (1987) (“It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated.”). Appellant alleged that Yodle failed to increase his number of Clicks, failed to reduce his costs per Click, failed to spend his entire advertising budget on Clicks, and failed to charge him no more per Click than the search engines were charging Yodle (R. 280-281). Each of these allegations, however, is merely a restatement of the obligations Appellant claims Yodle allegedly agreed to perform under the Contract. Moreover, the damages Appellant allegedly suffered as a result of Respondents’ alleged fraudulent conduct and breach of contract are identical. Thus, Appellant’s fraud claim was simply a dressed up breach of contract claim.

Even assuming Appellant’s fraud claim was not subsumed into his breach of contract claim, Appellant did not establish that Respondents made any misrepresentations of material fact, or that he relied upon any of Respondents’ purported misrepresentations. The transcripts of Respondent Leitch’s telephone conversations with Appellant unequivocally demonstrate that Appellant clearly understood and acknowledged that: (1) he would be paying Yodle a fixed monthly Management Fee and a fixed monthly Advertising Budget Fee in exchange for Yodle’s designing and undertaking a three-month internet advertising campaign for his business, and (2) Yodle would track his emails, record his telephone calls, and operate a mirror image of his website so that it could evaluate the quality of Clicks he was receiving and distinguish the Clicks generated by Yodle from those generated by Appellant’s own advertising (R. 19-21). The telephone transcripts further demonstrate that Yodle never represented that it would: (1) lower his cost per click, (2) spend his entire advertising budget each month, or (3) charge him whatever the search engines charged Yodle for his advertising (R. 187-189, 245, 249-250). Moreover, Appellant admittedly decided to cancel the

Contract allegedly due to a change in personal circumstances, and not because of any purported failure by Yodle to provide services as promised (R. 47). Without presenting any probative evidence to contradict the telephone transcripts, Appellant has failed to create an issue of material fact with respect to his claim for fraud.

C. Dismissal of Appellant's Non-Contract Causes of Action

Appellant asserted claims against Respondents for purported violations of the anti-racketeering law, the Penal Law, and various consumer protection laws.⁴ As the Supreme Court correctly concluded, Appellant did not provide any factual support for the vague and conclusory allegations underlying those claims.⁵ In addition, the telephone transcripts establish that Appellant was aware of and agreed to let Respondents track his emails, record his telephone calls from potential clients, and operate a mirror image of his website. Moreover, even if he had established a legitimate factual basis to support the criminal and consumer fraud causes of action, Appellant failed to show that he was entitled to pursue any of them, either on behalf of himself or members of the public, against Respondents.

D. Dismissal of Respondents Leitch and Long for Lack of Personal Jurisdiction

Brad Leitch, a North Carolina resident, and Scott Long, an Arizona resident, were correctly

⁴ Appellant argued for the first time on appeal that Respondents also violated General Business Law § 349. Because he failed to raise it at the trial court, it was clearly beyond the scope of the appeal. In addition, New York courts have held that a private contract dispute does not fall within the ambit of the statute. *Ammirato v. Duraclean Intern., Inc.*, 687 F. Supp. 2d 210, 221 (E.D.N.Y. 2010).

⁵ Similarly, in his instant Motion, Appellant asserts a spurious claim of conspiracy and cover up among Yodle's attorney, Justice Hummel, and the Appellate Division Judges based solely on the decisions not having been in his favor.

dismissed for lack of personal jurisdiction. All of the communications between Long and Appellant were made by Long from Arizona via e-mail or telephone, and consisted of sending three e-mails and leaving two voicemail messages. Similarly, all of Leitch's contacts with Appellant took place while he was in his North Carolina office, and his sales negotiations with Appellant consisted of three telephone conversations and three emails. Under the circumstances, this limited contact with Appellant was insufficient to subject either Long or Leitch to the jurisdiction of New York courts. *See Executive Life Ld. v. Silverman*, 68 A.D.3d 715, 717 (2d Dept. 2009).

E. Denial of Appellant's Motion to Compel Discovery

The decision below on Appellant's motion to compel discovery was discretionary and therefore it is not subject to review by the Court of Appeals. *See Walker Memorial Baptist Church v. Saunders*, 285 N.Y. 462 (1941) (stating that discretionary decisions are not appealable to the Court of Appeals). Nonetheless, as the Appellate Division correctly concluded, the Supreme Court did not abuse its discretion in denying Appellant's motion to compel discovery. Appellant failed to establish that Respondents did not meet their discovery obligations with respect to the first set or second set of interrogatories, or that the information sought in the second set of discovery demands was "material and necessary" for the prosecution of the lawsuit. Moreover, Appellant did not demonstrate that he made the required good faith effort to resolve the discovery dispute prior to making the motion.

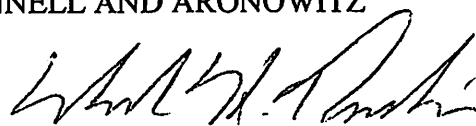
CONCLUSION

Based on the foregoing, Appellant's motion for leave to appeal to the Court of Appeals should be denied.

DATED: May 23, 2013

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