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IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CIVIL DIVISION

UNIFUND PORTFOLIO A, LLC, et al.	:	Case No. A-0405897
Plaintiffs	:	(Judge Myers)
vs.	:	
ACCOUNT MANAGEMENT SERVICES, LLC, et al.	:	***DECISION***
	:	
Defendants	:	

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Defendants are seeking to enforce a Settlement Agreement entered into between the parties. Plaintiff is also seeking to enforce the Agreement, or in the alternative, to reform it. These motions turn on specific language in the Agreement and its interpretation. Defendant claims that the language is clear and unambiguous. Plaintiff claims it is not.

First, a little background. This case involves an underlying dispute between two companies who buy, sell and collect delinquent and defaulted credit card accounts receivable. This case involves conveyance of receivables from Unifund to AMS under 29 A/R Agreements.

The parties agreed to settle this case and entered into a Settlement Agreement. Pursuant to this detailed, 29 page Agreement (excluding signature pages). AMS agreed to pay Unifund $750,000 for certain receivables under Expired A/R Agreements. AMS also. agreed to purchase additional receivables under Unexpired A/R Agreements. These were sold to AMS for $3,720,000, payable in monthly installments.

As security for AMS' payment obligations under the Agreement, Unifund was granted a security interest in the Receivables under the Unexpired A/R Agreements until all installment payments were made by AMS. Under Paragraph 5(g) of the Agreement, AMS also was required on a monthly basis to provide Unifund with Account Information and Litigation Information, and an Escrow Agent with Collector's Notes, for the Receivables under the Unexpired A/R Agreements. This information was to be provided so that if AMS defaulted on its payment obligations and Unifund repossessed the Receivables, Unifund could use this information to collect the Receivables for its own benefit.

As additional security for AMS' payment obligations under the Agreement, on April 25, 2005, a Consent Judgment was filed against AMS in the amount of $3,720,000. All payments made by AMS under the Agreement counted toward the satisfaction of the agreed Consent Judgment. Execution of the Consent Judgment was stayed so long as AMS complied with its payment and reporting obligations set forth above.

The Agreement provided two mechanisms under which AMS could reduce or pay off the $3,720,000, in addition to making monthly installment payments. First, Paragraph 5(f) provided that AMS could sell any of the Receivables under the Unexpired A/R Agreements to third parties, so long as the sale price was at least three cents for each remaining dollar of remaining principal on the Receivables to be sold. If that happened, Unifund would receive 50% of all funds that AMS received from the third parties for the sale of the Receivables, which would be applied to reduce the $3,720,000 balance that AMS owed under the Agreement.

Second, Paragraph 5(f) of the Agreement provided that AMS could offer to sell to Unifund any of the Receivables under the Unexpired A/R Agreements, so long as the offered

Receivable was a "Qualifying Receivable." If, at the time of offer, the Receivable was a "Qualifying Receivable," Unifund was obligated to purchase the Qualifying Receivable from AMS within three business days for three cents per each dollar of remaining principal balance on the Qualifying Receivable. All amounts due AMS for such sales would then be applied to AMS' outstanding payment obligations under the Agreement.

The dispute in this case revolves around the meaning of "qualifying receivable." That term is defined in ¶5(f) as follows:

> A Receivable is a Qualifying Receivable if, subject to this Agreement, AMS controls the Receivable and has the legal right to transfer it to Unifund, if there is no pending or threatened suit, action, arbitration, bankruptcy proceeding, or other legal proceeding which could adversely affect the Receivable or AMS' or Unifund's interest therein, if no pending bankruptcy petition has been filed by or against the obligor(s) to the Receivable, if the Receivable has not been paid off in full, if an obligor of the Receivable is still alive, ***and if AMS has complied with federal, state, and local law applicable to the Receivable.*** (Emphasis added)

The Agreement further provides that "[U]nder no circumstances shall Unifund be required to purchase any Receivable which is not a Qualifying Receivable."

The issue in this case is whether the tendered receivables are "qualifying." More specifically, are those "OOS" – out of statute" receivables – qualifying. Among the receivables tendered by AMS in this case were 34,000 "out of statute" receivables. OOS means that the statute of limitations has expired and a lawsuit may not be instituted or threatened on them. While they may still be collected, a creditor may not threaten or institute suit. In some states, there are even further restrictions.

Unifund claims that OOS receivables are not qualifying because with respect to them, AMS has not "complied with federal, state, and local law." Unifund claims that by letting the statute run without filing suit, AMS has not complied with the law.

AMS, however, claims that it is in full compliance with the law, and that the Agreement is clear and unambiguous on its face. Therefore, it argues, Unifund must purchase these tendered receivables. Unifund argues that if it is required to do so, the effect will be that it compromised a $2.5 million claim for tens of thousands of dollars. AMS argues that this is the clear language of the Agreement.

As stated above, the narrow issue before the Court is whether out of statute receivables are receivables as to which AMS failed to comply with federal, state and local law applicable to those receivables. The Court finds that the language of the Agreement is clear and unambiguous and must be enforced as written. The Court therefore cannot consider parole evidence. The Court recognizes that the ultimate result may be a harsh result for Unifund, but the language is clear. Further, AMS is entitled to the benefit of its bargain.

AMS has complied with the law relating to these receivables. It has violated no statutes. Unifund argues AMS has not complied with the law because it failed to institute suit. However, there is no legal requirement for a creditor to institute suit to collect a debt. Thus, AMS has violated no law by failing to do so.

Unifund argues that the language not only prohibits AMS from violating the law, but also requires compliance with the law. The Court agrees, but does not agree with Unifund's argument that this places upon AMS a duty to file suit before the statute of limitations lapsed.

Unifund also argues that AMS had a duty to protect its security and that by failing to file suit, AMS failed to do so. While this may be true as a general proposition of law, it does not change the fact that the language of the Agreement is clear and unambiguous.

Unifund further argues that parol evidence may be admitted to introduce evidence of industry custom. However, even under the authority cited by Unifund, this is true only when a contract is ambiguous. Because the Court finds the language clear on its face, evidence of custom and usage may not be admitted.

Finally, Unifund argues that its obligation should be voided because of a unilateral mistake. Where one party makes a unilateral mistake at the time a contract is made as to a basic assumption on which he or she made the contract, and that mistake has a material effect on the agreed exchange of performance that is adverse to the party, the contract is voidable by that party if he or she does not bear the risk, of the mistake and: (a) the effect of the mistake is such that enforcement of the contract would be unconscionable; or (b) the other party had reason to know of the mistake or his or her fault caused the mistake. Southern Ohio Medical Center v. Trinidad (4 Dist. 2003), No. 03CA2870, 2003 Ohio App. LEXIS 3925, at 15. A party bears the risk of the mistake if: (1) the mistake was allocated to it by agreement; (2) it possessed more than limited information at the time of formation; and (3) it would be reasonable to bear the mistake under the circumstances. Id.

The Court finds that Unifund cannot establish the first requirement: that it did not bear the risk of mistake. Thus, while it may be able to prove the other elements, its argument still fails.

As to the other disputed receivables, (i.e. the 2,231 admittedly not qualified) the Court finds that Unifund is not obligated to purchase these.

Therefore, the Court grants AMS' motion to enforce the Agreement regarding the sale of the disputed OOS accounts receivable. As to the remaining admittedly non-qualifying receivables, the motion is denied. Unifund's cross motion is denied. AMS' request for attorney fees is denied.

The parties are referred to Local Rule 17 for preparation of an entry.

Judge Beth A. Myers

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