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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
SUCV2015-02833-BLS2

Notice sent
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B. S. P.
P.S. D., LLP.
P. J. D.
P. R.

JOSHUA S. ZUCKERT,
Plaintiff

vs.

FRAEN MECHATRONICS LLC, FRAEN CORPORATION, FRAEN MACHINING CORPORATION, FRAEN MACHINING SRL HOLDING CORPORATION, FRAEN REAL ESTATE CORPORATION, FRAEN SRL HOLDING CORPORATION, & SK PATENTS LLC,
Defendants

(sc)

MEMORANDUM OF DECISION AND ORDER
ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Joshua S. Zuckert filed this action against defendant Fraen Corporation (Fraen) and related entities alleging breach of two agreements that concern a patent for a “rotary single-phase electromagnetic actuator,” a torque motor used in automobiles. Zuckert’s Complaint asserts the following claims: violation of G.L. c. 93A (Count I), fraud and deceit (Count II), breach of contract (Count III), breach of the implied covenant of good faith and fair dealing (Count IV), fraudulent misrepresentation (Count V), fraudulent concealment (Count VI), and misrepresentation (Count VII). On October 28, 2015, this Court denied defendants’ Motion to Dismiss for failure to state a claim upon which relief may be granted, although this judge did view the Complaint as “decidedly thin.” With discovery closed, the case is now before this Court on the defendants’ Motion for Summary Judgment. After careful review of the summary judgment record, this Court concludes that the plaintiff has no reasonable expectation of proving his claims, so that summary judgment in defendants’ favor is appropriate.

BACKGROUND

The summary judgment record contains the following undisputed facts. Fraen, a Massachusetts corporation, manufactures electric motor and optical systems for the automotive industry. Zuckert, a mechanical engineer, was the holder of a patent for a torque motor used in automobiles. Zuckert approached Fraen about marketing such devices. In 2012, the parties entered into two agreements: a patent purchase agreement (PPA) and a sales representative agreement (SRA). The defendants' performance under these agreements is what is at issue in this lawsuit.

Under the PPA, Zuckert assigned all rights, title, and ownership interest to the patent rights for the torque motor to Fraen's subsidiary, defendant SK Patents. In return, SK Patents and Fraen agreed to pay Zuckert a royalty of 0.25 percent on net sales of any product covered by the patent and a royalty of 5 percent of any licensing income, up to a total payment of \$500,000. The patent rights transfer was permanent and irrevocable so long as Zuckert received at least \$162,000 in compensation under the SRA by December 15, 2013. Paragraph 7 of the PPA expressly contemplated assignments, with no limitation on SK Patent's ability to make such an assignment. The PPA also contains an integration clause. ¶10 of PPA.

Under the SRA, Zuckert agreed to act as Fraen's sales representative and to market the torque motor in a "worldwide territory." Zuckert was required, among other things, to use his best efforts to sell the torque motor, to generate customer contacts, to forward orders promptly, and to submit sales reports. ¶3 of SRA. In return, Fraen agreed to make monthly payments to Zuckert of \$9,000 over twenty four months regardless of whether any sales were made, and to make additional payments in the event that Zuckert sold torque motors. ¶5(g) of SRA. Fraen would also pay Zuckert's travel expenses and provide literature and samples concerning the

products upon request. ¶4 of SRA. The SRA did not by its terms require Fraen to produce torque motors on a volume basis before any sales were made. Like the PPA, the SRA contained an integration clause and placed no limitation on Fraen in assigning its rights. ¶10 and ¶16 of SRA.

In May 2013, Fraen transferred its electric motor business assets to another entity, defendant Fraen Mechatronics, which also received the torque motor patent rights as a result of an assignment. As outlined in the affidavit of Fraen Mechatronics CEO John P. Lambert, Fraen had invested approximately \$700,000 in the torque motor project before that assignment; since then, it has independently raised an additional \$1 million in investments. Lambert's affidavit also states that Fraen Mechatronics has produced multiple A-sample prototypes of the torque motor, successfully prosecuted the patent, developed a worldwide supply chain, conducted lifetime performance testing, and completed thermal shock, mechanical shock, and vibration testing. The defendants assumed all patent prosecution expenses, which has totaled more than \$80,000. Zuckert has offered no evidence to contradict these assertions or even to call them into question indirectly based on any other evidence in the summary judgment record.

By December 15, 2013, Fraen and Fraen Mechatronics paid Zuckert \$171,000 under the PPA and SRA. In 2014, Fraen Mechatronics paid Zuckert an additional \$44,303.23 under the SRA. During this time period, the only orders that the defendants received from Zuckert involved just six test motors. Fraen Mechatronics never received payment for the six test motors, but if it had, Zuckert would have received less than \$40 in commission and royalty payments in connection with that transaction.

In January 2015, Zuckert sent the defendants e-mails alleging a breach of the PPA. He demanded \$500,000 in damages and return of the torque motor intellectual property. The

following month, Zuckert sent the defendants a 93A letter making the same demands.¹

Although defendants denied that they owe Zuckert any money, they did not dispute (nor do they now dispute) Zuckert's right to receive royalty payments up to \$500,000 in the event the torque motor project generates sales. Such sales have not materialized, however.

DISCUSSION

In support of their motion, the defendants argue that the plaintiff has no reasonable expectation of proving the elements of any of his claims. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 711 (1991); see also Miller v. Mooney, 431 Mass. 57, 60 (2000). This Court agrees. Zuckert's contract claims fail based on the clear and unambiguous terms of the PPA and SRA and the undeniable performance by the defendants of their contractual obligations. In particular, the defendants have made all required payments to Zuckert (more than enough to extinguish the patent reversion rights set forth in the PPA), and as to royalties, none are due, since there have been no torque motor sales. Regarding the assignment of the patent to Fraen Mechatronics, that is clearly permitted by the contracts. Although the Complaint had alleged that the assignment to Fraen Mechatronics was a "sham" intended to deprive the plaintiff of the use and sale of the patent, there is no support for that in the summary judgment record. Rather, the evidence shows that Fraen Mechatronics is a genuine entity that has made significant investment in the torque motor project. There is likewise no evidence to substantiate the Complaint's allegation that Fraen intentionally and willfully slowed the development of the torque motor business so as to deprive Zuckert of the fruits of the bargain. Indeed, Lambert's uncontradicted affidavit shows quite the contrary. In short, plaintiff has no reasonable

¹ This was actually the second 93A letter Zuckert sent to the defendants. The first was in March 2013; however, the parties resolved their disputes over the issues raised in that first letter without having to resort to litigation.

expectation of proving his contract-based claims or of showing that the defendants conducted themselves in bad faith or in violation of Chapter 93A.

In opposition to the defendants' motion, Zuckert argues first that it is premature. More than a year has gone by since this lawsuit was filed, however, and although the defendants have produced many documents voluntarily, Zuckert himself has conducted no discovery. Moreover, he has not filed a proper affidavit under Mass. R. Civ. P. 56(f) to support his assertion that, if he were allowed to conduct discovery, it would assist in resolving the issues before the Court. See Aronson v. Commonwealth, 401 Mass. 244, 255 (1987); See also First Nat'l Bank v. Slade, 379 Mass. 243, 244-245 (1979). In opposing the Motion, Zuckert has submitted his own affidavit. But taking that affidavit at face value, this Court concludes that it is still not enough to raise a triable issue.

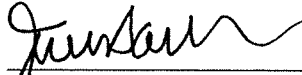
Zuckert alleges that the "spirit of the deal" was that Fraen would make volume quantities of the torque motor and have a factory available for its large scale production, and that Fraen's failure to do this amounted to a breach of contract and a breach of the covenant of good faith and fair dealing. Nothing in the PPA and the SRA, however, required Fraen to have a factory producing large quantities of the torque motors before any sales were made; rather, Fraen was required only to provide samples of the product. Zuckert also contends that Fraen "fraudulently misrepresented an intention to establish, develop and operate a torque motor production business" and that Zuckert reasonably relied on those representations. Promises regarding future performance are generally not actionable fraud, however, nor is it enough to rely simply on plaintiff's hopes or expectations: he must identify specific statements of fact made by the defendants which were demonstrably false at the time they were made. Zuckert has failed to do that, leaving only the language of the contracts themselves. As the defendants state in their

Memorandum in support of the Motion, plaintiff may not invent non-existent obligations and impose his own subjective intent as to the meaning of plain and unambiguous contractual language absent some additional evidence of fraudulent conduct by the defendants. Such evidence is entirely lacking here.

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CONCLUSION AND ORDER

For all of the foregoing reasons and for other reasons set forth in the defendants' Memoranda, their Motion for Summary Judgment is **ALLOWED**, and it is **ORDERED** that the Complaint be **DISMISSED**, with prejudice.



Janet L. Sanders
Justice of the Superior Court

Dated: October 12, 2016