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Seller of GEORGE FOREMAN marks down for the count on breach of contract Ownership changes claims

United States - McDermott Will & Emery LLP

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In *Perlmutter v Russell Hobbs Inc* (Case 10-4121, September 13 2011), a breach of contract dispute over the sale of GEORGE FOREMAN marks, the US Court of Appeals for the Third Circuit, in a non-precedential decision, has ruled against the plaintiff, concluding that no breach of contract took place and that all remaining claims were waived.

Sam Perlmutter, a Los Angeles attorney, introduced former heavyweight boxing champion George Foreman to the opportunity to endorse a kitchen appliance that later was branded as the 'George Foreman Lean Mean Fat-Reducing Grilling Machine'. Commonly known as the 'George Foreman Grill', more than 100 million of the indoor grills have been sold worldwide. Perlmutter entered into a contract with defendant Salton Inc to sell certain GEORGE FOREMAN trademarks and associated goodwill to Salton. Salton agreed to pay Perlmutter \$5.5 million in four instalments of \$1,375,000. Salton made the first three payments but defaulted on the fourth. The parties then amended their agreement to permit Salton to make the fourth payment in shares of stock. Section 3(a) of the amendment specified that the shares would not originally be registered under the Securities Act of 1933 and could not be sold until registration took place. Section 3(d) of the amendment further provided that, if Perlmutter was unable to sell the shares for the full amount due him, Salton would make another payment in cash or stock to equal the difference.

Upon selling the issued shares, Perlmutter was left with a shortfall of \$1,012,563.71. Salton then issued additional shares that equalled in value the shortfall amount. These shares, however, were also unregistered, and thus could not immediately be sold. Perlmutter asked Salton to register the shares, and it agreed to do so, but failed to follow through on this promise; as a result, upon selling these shares, Perlmutter was again left with a shortfall.

Perlmutter subsequently brought claims against Salton for breach of contract, breach of the implied covenant of good faith and fair dealing, and negligent misrepresentation. Perlmutter contended that Salton had breached their agreements by paying the shortfall amount in restricted shares and failing to end the stock restrictions as promised. Perlmutter also sought to amend his complaint to cure a number of unspecified defaults. Ultimately, the district court dismissed Perlmutter's breach of contract claims because it found that the payment of the shortfall amount in restricted shares was not a breach, because it was expressly authorised by Section 3(a) of the amendment. Further, the district court denied Perlmutter's request to amend his complaint.

The Third Circuit affirmed the district court's holding that the payment of the shortfall amount in restricted shares was not a breach, as it was expressly authorised by the parties' amendment. The court refused to consider Salton's argument that Section 3(d) of the agreement, which required Salton to compensate Perlmutter for any devaluation of the shares as a result of the restriction, also applied to the shortfall shares, finding that Perlmutter had waived the argument by failing to raise it in district court. The court also disposed of Perlmutter's claim concerning Salton's failure to timely register the shortfall shares, finding that it was a "gratuitous promise without consideration" and that any promissory estoppel claim would similarly fail for lack of evidence of reliance on the promise.

Refusing to consider Perlmutter's other claims because he failed to develop them in his opening appellate brief, the court nevertheless went on to state that the breach of covenant claim would have been unsuccessful because the allegedly breaching conduct of using restricted stock was expressly authorised by Section 3(a). The court also upheld the denial of Perlmutter's requests to amend his complaint to cure various defaults because he did not articulate to the trial court any reason why he should be given "another bite at the apple".

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