Hosto v. Intellinet

2000 | Cited 0 times | Court of Appeals of Arkansas | March 22, 2000

NOT DESIGNATED FOR PUBLICATION

AFFIRMED

Appellant Bryan Hosto was a former owner/member of Intellinet, LLC. (Intellinet), an internet service provider. On February 6, 1996, Hosto sold his interest in the company to Intellinet in return for Intellinet's agreement to remove Hosto's name from all instruments of indebtedness, both past, present, and future, and to provide the following services to Hosto and his assigns for five years: a) the use, at no charge, of up to 25 megabytes hard-drive storage on Intellinet's server for storage of web pages; b) links in and to IntelliMall; c) any level of connectivity up to a T1 line; d) three unlimited dial-up accounts. Subsequent to Intellinet's agreement with Hosto, Intellinet was purchased by appellee, Internet Partners of America, LLC. (IPA).

The above-mentioned services continued to be provided to Hosto until July of 1997, at which time some of the services were terminated. By September of 1997, the services that had been provided to Hosto were terminated. When Hosto attempted to restore the services provided to him through its agreement with Intellinet, IPA did not restore the services. As a result, Hosto filed a complaint on October 7, 1997, seeking judgment against IPA and Intellinet for consequential damages, costs, and attorney's fees.

On November 12, 1997, appellee filed a motion to dismiss, asking that Hosto's complaint be dismissed for improper venue and for failure to state a claim upon which relief may be granted. In the alternative, appellee moved for summary judgment. Appellee asserted that IPA purchased only certain assets and assumed only certain liabilities from Intellinet, and that the contractual obligations alleged by Hosto in his complaint were not included in the Asset Purchase and Sale Agreement.

The Asset Purchase and Sale Agreement provided in relevant part:

IntelliNet desires to sell, transfer and convey to IPA all of its right, title and interest in certain assets more particularly described in ¶ 1 hereof.

1. Agreement to Sell and Purchase Certain Assets. On the terms and subject to the conditions herein set forth, IntelliNet hereby agrees as of the date first written above, to sell, transfer, assign and deliver to IPA, and IPA agrees to purchase, acquire and accept all assets of IntelliNet that are owned

by IntelliNet which are necessary for the day-to- day operations of IntelliNet's internet service provider business as it is found on the closing date, more particularly those assets located at its place of business at 523 South Louisiana, The LaFayette Building, Suite 550, Little Rock, Arkansas, the service contracts currently outstanding and existing as more particularly identified in ¶ 12 hereof, along with whatever interest IntelliNet owns in the tradename, "IntelliNet", if any, together with all other assets particularly identified on the Exhibit A, which is attached hereto and incorporated herein by reference (hereinafter collectively referred to as the "Acquired Assets").

2. Purchase Price. The purchase price for the Acquired Assets, payable as hereinafter provided, is Three Hundred Fifty Three Thousand Four Hundred Thirty Six and 88/100's ($353,436.88) Dollars (the "Purchase Price"). The Purchase Price is to be considered a confidential matter between IntelliNet and IPA. The Purchase Price shall be paid as follows:

(a) IPA has delivered to IntelliNet a down payment of Fifty Thousand and No/100's ($50,000.00) Dollars by check of immediately available United States dollars which was deposited into IntelliNet's account, the receipt of which is hereby acknowledged by IntelliNet; (b) the payment and full satisfaction of the notes payable from IntelliNet and/or Kevin H. Lewis to First Commercial Bank, N.A. of Little Rock, Arkansas (hereinafter the "Lienholder") in an amount not exceeding Eighty Five Thousand and No/100's ($85,000.00) Dollars. Said payment shall occur no later than five (5) days subsequent to the Closing Date;

(c) the assumption or payment and full satisfaction of the liabilities involving the four (4) lease agreements described hereinbelow whose aggregate buyout liability does not exceed Eighteen Thousand Four Hundred Thirty Six and 88/100's ($18,436.88) Dollars. This assumption of full payment of these leases shall occur no later than five (5) days subsequent to the Closing Date;

1) #0807532 with Sanwa Leasing Corporation in the amount of Six Thousand Five Hundred Ninety Nine and 41/100's ($6,599.41);

2) #95101936 with Aloha Telecommunications in the amount of Three Thousand Six Hundred Forty Three and 79/100's ($3,643.79);

3) #95031907 with Aloha Telecommunications in the amount of Two Thousand Three Hundred Twenty Five and 60/100's ($2,325.60); and

4) #94090763 with Aloha Telecommunications in the amount of Five Thousand Eight Hundred Sixty Eight and 08/100's ($5,868.08).

(d) On the Closing Date, One Hundred Thousand and No/100's ($100,000.00) Dollars shall be paid to IntelliNet by IPA by cashier's check of immediately available funds; and

(e) a short term note receivable from IPA in the amount of One Hundred Thousand and No/100's ($100,000.00) Dollars which shall be secured by a lien on the Acquired Assets . . . .

3. Delivery of Acquired Assets on Closing Date. On the terms and subject to the conditions set forth in this Agreement, Intellinet shall deliver the Acquired Assets to IPA at Intellinet's offices located at 523 South Louisiana, Suite 550, Little Rock, Arkansas 72201 on the closing date.

5. Closing. On the closing date, Intellinet shall, upon receipt of the purchase price and related documents, deliver or cause to be delivered to IPA the Acquired Assets as listed on the attached Exhibit "A" conveying to IPA good title to the Acquired Assets free and clear from all liens, and claims and encumbrances other than those specifically listed in ¶ 2 hereinabove; and (b) title to and risk of loss or damage to or destruction of the Acquired Assets shall pass from Intellinet to IPA upon delivery of the acquired assets by Intellinet.

12. Assignment. (a) Neither this Agreement nor the rights or obligations hereunder shall be assigned by either party without the prior written consent of the other party; and (b) IPA agrees to assume all obligations and responsibilities and Intellinet agrees to assign all of its right, title and interest in the following Independent operation/reseller agreements between Intellinet and respectively named parties

13. Miscellaneous. This agreement contains the entire understanding between the parties hereto with respect to the subject matter hereof and supersedes all prior oral and written agreements and understandings. The provisions hereof may not be amended, waived, changed, terminated or discharged in any way whatsoever except in writing executed by the party to be charged therewith; . . . . This agreement shall be construed and interpreted under the laws of the State of Arkansas . . . .

IntelliNet, LLC by Kevin Lewis, Member

Internet Partners of America, LLC by Kevin Layman, Member

and

President

In his response to the motions filed by appellee, Hosto contended that venue was proper because the contracts entered into between Intellinet and Hosto and between IPA and Intellinet were executed in Pulaski County. He also conceded that while the Asset Purchase and Sale Agreement evidenced that only assets of Intellinet were purchased by IPA rather than Intellinet being purchased as an on-going entity, there remained a factual question of whether that agreement solely purchased the assets of Intellinet or whether it was a complete consumption of Intellinet as on an ongoing entity. Thereafter, Hosto filed an amended complaint alleging that venue was proper and that all of the allegations in

his original complaint were the same. Intellinet filed an answer to the amended complaint and a cross-claim against IPA. In its answer, Intellinet stated that it dissolved its company on December 31, 1996, and that it sold its assets to IPA on May 1, 1996. Intellinet stated that the services and indemnification agreement between it and Hosto spoke for itself and that Hosto had a financial interest in Intellinet prior to the execution of the services and indemnification agreement. In reference to its cross-claim, Intellinet alleged that when it entered into the Asset Purchase and Sale Agreement with IPA, at least one member of IPA's management personnel, at the time Hosto's cause of action arose, had knowledge of the obligations Intellinet may have had to provide services to Hosto and the manner in which those services were provided. It alleged that IPA was responsible for damages, if any, sustained by Hosto when IPA terminated Hosto's services, and that IPA should indemnify it for any damages found due to Hosto by Intellinet. On February 20, 1998, IPA filed a motion to dismiss Intellinet's cross- claim, or in the alternative, a motion for summary judgment on the cross-claim. In the motions, appellee adopted and incorporated its motion to dismiss, or in the alternative, its motion for summary judgment and Brief in Support filed November 12, 1997.

Intellinet subsequently presented an affidavit of Kevin Lewis, in which Lewis stated that in the purchase of Intellinet, he discussed with IPA that IPA was going to continue to operate business as usual with respect to the day-to-day operation of Intellinet and that Intellinet would be kept as a separate operating unit. Lewis stated that IPA would keep all of the employees of Intellinet and all of Intellinet's existing accounts. Both Hosto and Intellinet presented the oral deposition of David Laser, former general manager of Intellinet, to show that for a continued period of time after the purchase of Intellinet, IPA continued to do business as Intellinet for at least three or four months.

At a hearing held December 9, 1998, on IPA's motion for summary judgment [1] , appellee objected to testimony in Lewis's affidavit and Laser's deposition transcript because such testimony was in violation of the parol evidence rule. It further argued that the Asset Purchase and Sale Agreement contained a merger clause, which established that all prior agreements and understandings were superseded by the Asset Purchase and Sale Agreement.

On April 16, 1999, a judgment was rendered in favor of appellee's motion for summary judgment. The trial court found that the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits submitted, showed that there was no genuine issue of material fact with regard to Hosto's claim against IPA. It found that the evidence submitted by Hosto intended to vary the terms of the written contract entered into by Intellinet and IPA, and that such evidence was violative of the parol evidence rule and inadmissible in that it varied the terms of the written contract between IPA and Intellinet.

Appellant now argues that the trial court erred in granting appellee's motion for summary judgment when there remained genuine issues of material facts.

On review, the appellate court determines if summary judgment was appropriate based on whether

the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. George v. Jefferson Hospital Ass'n, Inc., 337 Ark. 206, 987 S.W.2d 710 (1999). The burden of sustaining a motion for summary judgment is always the responsibility of the moving party. McDonald v. Pettus, 337 Ark. 265, 988 S.W.2d 9 (1999). All proof submitted must be viewed in a light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. Rankin v. City, 337 Ark. 599, 990 S.W.2d 535 (1999).

A corporation which purchases the assets of another corporation does not succeed to the liabilities of the selling corporation except (1) where the transferee assumes the debts and obligations of the transferor by express or implied agreement; (2) where there is a consolidation or merger of the two corporations; (3) where the transaction is fraudulent or lacking in good faith; and (4) where the purchasing corporation is a mere continuation of the selling corporation. Ford Motor Company v. Nuckolls, 320 Ark. 15, 894 S.W.2d 897 (1995).

Appellant argues that the language contained in the Asset Purchase and Sale Agreement stating that IPA agreed to accept "all assets of IntelliNet that are owned by IntelliNet which are necessary for the day- to-day operation of IntelliNet's Internet service provider business," raises a factual question of whether IPA continued Intellinet as an on- going entity. Here, however, the Asset Purchase and Sale agreement is silent in regard to the February 6, 1996, agreement between Intellinet and Hosto and it specifically states that it "contains the entire understanding between the parties hereto with respect to the subject matter hereof and supersedes all prior oral and written agreements and understandings." Therefore, because the Asset Purchase and Sale Agreement clearly sets out the terms of its liabilities and obligations, we find no merit in appellant's argument that the affidavit of Kevin Lewis and the deposition of David Laser establishes that IPA continued to operate Intellinet as an on-going entity. This court has stated that where a contract is plain, unambiguous, and complete in its terms, parol evidence is not admissible to contradict or add to the written contract. See Hagans v. Haines, 64 Ark. App. 158, 984 S.W.2d 41 (1998).

We conclude that the trial court did not err in granting the summary judgment motion in favor of IPA.

Affirmed.

Jennings and Griffen, JJ., agree.

1. Appellee withdrew its motion to dismiss and proceeded only on its motion for summary judgment.