

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES P. DOLLARD IA Part 13  
Justice

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FEDERATION OF THE BANGLADESH  
ASSOCIATIONS OF NORTH AMERICA  
(FOBANA 2000) NEW YORK, INC.

- against -

RADIO CITY ENTERTAINMENT,  
A DIVISION OF MADISON SQUARE  
GARDEN, L.P.

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Index  
Number 20313 2001  
Motion  
Date October 12, 2005  
Motion  
Cal. Number 1

The following papers numbered 1 to 5 read on this motion by defendant Radio City Entertainment, a division of Madison Square Garden, LP, for, inter alia, summary judgment dismissing the complaint against it and on this cross motion by plaintiff Federation of Bangladesh Associations of North America (Fobana 2000) New York, Inc. for an order, inter alia, dismissing the answer of the defendant for failure to make disclosure.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits .....	1-2
Notice of Cross motion - Affidavits- Exhibits....	3
Reply Affidavits .....	4-5

Upon the foregoing papers it is ordered that the motion and the cross motion are denied. (See the accompanying memorandum.)

Dated: December 15, 2005

\_\_\_\_\_  
J.S.C.

MEMORANDUM

SUPREME COURT : QUEENS COUNTY  
IA PART

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FEDERATION OF THE BANGLADESH  
ASSOCIATIONS OF NORTH AMERICA  
(FOBANA 2000) NEW YORK, INC.

INDEX NO. 20313/01

BY: DOLLARD, J.

- against -

DATED: December 15, 2005

RADIO CITY ENTERTAINMENT,  
A DIVISION OF MADISON SQUARE  
GARDEN, L.P.

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X

Defendant Radio City Entertainment, a division of Madison Square Garden, LP, has moved for, inter alia, summary judgment dismissing the complaint against it. Plaintiff Federation of Bangladesh Associations of North America (Fobana 2000) New York, Inc. has cross-moved for an order, inter alia, dismissing the answer of the defendant for failure to make disclosure.

On or about June 19, 2000, plaintiff Federation of Bangladesh Associations of North America (Fobana 2000) New York, Inc. and defendant Madison Square Garden entered into an agreement whereby the former received a license to use a certain area within the premises of the latter for a cultural event. The plaintiff association paid the defendant a license fee of \$60,000 and made an advance payment of \$95,000 to cover the defendant's estimated expenses for furnishing the plaintiff with personnel, services,

equipment, and materials. Paragraph 3 of the license agreement provides in relevant part: "(a) In consideration for the grant of the License and the right to use the Premises \*\*\*, Licensee agrees to pay to Licensor, without demand, the total amount of Sixty Thousand Dollars (\$60,000) \*\*\*. (b) In addition, the Licensee agrees to pay to Licensor the sum of Ninety-five Thousand (\$95,000) Dollars \*\*\* to cover estimated expenses for personnel, services, equipment, and materials furnished by Licensor to Licensee \*\*\*. (c) To the extent that actual expenses for such personnel, services, equipment, and materials \*\*\* are in excess of or less than Ninety-five Thousand Dollars (\$95,000), the payment described in subparagraph 3(b) above shall be adjusted and payment shall be made therefor by Licensee or Licensor \*\*\*." Paragraph 4 of the license agreement provides in relevant part: "Licensee represents and warrants to Licensor that neither Licensee \*\*\* shall derive any revenue, income, compensation or consideration from the Event, from any source or by any means whatsoever, direct or indirect, except ticket sales." Paragraph 11 of a Rider to the License agreement provides in relevant part: "(a) Licensee may not bring or sell alcoholic beverages into the Building. Licensor reserves and retains the sole right to provide at Licensee's expense, any and all catering services for the Event \*\*\*."

The defendant received the right to collect the proceeds of ticket sales to the cultural event held by the plaintiff on the

defendant's premises on September 2 and 3, 2000, but the defendant promised to account for the proceeds. The defendant subsequently orally informed the plaintiff that approximately \$78,000 had been collected in ticket sales. However, the defendant allegedly did not provide the plaintiff with a formal accounting, nor did the defendant surrender the proceeds. Moreover, on or about September 1, 2000, the plaintiff set up food and refreshment areas, but the following day, the defendant forbade the plaintiff from selling food and refreshments, thereby causing a loss of expenses allegedly in excess of \$35,000 and a loss of profits allegedly amounting to around \$100,000. This action ensued.

According to Harold M. Weidenfeld, the defendant's Vice-President for Legal & Business Affairs, "for the instant event, the fees and costs exceeded by \$21,258.41 the ticket sales and any advance payments made by plaintiff on the fees and costs of the event." The defendant alleges that since its fees and expenses exceeded the revenue derived from ticket sales and advance payments by \$21,358.41, pursuant to paragraph 3(c) of the license agreement the plaintiff is obligated to pay this sum. Indeed, the defendant has counterclaimed against the plaintiff for this sum. Moreover, the defendant alleges that paragraph 4 of the license agreement and paragraph 11 of the Rider preclude the plaintiff from claiming damages arising from the defendant's refusal to permit the plaintiff to sell food and refreshments.

On the other hand, Ashraful Hasan, the Chairman of the plaintiff's Cultural Committee, alleges that the plaintiff had held a similar event on the defendant's premises two years earlier in 1998 and had sold food at the prior event. Frank Gleeson, who represented the defendant in its dealings with the plaintiff, expressed his understanding that "the 2000 FOBANA Event would be a repetition of the 1998 event." The plaintiff signed documents presented by Gleeson and soon thereafter paid the \$60,000 license fee and \$95,000 advance on the defendant's expenses. The plaintiff then proceeded to make arrangements with vendors for the provision of Halal food. According to Hasan, "On September 1, 2000, plaintiff \*\*\* brought massive amounts of food obtained from food vendors within the MSG grounds to a location chosen by Mr. Frank Gleeson himself. However, the next day at 11:00 A.M., Mr. Gleeson came back to us with security personnel and stated that his superiors had changed their mind and would not allow us to sell any food within the MSG grounds \*\*\*. [T]he food had to be discarded in toto." Hasan alleges that the plaintiff lost approximately \$130,000 in gross revenue from food sales that it could not make, and he bases the figure on revenues derived from the event held two years earlier. Hasan further alleges that after the event, Gleeson provided him with a preliminary accounting showing that the defendant had incurred expenses of \$96,090, but when the plaintiff subsequently pressed the defendant for revenue derived from ticket

sales, the defendant claimed that its expenses totaled \$171,358. (The court notes that the "Final Settlement" statement dated October 21, 2000 allegedly provided by the defendant actually shows "total service charges" amounting to \$185,489.98.) Hasan also contends that the event generated more in ticket sales than the \$82,000 figure provided by the defendant. He alleges: "According to our calculations, the number of visitors and members who entered the Event far exceeded the number of people who would have paid only \$82,000 in ticket sales."

On August 2, 2001, the plaintiff association began this action by the filing of a summons and a complaint. On July 7, 2004, the plaintiff submitted a motion for an order, inter alia, dismissing the defendant's answer for failure to make disclosure. The court granted the motion to the extent of, inter alia, directing the defendant to appear for a deposition on October 4, 2004. The court also directed the plaintiff to file a note of issue on or before October 22, 2004. On October 12, 2004, the plaintiff filed a note of issue and certificate of readiness.

The plaintiff's cross motion for an order imposing sanctions upon the defendant for failure to comply with discovery demands is denied. The defendant did not show that the plaintiff willfully failed to comply with discovery demands. (See, Board of Managers of Atrium Condominium v West 79th Street Corp., 17 AD3d 108; Mendez v City of New York, 7 AD3d 766.) The defendant

served a response dated September 30, 2004 to the plaintiff's demand for discovery and inspection, and Frank Gleeson, whose deposition the plaintiff allegedly needs, left the defendant's employ before August 30, 2004.

That branch of the defendant's motion which is for summary judgment dismissing the complaint against it is denied. "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact \*\*\*." (Alvarez v Prospect Hospital, 68 NY2d 320, 324.) The defendant successfully carried this burden. The parties agree that the defendant permissibly collected ticket revenue for the plaintiff's event, that the plaintiff made an advance payment of \$95,000, and that the ticket revenues and advance payment of \$95,000 were to be applied toward payment of the defendant's expenses. The parties also agree that pursuant to paragraph 3(c) of their contract a partial refund of the advance payment would be made by the defendant or additional compensation over the advance payment would be paid by the plaintiff depending on whether the defendant's actual expenses exceeded \$95,000. According to Harold M. Weidenfeld, the defendant's Vice-President for Legal & Business Affairs, "for the instant event, the fees and costs exceeded by \$21,258.41 the ticket sales and any advance payments made by plaintiff on the fees and costs of the event."

Moreover, an accounting statement prepared by the defendant dated October 21, 2000 shows total service charges amounting to \$185,489.98, and, if this figure is accurate, paragraph 3(c) of the license agreement would require the plaintiff to make an additional payment on expenses to the defendant. Finally, paragraph 4 of the license agreement and paragraph 11 of the rider prima facie precluded the plaintiff from selling food and refreshments at its cultural event. The burden on this motion then shifted to the plaintiff to produce evidence in admissible form showing that there is an issue of fact which must be tried. (See, Alvarez v Prospect Hospital, supra.) The plaintiff successfully carried this burden. Ashraful Hasan's allegation based on observations of the crowds attending the event that ticket revenues exceeded the amount accounted for by the defendant has created an issue of fact in that regard. The record in this case also shows that there is an issue of fact pertaining to whether the defendant accurately accounted for its expenses. For example, according to Hasan, after the event Frank Gleeson provided him with a preliminary accounting showing that the defendant had incurred expenses of \$96,090, but when the plaintiff subsequently pressed the defendant for revenue derived from ticket sales, the defendant claimed that its expenses totaled \$171,358. (The "final settlement" statement dated October 21, 2000 actually claims "total service charges" amounting to \$185,489.98.) There is also an issue of fact pertaining to whether the actual

agreement of the parties permitted the plaintiff to sell food and refreshments at its cultural event. It is true that paragraph 4 of the license agreement and paragraph 11 of the rider prima facie forbade the plaintiff from generating revenue from the sale of food and refreshments and it is also true that the parol evidence rule "bars admission of any prior or contemporaneous oral agreement that may vary or add to the terms of a fully integrated, written agreement \*\*\*." (Rong Rong Jiang v Tan, 11 AD3d 373.) However, in view of the parties course of conduct, including, inter alia, the defendant's permitting the plaintiff to sell food at the prior event held in 1998, Gleeson's alleged understanding that the 2000 event would be a repetition of the 1998 event, and Gleeson's alleged aid in setting up the refreshment area before informing the plaintiff that his superiors had "changed their mind" about the sale of food, the court cannot determine here whether the license agreement, although a lengthy one, fully and accurately expresses the actual contract made by the parties. Unfortunately, neither side took Gleeson's deposition nor submitted his affidavit. Finally, contrary to the defendant's contention, damages allegedly accruing from the prohibition on the sale of food and refreshments are not too speculative to be recovered. (See, Kenford Co., Inc. v Erie County, 67 NY2d 257.) The plaintiff's demand for damages accruing from lost profits in the amount of \$100,000 is based on its experience at the 1998 event.

The remaining branches of the defendant's motion are denied.

Short form order signed herewith.

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J.S.C.