

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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:
KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP, :
:
Plaintiff, :
:
-against- :
:
DUADE READE and DUANE READE, INC., :
:
Defendants. :
-----X

COMPLAINT

Index No.

16101547

Plaintiff Kasowitz, Benson, Torres & Friedman LLP ("KBTF"), by its undersigned counsel, for its Complaint against Defendants Duane Reade and Duane Reade, Inc., hereby alleges as follows:

PARTIES

1. KBTF is a New York Limited Liability Partnership with its principal place of business in New York, New York.
2. Defendant Duane Reade is a general partnership with its corporate headquarters and principal place of business in New York, New York.
3. Defendant Duane Reade, Inc. is a Delaware corporation with its corporate headquarters and principal place of business in New York, New York. (Duane Reade and Duane Reade, Inc. are referred to together as "Duane Reade").

JURISDICTION AND VENUE

4. This Court has personal jurisdiction over Duane Reade pursuant to CPLR §§ 301 and 302, as Duane Reade is present in the State, transacts business within the State, and the

FILED
FEB. 04. 2010.
COUNTY CLERK'S OFFICE
NEW YORK

agreement that is the subject of this Complaint was negotiated and performed entirely within the State.

5. Venue is proper in this County pursuant to CPLR § 503 because both KBTF and Duane Reade have their principal offices in this County and all of the events giving rise to KBTF's claim occurred in this County.

FACTUAL ALLEGATIONS

Duane Reade's Dispute With Cardtronics

6. Duane Reade is the owner and operator of a chain of retail drug stores in and around New York. As the proprietor of hundreds of stores in the highly-concentrated New York metropolitan area, Duane Reade is able to offer valuable in-store placement rights to operators of automated teller machines ("ATM" machines), who collect a transaction surcharge from customers using the machines.

7. In or around 2006, a dispute arose between Duane Reade and Cardtronics LLP ("Cardtronics"), an operator of ATM machines, concerning Duane Reade's right to share in certain fees under an agreement with Cardtronics regarding the placement of ATM machines in Duane Reade's drug stores (the "ATM Agreement"). In short, Duane Reade contended that Cardtronics was not paying Duane Reade the full amount of fees owed under the ATM Agreement based on a disputed interpretation of the contract.

Duane Reade Engaged KBTF to Handle the Dispute and Negotiated a Success Fee Arrangement

8. Duane Reade engaged KBTF as its legal counsel in connection with the Cardtronics dispute. At Duane Reade's request, KBTF agreed to forego its standard hourly-rate fees in exchange for a modified fee arrangement for its work on the matter (the "Fee

Agreement”). Under the Fee Agreement, KBTF’s legal fee was derived from two components: a flat fee of \$1,000,000 (exclusive of disbursements) to be paid over a period of time; and a “Success Fee” equal to 20% of any value Duane Reade received in the matter in excess of \$4,000,000.

9. The Fee Agreement was documented in various written communications, including a series of emails between a partner of KBTF, Daniel Goldberg, and Duane Reade’s General Counsel, Michelle Bergman, and in numerous invoices sent to and paid by Duane Reade. Goldberg and Bergman had a longstanding relationship as attorney and client, as Bergman had engaged Goldberg on numerous occasions to represent Duane Reade in a variety of matters over a period of years, both while Goldberg was at KBTF and at his previous firm.

10. Pursuant to the Fee Agreement in place, KBTF engaged in legal and business strategy discussions with Duane Reade and provided advice to enable Duane Reade to implement a strategy for success. KBTF also provided a range of legal services to Duane Reade over a period of years in the Cardtronics litigation, including initiating the action, conducting a mediation, settlement negotiations, engaging in motion practice (including a motion to dismiss and summary judgment), discovery, and a successful appeal (the case initially having been dismissed on summary judgment, but then reinstated after KBTF prosecuted a successful appeal).

11. KBTF fully performed its obligations as counsel, and Duane Reade never complained in any way about KBTF’s performance. At all relevant times, KBTF stood ready to perform its obligations under the Fee Agreement, and did so perform.

12. Duane Reade partially performed under the Fee Agreement by paying the flat fee provided for thereunder in ten equal installments of \$100,000.

13. KBTF continued to provide legal and strategic advice and services following Duane Reade's final installment payment in reliance on the prospect of recovering a success fee in the event Duane Reade realized a favorable result from the litigation, as agreed in the Fee Agreement.

Duane Reade Obtains a Favorable Settlement of the Cardtronics Litigation

14. Thanks to the services performed and strategies formulated by and discussed with KBTF, Duane Reade ultimately achieved a successful outcome in the Cardtronics litigation, as discussed below.

15. At one point during the case, the Court ordered the parties to mediation, which the parties conducted in May 2007. KBTF represented Duane Reade at the mediation. Several proposals were discussed and negotiated with Cardtronics during the mediation in an effort to settle the dispute between Duane Reade and Cardtronics. As relevant here, two of them were (i) increasing the surcharge fee to be paid by consumers as a mechanism to increase the fees Duane Reade would realize, and (ii) canceling the ATM Agreement altogether so that Duane Reade could do a deal with another provider, such as JPMorgan Chase ("Chase"). As alleged below, the ultimate settlement reached included both of these terms.

16. After the mediation, in November 2008, Bergman left Duane Reade and no longer was the General Counsel. At that point, a new General Counsel took her place. Shortly thereafter, in or around February 2009, Duane Reade settled the Cardtronics litigation without KBTF's knowledge, despite the fact that KBTF had continuously represented Duane Reade in the matter since its inception.

17. The settlement achieved the stated goals Duane Reade hired KBTF expressly to achieve at the inception of the Cardtronics litigation, including those pursued at the May 2007 mediation. The settlement had several components, but the main concepts, as relevant here, were that (i) Cardtronics would pay Duane Reade cash, (ii) Cardtronics would increase the surcharge fees consumers would pay at the ATM machines, thereby providing Duane Reade with more revenue under the ATM Agreement, (iii) Cardtronics agreed to terminate the ATM Agreement so that Duane Reade could do a more lucrative ATM deal directly with Chase, and (iv) Cardtronics agreed to cooperate and assist Duane Reade in transitioning the ATM business to Chase.

18. Taking into account the cash from Cardtronics, the increased surcharge fees, and the increase in money Duane Reade is receiving from Chase under the Chase ATM deal that replaces the Cardtronics one, as provided for in the Cardtronics settlement, Duane Reade realizes more than \$39,500,000 from the Cardtronics litigation.¹

19. Under the terms of the Fee Agreement, KBTF is entitled to 20% of any such value in excess of the \$4,000,000 threshold provided for in the Fee Agreement. Accordingly, KBTF is entitled to a success fee under the Fee Agreement of no less than \$7,100,000, which represents 20% of the \$35,500,000 in value that exceeds the threshold amount, in addition to 20% of all other revenues obtained by Duane Reade under the Chase deal which KBTF requires further discovery to calculate precisely.

20. Duane Reade has, without basis, refused to honor its contractual obligation to pay the Success Fee. Notably, and as Duane Reade is aware, Bergman, Duane Reade's General

¹ On its face, the Chase ATM agreement provides incremental value to Duane Reade from sources which KBTF can currently quantify, in addition to certain revenues that KBTF requires further discovery to calculate precisely but which are likely to be substantial.

Counsel who negotiated and made the Fee Agreement with KBTF, has attested under oath as to the existence of the Fee Agreement, its terms, and the goals Duane Reade sought to obtain by way of the litigation (which Duane Reade thereafter obtained by way of the Cardtronics settlement).

AS AND FOR A FIRST CAUSE OF ACTION
(BREACH OF CONTRACT)

21. KBTF incorporates paragraphs 1 through 20 of the Complaint as if fully set forth herein.

22. The Fee Agreement is a valid, binding and enforceable contract as between KBTF and Duane Reade, which was documented in various writings between KBTF and Duane Reade.

23. KBTF has performed all of its obligations under the Fee Agreement and is not in breach of any provision thereof.

24. Duane Reade partially performed its obligations under the Fee Agreement by paying the flat fee component of the Fee Agreement to KBTF, and continuing to accept the services provided by KBTF long after Duane Reade paid the flat fee, after which it ceased paying any fees.

25. Duane Reade has breached and/or repudiated the Fee Agreement by failing and refusing to pay the Success Fee that KBTF earned in connection with the settlement of the Cardtronics litigation.

26. As a result of Duane Reade's breach, KBTF has been damaged in an amount to be proven at trial, but which is not less than \$7,100,000.

AS AND FOR A SECOND CAUSE OF ACTION
(QUANTUM MERUIT)

27. KBTF incorporates paragraphs 1 through 26 of the Complaint as if fully set forth herein.

28. KBTF fully performed its obligations to Duane Reade under the Fee Agreement in good faith by conducting the litigation against Cardtronics, as well as providing legal and business advice and strategies related to the Cardtronics litigation and the resolution thereof.

29. Duane Reade accepted those services at all times without protest or complaint and allowed KBTF to continue its performance throughout the Cardtronics litigation, even after Duane Reade stopped paying fees to KBTF on a monthly basis.

30. KBTF expected to be compensated for the services it provided to Duane Reade, as evidenced by the Success Fee contained in the Fee Agreement, which served as an integral part of KBTF's compensation for its representation of Duane Reade in the Cardtronics litigation, particularly considering the risk KBTF agreed to accept by taking the matter on a contingent fee basis.

31. The value of the services provided by KBTF is substantial and will be proven at trial.

AS AND FOR A THIRD CAUSE OF ACTION
(UNJUST ENRICHMENT)

32. KBTF incorporates paragraphs 1 through 31 of the Complaint as if fully set forth herein.

33. Duane Reade received substantial value and enrichment as a result of KBTF conducting the litigation against Cardtronics, including from the legal services and advice KBTF gave in connection with the Cardtronics litigation.

34. The value received by Duane Reade was at the expense of KBTF, who performed many hours of legal work and strategic analysis on Duane Reade's behalf, including litigation, mediation, appellate work, and business advisement.

35. Principles of equity and good conscience require Duane Reade to make restitution to KBTF for its receipt of KBTF's services.

REQUEST FOR RELIEF

WHEREFORE, KBTF demands judgment as follows:

A. On its First Cause of Action: damages in an amount to be determined at trial, but not less than \$7,100,000;

B. On its Second Cause of Action: damages in an amount to be determined at trial, but not less than \$7,100,000;

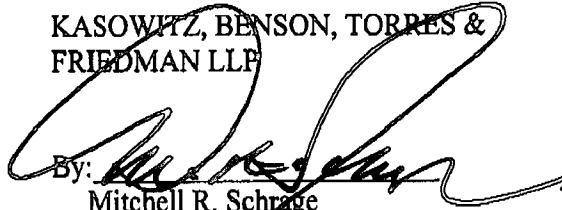
C. On its Third Cause of Action: damages in an amount to be determined at trial, but not less than \$7,100,000;

D. An award of costs and disbursements in prosecuting this action to the extent permitted by law; and

E. Awarding KBTF such other and further relief as this Court deems just and proper.

Dated: New York, New York
February 4, 2010

KASOWITZ, BENSON, TORRES &
FRIEDMAN LLP

By: 

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COUNTY OF NEW YORK

KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP,

Plaintiff,

- against -

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Defendants.

SUMMONS AND COMPLAINT

KASOWITZ, BENSON, TORRES & FRIEDMAN LLP
Attorney(s) for Plaintiff

1633 BROADWAY
NEW YORK, NEW YORK 10019
212-506-1700

Pursuant to 22 NYCRR 130-1.1-a, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, (1) the contentions contained in the annexed document are not frivolous and that (2) if the annexed document is an initiating pleading, (i) the matter was not obtained through illegal conduct, or that if it was, the attorney or other persons responsible for the illegal conduct are not participating in the matter or sharing in any fee earned therefrom and that (ii) if the matter involves potential claims for personal injury or wrongful death, the matter was not obtained in violation of 22 NYCRR 1200.41-a.

Dated: February 4, 2010

Signature 

Print Signer's Name Mitchell R. Schrage

Service of a copy of the within

is hereby admitted.

Dated:

Attorney(s) for

PLEASE TAKE NOTICE

Check Applicable Box

NOTICE OF ENTRY

that the within is a (certified) true copy of a
entered in the office of the clerk of the within-named Court on

20

NOTICE OF SETTLEMENT

that an Order of which the within is a true copy will be presented for settlement to the
Hon. _____, one of the judges of the within-named Court,
at _____
on _____ 20 _____, at _____ M.

Dated: