

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 10-27-11
SUBMITTED: 11-3-11
MOTION NO.: 004-MG; CASE DISP

HABITAT, LTD.,

Plaintiff,

-against-

THE S.A. JACKSON LAW FIRM, P.C.
Attorneys for Plaintiff
70 East 55th Street
New York, New York 10022

**THE ART OF THE MUSE, INC. d/b/a OLY
STUDIO and MECOX GARDENS &
POTTERY, INC.,**

Defendants.

DAVIS & GILBERT LLP
Attorneys for Defendant The Art of the
Muse, Inc. d/b/a Oly Studio
1740 Broadway
New York, New York 10019

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Upon the following papers numbered 1-13 read on this motion for summary judgment ; Notice of Motion and supporting papers 1-11 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 12 ; Replying Affidavits and supporting papers 13 ; it is,

ORDERED that this motion by the defendant The Art of the Muse, Inc., d/b/a Oly Studio, for an order dismissing the complaint is granted.

The plaintiff is a domestic retailer of antique and faux antique furniture in Suffolk County, New York. The plaintiff has operated a retail antique furniture store in Water Mill, New York, for more than ten years and entered the faux antique furniture retail market in 2004. The plaintiff opened a second retail store in Bridgehampton, New York, in 2007.

The defendant Oly Studio (hereinafter "Oly") is a manufacturer and distributor of faux antique furniture. Between 2004 and 2007, the plaintiff and other faux antique furniture dealers in Suffolk County purchased Oly's products. In fact, the plaintiff has dealt almost exclusively with Oly regarding the purchase of faux antique furniture for resale to consumers in Suffolk County.

The plaintiff first began selling Oly's furniture in 2004. The plaintiff ordered \$21,744.54 worth of merchandise from Oly in 2004 and \$18,613.12 worth of merchandise in 2005. The plaintiff alleges that, due to the popularity of Oly's products and relying to its detriment on a promise by Oly to supply it, the plaintiff prepared to open a second store in 2006 exclusively for Oly's products. The plaintiff signed a six-year lease at a total cost of \$500,000 and renovated the space for an additional \$250,000 plus insurance. The plaintiff planned to order \$100,000 worth of Oly products for the new store in Bridgehampton.

In January 2007, the plaintiff placed an order for \$27,670.91 worth of merchandise from Oly for the Bridgehampton store. On January 28, 2007, the plaintiff's president met Oly's director at a trade show and informed him that the plaintiff was opening a new store for Oly's products and would soon be ordering \$100,000 worth of Oly's products to stock it. Oly's director responded that he would have to secure permission from the defendant Mecox Gardens & Pottery, Inc. (hereinafter "Mecox") in order to continue to sell Oly's products to the plaintiff. Mecox is a large retailer of home furnishings with at least seven retail stores nationwide, two of which are located in Suffolk County. Mecox is the plaintiff's largest competitor and one of Oly's largest accounts. It purchases a significant amount of Oly furniture for resale to consumers in Suffolk County. After consulting with Mecox, and before the plaintiff placed another order, Oly advised the plaintiff by a letter dated March 9, 2007, that it was terminating their business relationship effective immediately. As a result, the plaintiff was forced to stop selling faux antique furniture at its retail stores, which caused it to lose a great deal of revenue.

The plaintiff commenced an action against Oly and Mecox in the United States District Court for the Eastern District of New York alleging violations of the Sherman Act (15 USC §§ 1 & 2) and the Donnelly Act (New York General Business Law § 340) and to recover damages for breach of contract, promissory estoppel, and tortious interference with commercial relations. By a memorandum and order dated March 25, 2009, the District Court (Hurley, J.) dismissed the plaintiff's first, second, and third causes of action, which alleged violations of the Sherman Act. The District Court declined to exercise supplemental jurisdiction over the plaintiff's remaining state-law claims and dismissed them without prejudice.

The plaintiff subsequently commenced this action against Oly and Mecox. The complaint contains substantially the same factual allegations as the federal complaint and causes of action for violation of the Donnelly Act, breach of contract, promissory estoppel, and tortious interference with commercial relations. By an order dated December 14, 2009, the defendants' motions to dismiss the complaint were granted to the extent of dismissing all of the causes of action except the second for breach of contract against Oly. Oly now moves for summary judgment dismissing the second cause of action on the ground that it is barred by the statute of frauds.

The plaintiff's breach-of-contract claim is based on a purported oral distributorship agreement. New York law requires that a distribution agreement be embodied in

a written instrument sufficient to satisfy the statute of frauds (**Viewsonic Corp. v Famart Computer, Inc.**, US Dist Ct, SDNY, Mar. 30, 2000, Martin, J [2000 WL 335586], *citing* **United Beer Distrib. Co. v Hiram Walker (N.Y.) Inc.**, 163 AD2d 79). UCC 2-201(1), which requires a signed writing for a contract for the sale of goods of \$500 or more, has been held to apply to distributorship agreements that necessarily involve the purchase of more than \$500 worth of goods (**United Beer Distrib. Co.**, *supra* at 80-81). Thus, in the absence of a signed writing, the plaintiff's breach-of-contract claim must fail.

Plaintiff argues that the merchant's exception to UCC 2-201(1) applies. The merchant's exception (UCC 2-201[2]) provides:

Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

The confirmatory writing upon which the plaintiff relies is a document entitled "Terms & Conditions."

Oly has established, *prima facie*, that it does not have distributorship agreements with any of its customers and that the "Terms & Conditions" upon which the plaintiff relies is not a distributorship agreement, but a sales document that accompanies every order of furniture delivered. The plaintiff has not produced any evidence in opposition thereto. The plaintiff merely argues that a distributorship agreement is implied by the language of the "Terms & Conditions," specifically paragraph 1.b, which reserves to Oly the right to refuse any order.

A distributor is generally defined as a person or legal entity that stands between the manufacturer and the retail seller in purchases, consignments, or contracts for sale (**Amoco Oil co. v D.Z. Enterprises, Inc.**, 607 F Supp 595, 603). The term is synonymous with "wholesaler" or one who buys in large quantity for sale to retailers, not consumers (**Id.**). It is undisputed that the plaintiff purchased furniture from Oly for resale to consumers in its retail shops.

A review of the "Terms & Conditions" supports Oly's interpretation thereof. It makes no reference to the plaintiff's distribution of Oly's products within a particular territory (*see e.g.*, **North Shore Bottling Co. v Schmidt & Sons**, 22 NY2d 171; **Matter of Twentieth Century-Fox Film Corp. v Gerosa**, 9 NY2d 750; **United Beer Distrib. Co. v Hiram Walker (N.Y.) Inc.**, *supra*; **Raygo, Inc. v Credle Equip.**, 40 AD2d 207). In fact, the words "distribute," "distributor," "distributing," "distribution," and the like are not used anywhere therein. The words that are used, words such as "orders," "purchase orders," and "sales programs," do not establish a distributorship agreement, but only a sale of goods (*see*, **United Beer Distrib. Co. v**

Hiram Walker (N.Y.) Inc., *supra* at 81; **United Magazine Co. v Murdoch Magazines Distrib.**, 146 F Supp 2d 385, 405, *affd* 279 Fed Appx 14). The fact that Oly reserved to itself the right to refuse any order, without more, is insufficient to raise a triable issue of fact in opposition to Oly's prima facie case.

The statute of frauds contained in General Obligations Law § 5-701(a)(1) has also been applied to oral distribution agreements (*see*, **North Shore Bottling Co. v Schmidt & Sons**, *supra*; **United Beer Distrib. Co. v Hiram Walker (N.Y.) Inc.**, *supra*. at 81). General Obligations Law § 5-701(a)(1) provides that an agreement, promise, or undertaking is void unless embodied in a writing or writings and signed by the party to be charged if, by its terms, it is not to be performed within one year from the making thereof. The key issue is whether the purported oral distributorship agreement was capable of performance within one year. The plaintiff does not allege that its purported agreement with Oly contained a term certain for its duration, nor does the plaintiff allege that either or both parties, pursuant to the terms of their purported agreement, could discontinue their activities within one year (*see*, **North Shore Bottling Co. v Schmidt & Sons**, *supra*). When, as here, the purported oral agreement is one of indefinite duration and can only be terminated within one year by its breach during that period, it falls within the bar of General Obligations Law § 5-701(a)(1) and is void (*see*, **D & N Boening, Inc. v Kirsch Beverages, Inc.**, 63 NY2d 449, 457; **Zimmer-Masiello, Inc. v Zimmer, Inc.**, 159 AD2d 363, 368).

In the absence of an enforceable contract, UCC 2-309(3), which requires reasonable notification to terminate a contract of indefinite duration, does not apply. Accordingly, the motion is granted.

Finally, the court did not consider the letters from counsel that were received after the return date of the motion in violation of Rule 18 of the Rules of the Commercial Division.

Dated: January 26, 2012

J.S.C.