STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

SHRINK PACKAGING SYSTEMS CORP.,

Plaintiff,

v.

SEOIL INDUSTRIAL, U.S.A., INC.,

Defendant.

DECISION AND ORDER

Index #2007/06606

Defendant, Seoil Industrial U.S.A., Inc., moves pursuant to CPLR 3211(a)(1) and (7) for an order dismissing plaintiff's first, second, and fourth causes of action in the amended complaint. The Amended Complaint was not attached to the original motion papers, but was forwarded to the court separately in connection with screening for assignment to the Commercial Division. This matter previously came before the court in June, 2007 when defendant moved to vacate a default judgment. That motion was granted.

On this motion to dismiss, the court must "accept the facts as alleged in plaintiff's complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Leon v. Martinez, 84 N.Y.2d 87-88 (1994). See also, Nonnon v. City of New York, 9 N.Y.3d 825 (2007). Plaintiff's complaint alleges as follows: defendant, a manufacturer and/or distributor of products such as drinking straws, engaged in

"wrongful and tortious conduct" that caused damage to plaintiff. Plaintiff's Complaint, ¶¶4, 8.

Plaintiff alleges that, on March 29, 1988, the parties herein, or its predecessors, entered into an Agency Agreement that expired by its terms on March 29, 1999. Id. at ¶12. In the Agency Agreement, Seoil Industrial Co., Ltd. (Hereinafter Seoil Korea) granted to plaintiff an exclusive distributorship of various products, including plastic straws, and agreed further that Seoil Korea would not sell those straws to anyone else in the United States. Id. at ¶¶12-13. Under the agreement, however, if a customer sought to purchase the straws directly from Seoil Korea, then plaintiff would be entitled to a 5% commission of the sale price on a FOB/Korea basis. Id. at ¶14. It is further alleged that, after the Agency Agreement expired, the parties continued to engage in business and perform their obligations consistent with the agreement, thus reaffirming it's terms. Id. at ¶15.

On March 24, 1997, Seoil Korea entered into a confidentiality agreement with Kraft/Capri Sun, Inc. to evaluate the possibility of plaintiff providing packaging, including straws, for drinks. Id. at ¶16. By letter dated December 19, 1997, plaintiff notified Seoil Korea that it had negotiated a contract to provide the straws to Kraft/Capri Sun under an attached Exclusive Supply Agreement, and requested Seoil Korea to

countersign for the purpose of guaranteeing plaintiff's performance of it's supply contract with Kraft. Id. at ¶17. Seoil Korea did so.

After the initial terms of the SPS/Kraft supply agreement expired, plaintiff and Kraft/Capri Sun agreed to extend the term of the Exclusive Supply Agreement and to modify the terms. Id. at ¶23. The complaint alleges generally that defendant, Seoil USA, voluntarily performed pursuant to the expired Agency Agreement and the new or extended Exclusive Supply Agreements, benefitted therefrom, and held itself out as bound by, and obligated to, said agreements. Id. at ¶24.

Plaintiff further alleges a breach of the Agency Agreement and the new or extended Exclusive Supply Agreement, in that defendant either has or seeks to sell the straws directly to Kraft and other customers of plaintiff. Id. at ¶25. Moreover, as of February 1, 2007, defendant has refused to sell the straws to or through plaintiff. Id. at ¶26.

The instant motion pertains to the first, second, and fourth causes of action. Plaintiff's first cause of action alleges that defendant breached the Agency Agreement and Exclusive Supply Agreement by refusing to sell the straws to plaintiff and by selling them directly to plaintiff's customers. Id. at ¶29. Plaintiff alleges damages in the amount of $500,000 per year for the duration of the years Kraft is obligated to purchase the

straws from plaintiff. Id. at ¶30. The second cause of action alleges defendant breached the Agency and Exclusive Supply Agreements by selling or attempting to sell the straws directly to persons or entities unknown to plaintiff. Id. at ¶32. On this cause of action, plaintiff alleges damages in the amount of $750,000. Id. at ¶33. Finally, on the fourth cause of action, it is alleged that the Agency Agreement provides for a "sleeping commission" of 5% if a customer purchases goods directly from defendant. Id. at ¶40. Plaintiff alleges that this commission has not been paid and that it is entitled to an accounting and judgment for the sum due. Id. at ¶¶41-42.

Motion to Dismiss: Documentary Evidence

Dismissal is warranted under paragraph 1 of subdivision (a) of CPLR §3211 "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Id. at 88. See also, Goshen v. Mut. Life Ins. Co., 98 N.Y.2d 314, 326 (2002)("motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law"); 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002). "In order to prevail on a motion to dismiss based on documentary evidence pursuant to CPLR §3211(a)(1), the documents relied upon must definitively dispose of plaintiff's claim." Bronxville Knolls,

Inc. v. Webster Town Center Partnership, 221 A.D.2d 248 (1st Dept. 1995). See also, Zuckerwise v. Sorceron, Inc., 289 A.D.2d 114 (1st Dept. 2001).

Defendant alleges that the documentary evidence demonstrates that defendant, Seoil USA, is not a party to the Agency Agreement and, consequently, is not bound by its terms. Defendant is correct in asserting that defendant Seoil USA is not a named party to the Agency Agreement. Defendant is further correct that the Agency Agreement, by its terms, expired in 1999.

Seoil Korea is a party to the Agency Agreement. In order to bind Seoil USA to this agreement, plaintiff offers the following: (1) Exhibit L, email from JT Kim to plaintiff signed "JT Kim SEOIL Industrial Co., Ltd. SEOIL Industrial USA, Inc."; (2) Exhibit O, letter from Jong-In Kim (JT Kim's father) to plaintiff, stating:

> Last spring when I was in Seoil's US operation, I met up with your son, Andy James. Though my son, J T, wanted to supply Kraft directly, I persuaded him and having him making the decision to keep working with your company. I remember that your son also agreed that SPS would walk away from the Kraft business and assist Seoil in the direct supply if no progress were made.

(3) Exhibit V, letter from JT Kim, who runs Seoil's USA operation, on Seoil USA letterhead to plaintiff dated July 10, 2003, discussing the Kraft straw situation; (4) Exhibit W, letter from JT Kim on Seoil USA letterhead to plaintiff dated July 10,

2003, discussing Kraft again and specifically referencing "[i]n the five years of supplying to Kraft, we have worked closely with SPS to establish production requirements and inventory levels for the coming year."

Defendant also alleges that it cannot be deemed in breach of the Exclusive Supply Agreement because it was not a party to that agreement either. The initial Exclusive Supply Agreement, dated 12/02/97, states:

> This contract is a (2) year supply agreement between Kraft, Inc. ("Kraft") and Shrink Packaging Systems International ("Shrink Packaging") for purchase of Capri Sun straws commencing on 1/1/98 and terminating 12/31/99.
>
> * * *
>
> It is the intention of both parties to extend thev current contract through 12/31/00 for Capri Sun Straws . . . commencing on January 1, 00 and continuing through 12/31/00.

Zuckerman Affidavit, Exh.#2. It is not disputed that plaintiff and Kraft extended the term of the Exclusive Supply Agreement in accord with the agreement's terms.

Plaintiff alleges generally that the supply agreement was extended until February 1, 2007, referencing the affidavit of C. Kist, Exhibit C, but Exhibit C only demonstrates a December 2005 supply agreement between plaintiff and Kraft, covering 2006 through 6/30/06, together with individual orders submitted by Kraft to plaintiff after that date, not covered by any extension of the December 2005 supply contract, in August 2006, September

2006, two in October 2006, and two in November 2006. Defendant contends that plaintiff and Kraft extended the agreement through December 31, 2003, but that as of that date it ceased.

While not a party to the Exclusive Supply Agreement, Seoil Korea, in December 1997, did sign a letter agreement acknowledging SPS's Exclusive Supply Agreement with Kraft. That letter agreement, between SPS and Seoil Korea, only incorporated two contracts, consisting of a Seoil Korea product specification sheet referencing "Item Number: IBSF-35135-Y," and a single purchase order between SPS and Kraft (Contract # C003402). The letter agreement recited an agreement by Seoil Korea "to provide the straws required by the terms of the agreement and to otherwise assure SPS is able to perform on the contract." The letter agreement also stated that Seoil Korea was "obligat[ed] to construct a manufacturing plant in the United States," and to indemnify plaintiff for loss or claims resulting from Seoil Korea's failure to supply goods in the time frame agreed upon. The letter agreement, in its subject heading, references a "January 1, 1998 - January 1, 2001" time frame. This accords with the supply contract between SPS and Kraft, attached thereto and quoted above, which provided for a "(2) year supply agreement . . . commencing 1/1/98 and termination 12/31/99," and announced the parties' intention "to extend the current contract through 12/31/00."

In mid-2000, evidently without the benefit of a new agreement or endorsement executed between SPS and Seoil Korea (or Seoil USA for that matter), SPS and Kraft executed another supply contract #002826, which by its terms "supercede[d] Contract C003402." The new superceder contract, again between SPS and Kraft only, stated that it was "a (3) year supply agreement between Kraft, Inc. ('Kraft') and Shrink Packaging Systems International . . . commencing 1/1/98 and terminating 12/31/03." Significantly, the superceder agreement emphasized at the top: "THIS CONTRACT IS DATE-DRIVEN AND WILL EXPIRE WHEN DATE IS REACHED." The signature of the buyer is dated 8/29/00.

The record does not reveal what contracts between SPS and Kraft were executed to cover the 2004 to 2005 time frame, but in December 2005, SPS and Kraft executed a new supply Contract # 015046, which recited that it "supercede[d] and replace[d] Contract #0000002826," and that its term was to begin 1/01/06 and end 6/30/06. The copy of this purchase order, provided by plaintiff in response to the motion, Kist affidavit, sworn to September 11, 2007, Exh. C, did not include the second page thereof, but by agreement of the parties in a teleconference after oral argument it was faxed to the court and shall be a part of the record. It also provided that "THIS CONTRACT IS DATE-DRIVEN AND WILL EXPIRE WHEN DATE IS REACHED." Also, the 2005 agreement incorporated the reverse side of the purchase order

which contained the same no-assignment and integration clauses as were contained in the superceded purchase orders/supply contract described above.

Although it appears that Seoil Korea built a US manufacturing plant in Ohio, as promised in its 1997 letter agreement, plaintiff evidently failed to secure subsequent letter agreements, either from Seoil Korea or Seoil USA, covering the #002826 purchase order between SPS and Kraft, any purchase orders that may have covered the 2004-2005 time frame, or the #015046 purchase order covering the first half of 2006. Nor did SPS secure any written agreement either extending the 1998-1999 Agency Agreement from Seoil Korea or a written agreement of the same kind from Seoil USA.

Motion to Dismiss: Failure to State a Cause of Action

On a motion to dismiss pursuant to CPLR §3211(a)(7) the complaint must be given every favorable inference and the allegations in the complaint are deemed to be true. See Dannasch v. Bifulco, 184 A.D.2d 415, 417 (1st Dept. 1992). When considering such a motion, it is the task of the court to determine whether, "'accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated.'" Campaign for Fiscal Equity, Inc. v. State of New York, 86 N.Y.2d 307, 318 (1995)(citations omitted). If the court determines "that plaintiffs are entitled to relief on any

reasonable view of the facts stated," the court's inquiry is complete, and the complaint is deemed legally sufficient. See id. Plaintiff's complaint must be examined in accordance with the above standards.

ANALYSIS

Defendant argues that the Agency Agreement has expired by its terms, which states: "This Agreement shall be effective from March 28, 1988 to March 29, 1999." Plaintiff's complaint, which concedes that the Agency Agreement expired, alleges:

> 15. From the expiration date stated in the Agency Agreement through February 1, 2007, Defendant and Plaintiff continued to engage in business and perform their respective obligations consistently with the terms of the Agency Agreement thereby reaffirming the terms of the Agency Agreement on a continuing and ongoing basis.

Complaint, ¶15. The Court of Appeals has stated:

> Where, after the expiration of a contract fixing the reciprocal rights and obligations of the parties, they continue to do business together, the conduct of the parties may at times permit, or even constrain, a finding that the parties impliedly agree that their rights and obligations in connection with such business should continue to be measured as provided in the old contract. *Even in such case, however, the reciprocal obligations arise from the new implied contract* and, unless an intent to make such a new contract is expressed or may be fairly inferred from the conduct of the parties, the obligations of the parties are as a matter of law not measured by the terms of the contract which has expired.

New York Tel. Co. v. Jamestown Tel. Corp., 282 N.Y. 365, 371

(1940)(emphasis supplied). See also, Computerized Med. Imaging Equipment, Inc. v. Diasonics Ultrasound, Inc., 303 A.D.2d 962 (4th Dept. 2003); Town of Webster v. Village of Webster, 280 A.D.2d 931 (4th Dept. 2001); North Amer. Hyperbaric Center v. City of New York, 198 A.D.2d 148 (1st Dept. 1993). "However, '[t]he fact that the parties continue to deal under some sort of informal arrangement does not, without more, mean that all the terms of the expired formal contract continue to apply.'" Town of Webster, 280 A.D.2d at 934, *quoting* Twitchell v. Town of Pittsford, 106 A.D.2d 903, 904 (4th Dept. 1984).

Here, the causes of action in plaintiff's complaint targeted for dismissal are premised exclusively upon clearly expired agreements between plaintiff and Seoil Korea on the one hand, and between plaintiff and Kraft on the other. None of these agreements involved Seoil USA as a party. Thus, inasmuch as the causes of action plead breach of the expired agreements between plaintiff and other parties, Seoil USA is entitled to dismissal of the causes of action that are the subject of defendant's motion. See Black Car and Livery Ins., Inc. v. H&W Brokerage, Inc., 28 A.D.3d 595, 595-96 (2d Dept. 2006); Bouley v. Bouley, 19 A.D.3d 1049, 1050 (4th Dept. 2005) ("Defendant was not a party to the contract referred to in the complaint, however, and thus cannot be sued for its breach"); Blank v. Noumair, 239 A.D.2d 534 (2d Dept. 1997).

I note further that the Agency Agreement between plaintiff and Seoil Korea, which expired in 1999, has a no-modification-without-written-consent clause (Article 9), a no-assignment-without-written-consent clause (Article 9), and an integration clause (Article 15). See generally, 150 Broadway N.Y. Assoc., L.P. v. Bodner, 14 A.D.3d 1, 5-6 (1st Dept. 2004). In addition, the only Exclusive Supply Agreement between SPS and Kraft referenced in Seoil Korea's 1997 letter agreement was of purchase order #003402. No subsequent letter agreements or endorsements were executed by Seoil Korea, or indeed Seoil USA. Even if separate letter agreements or endorsements of the SPS/Kraft purchase orders had been executed by defendant, these supply agreements between SPS and Kraft "incorporated" the "terms and conditions on the reverse of this purchase order," which were "made a part hereof," and those terms and conditions also included a no-assignment-without-consent provision and an integration clause. Furthermore, purchase order #002826 and the #015046 purchase order in 2005, the latter of which covered only the first half of 2006, stated that they were time sensitive and would, indeed, expire at the end of its stated term. Id. 14 A.D.3d at 5-6.

Plaintiff's complaint and opposing affidavit contain allegations with respect to an alleged continuation of these contracts after the expirations. But to obtain recovery,

plaintiff would have to show, because Seoil USA was not a party to the original agreements, not a continuation of these contracts by the same parties thereto as contemplated in the cases cited above, but rather an assumption by agreement, i.e., of Seoil USA, of the expired obligations of Seoil Korea under these expired agreements, by oral agreement or conduct. The submissions proffered by plaintiff suggest Seoil USA's agreement to bind itself in some manner to provide the straws, see Kim's correspondence to SPS, and but do not even remotely suggest agreement to bind Seoil USA to the Agency Agreement which expired in 1999, or to a continuation of "time sensitive" individual supply agreements between SPS and Kraft.

That JT Kim, the son who did not seem sympathetic to plaintiff's plight, was copied in on the e-mail negotiations between plaintiff and Kraft does not aid plaintiff in pleading an oral agreement between it and Seoil USA to bind itself to the terms of the expired agreements between plaintiff and Seoil Korea. See 150 Broadway N.Y. Assoc., L.P. v. Bodner, 14 A.D.3d at 5 ("regardless of any extrinsic evidence of self-serving allegations offered by the proponent of the claim"). Even if we had identity of parties, the continuation of business relationship cases plaintiff relies on hold that "the reciprocal obligations arise from the implied contract" (emphasis supplied) and "'are as a matter of law not measured by the terms of the

contract which has expired'" unless a contrary intent to adhere to all of the terms of the expired contract is shown or at least pleaded. Twitchell v. Town of Pittsford, 106 A.D.2d at 905, *quoting* New York Tel, Co. v. Jamestown Tel. Corp., 282 N.Y. 365, 371 (1940). In either event, however, the contract to be sued upon, as a matter of law, must be the new contract formed orally or by the conduct of the parties. *A fortiori*, the same rule must apply when a stranger to the original contract is alleged to have assumed and continued the business relationship previously existing between the contracts' original parties. Accordingly, inasmuch as plaintiff admits it did not plead an implied-in-fact or new oral agreement, defendant's motion to dismiss is granted without prejudice to recasting its claims in accordance with what it is alleged became the new implied agreement between plaintiff and Seoil USA.

One further point is worthy of mention. Defendant alleges that, even if the Agency Agreement is extant, the dispute is governed by Korean law and must be submitted to arbitration. The Agency Agreement states:

> The parties shall attempt to resolve any dispute, controversy or differences concerning the meaning, application, performance or breach of this contract, including but not limited to goods being received from Seoil in a damaged or substandard condition, through negotiation in good faith. If not so resolved, the dispute shall be settled by arbitration held in Seoul, Korea under Commercial Arbitration

> Rules of the Korean Commercial Arbitration Board. Such arbitration award shall be final and binding upon the parties and judgment upon the award rendered by the arbitrators may be entered by any court of competent jurisdiction.

Plaintiff alleges that, when after the expiration of the written Agency Agreement, the agreement was continued between the parties, including Seoil USA, the venue provision was not included as a provision of the oral contract because its inclusion would have been illogical.

The Federal Arbitration Act provides that a written arbitration provision in "a contract evidencing a transaction *involving commerce* . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2 (emphasis added). "The Supreme Court has interpreted the words 'involving commerce' as the functional equivalent of the phrase 'affecting commerce,' which ordinarily signals Congress' intent to exercise its Commerce Clause powers to the fullest extent." Diamond Waterproofing Sys., Inc. v. 55 Liberty Owners Corp., 4 N.Y.3d 247, 252 (2005). Consequently, if disputes arise with respect to a contract containing an arbitration provision and the contract "affects" interstate commerce, the FAA will apply. Id.

Likewise, a contract involving international commerce is also covered by the FAA. See Contec Corp. v. Remote Solution, Co., Ltd., 398 F.3d 205, 208 (2d Cir. 2005). Whether it is

presumed that Seoil Korea or Seoil USA was party to the Agency Agreement, as allegedly extended by the parties after its expiration, the FAA would apply. Seoil Korea necessarily involves international commerce, and Seoil USA based in Ohio involves interstate commerce, as plaintiff is based in New York.

The general rule in the continuation of business after expiration context (between the same parties) is that, while "the conduct of the parties subsequent to the expiration of [the agreement] may be construed to imply an agreement to extend some of the provisions of the expired [agreements], it may not, in the absence of a clearly expressed intention to renew the arbitration provision, bind a party to arbitrate." Dash & Sons, Inc. v. Tops Markets, LLC, 30 A.D.3d 998, 999 (4th Dept. 2006), *quoting* Donnkenny Apparel, Inc. v. Lee, 291 A.D.2d 224, 224-25. See also, Coudert v. Paine Webber Jackson & Curtis, 705 F.2d 78, 81 (2d Cir. 1983)("it is the general law of this circuit that there is no duty to arbitrate a grievance arising after the termination of the agreement between the parties, even if the expired agreement included an arbitration clause)(citing Korody Marine Corp. v. Minerals & Chemicals Philipp Corp., 300 F.2d 124, 125 (2d Cir. 1962)(per curiam)), abrogated in part, Fleck v. E.F. Hutton Group, Inc., 891 F.2d 1047 (2d Cir. 1989)(but not on the general principle quoted above). Here, of course, we do not have the same contractual party that is alleged to have continued the

expired contract, but a subsequently formed corporation in the United States, and given the cases cited above establishing that the contract which must be sued upon is the newly formed implied or oral contract, such cases as Rockwood Automatic Machine, Inc. v. Lear Corp. 13 Misc.3d 1219(A), 831 N.Y.S.2d 349 (Table) 2006 WL 2882348, 2006 N.Y. Slip Op. 51914(U)(Sup. Ct. Monroe Co. 2006), and other presumption of arbitrability cases in the expired agreement context, have no application. Seoil USA, the party insisting on arbitration on this motion, points to nothing in the record or otherwise tending to support Seoil USA's contractual intention to arbitrate. "Under the circumstances of this case, ... [Seoil USA is] not entitled to the benefit of the arbitration clauses ... to which... [it] w[as] not [a] part[y]." Matter of Miller, 40 A.D.3d 861 (2d Dept. 2007). There is no motion to compel arbitration or for a stay under Article 75. Accordingly, to the extent defendant seeks dismissal by reason of the arbitration clause in the expired agreement, that aspect of the motion is denied.

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: September 20, 2007
Rochester, New York