

**Atalanta Corporation v Galbani**

2006 NY Slip Op 30275(U)

July 17, 2006

Supreme Court, New York County

Docket Number: 0602494/2005

Judge: Bernard J. Fried

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

PRESENT: BERNARD J. FRIED  
Justice

PART 60

**FBI**

ATLANTA

PLAINTIFF

INDEX NO. #602494-2005

MOTION DATE \_\_\_\_\_

- v -

S.P.A. EGIDIO GALBANI

MOTION SEQ. NO. #001

MOTION CAL. NO. \_\_\_\_\_

DEFENDANT

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

**FILED**

JUL 17 2006

COUNTY CLERK'S OFFICE  
NEW YORK

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

NYS SUPREME COURT  
REVIEWED  
JUL 18 2006  
E-FILING DEPT.

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

Dated: 7/17/06

Bernard J. Fried  
J.S.C. **BERNARD J. FRIED**  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FBEM**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 60

-----X

ATLANTA CORPORATION,

Plaintiff,

-against-

Index No. 05/602494

S.P.A. EGIDIO GALBANI,

Defendant.

-----X

Appearances:

For Plaintiff:  
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For Defendant:  
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**Fried, J.:**

This is an action for breach of contract brought by Atlanta Corporation, a leading importer and distributor of food products, against S.P.A. Egidio Galbani (“Galbani”), a manufacturer and distributor of Italian cheeses and Italian pork meat products. Galbani moves to dismiss the complaint pursuant to C.P.L.R. § 3211(a)(7), based on failure to state a cause of action, and C.P.L.R. § 3016(b), based on failure to plead with particularity.

The following is based on the allegations in the complaint: On or about October 25, 2000, Galbani entered into a three-year Distribution and License Agreement with Cucina Classica Italiana Inc. (“Cucina”), a New Jersey corporation (the “Distribution Agreement”). The Distribution Agreement granted Cucina an exclusive, non-transferable

license to use some of Galbani's trademarks in connection with the manufacture and distribution of food products in the United States. The Distribution Agreement was due to expire on December 31, 2003. The Distribution Agreement contained terms defining its exclusivity, transferability, and duration. (Compl. ¶ 6.)

On or about June 19, 2002, Cucina contacted Atalanta to begin negotiations to sell its import business to Atalanta, which would include the transfer of the Distribution Agreement from Cucina to Atalanta. Atalanta made clear to Cucina and Galbani that an extension of the Distribution Agreement was a necessary element of the sale. Negotiations between Cucina, Galbani, and Atalanta ensued.

Atalanta distributed products that competed with Galbani's products, but the Distribution Agreement contained non-compete provisions. Consequently, Atalanta and Galbani negotiated to modify the Distribution Agreement to allow for the distribution of those competing products. In a letter agreement dated July 31, 2002, Galbani and Atalanta reached a preliminary agreement with respect to the modification and extension of the Distribution Agreement. (Compl. ¶ 9.)

On September 5, 2002, Bernard Lillis, Chief Executive Officer of Cucina, stated to Marco Pellegrino, Direttore Generale of Galbani, that Atalanta distrusted Galbani's intentions with respect to the preliminary agreement. On July 31, 2002 Lillis suggested to Pellegrino that a face-to-face meeting was necessary to resolve the misunderstandings concerning the extension.

In an October 7, 2002 letter, Lillis stated to Pellegrino that Atalanta's ideal situation would be to take over the current Distribution Agreement either with a "firm

guarantee” of a new agreement on January 1, 2004 or a new five-year agreement effective immediately upon the purchase of Cucina’s assets. (Compl. ¶ 11.)

On October 9, 2002, representatives from Atalanta, Cucina, and Galbani met. Pellegrino verbally agreed to Atalanta’s request for the transfer of the Distribution Agreement and to enter into a five-year extension thereof beginning on January 1, 2004. The verbal agreement was conditioned on Atalanta purchasing Cucina’s import business and satisfying certain debt owed by Cucina to Galbani.

On December 5, 2002, Atalanta, Cucina, and Galbani entered into a Memorandum of Meeting (the “December 5, 2002 Memorandum”), in which the parties agreed to modify the Distribution Agreement to facilitate its transfer to Atalanta. The December 5, 2002 Memorandum stated, “A new License and Distribution Agreement [the “new distribution agreement”], the negotiation of which will begin after January 1, 2003, will clearly define a non competition clause and the format for determining what constitutes ‘competing products’ that is acceptable to both parties.” (Compl. at Exhibit E.) The modified Distribution Agreement contained the essential terms of and was be the basis of the new distribution agreement. (Gellert Aff. ¶ 28.) The parties agreed that the parties would enter into the new distribution agreement, “the negotiation of which would begin after January 1, 2003.” (Compl. ¶ 13.) “There were only two open issues in the new distribution agreement to [clearly define]; a non-competition clause and the format

for determining what constitutes ‘competing products’ that is acceptable to both parties.”  
(Gellert Aff. ¶ 30).

Galbani required, as a condition of its consent to the assignment of the Distribution Agreement from Cucina to Atalanta, that Atalanta do the following: (a) assume \$300,000 of Cucina’s debt to Galbani, (b) be responsible for all product in transit on the date of closing from Galbani to Cucina, (c) pay Galbani for all amounts billed by Galbani to Cucina for product shipped, and (d) accept certain changes to the Distribution Agreement. (*Id.*) Atalanta agreed to the requirements.

Atalanta closed on the sale of Cucina’s import business on December 30, 2002. Among the closing documents was a letter from Galbani to Cucina and Atalanta confirming the terms of the above December 5, 2002 Memorandum and consenting to the transfer of the Distribution Agreement from Cucina to Atalanta, effective January 1, 2003.

Following Atalanta’s purchase of Cucina, representatives from Atalanta met with representatives from Galbani on numerous occasions. In virtually every communication, Atalanta inquired as to the status of a new distribution agreement. In September 2003, Galbani sent a draft of a proposed five-year new distribution agreement. The proposed five-year new distribution agreement was “non-exclusive, contained onerous, unreasonable non-competitive provisions, and gave Galbani the right to exclude products from Atalanta’s distribution.” (Compl. ¶ 21.)

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\* The Gellert Affidavit states that the December 5, 2002 Memorandum stated that the two open issues were “to be more clearly defined” in the new distribution agreement. The December 5, 2002 Memorandum actually states that the new distribution agreement will “clearly define” the two issues.

On February 24, 2004, the parties agreed to extend the existing Distribution Agreement until December 31, 2004. In the ensuing months, Atalanta approached Galbani about a new distribution agreement, but was not given any assurances. On May 10, 2005, Marco Valsecchi, Galbani's new Direttore Generale, sent a fax to Thomas Gellert, Atalanta Cheese Division's Vice President, notifying him that Galbani would no longer use Atalanta to distribute its products in the United States, effective May 31, 2005.

Atalanta brought this action asserting three causes of action. First, Atalanta claims that Galbani breached a duty to negotiate in good faith a new distribution agreement in accordance with the terms set forth in the December 5, 2002 Memorandum. Second, Atalanta asserts that Galbani fraudulently induced Atalanta into purchasing the Cucina import business by making promises to grant Atalanta a five-year extension of the Distribution Agreement, while Galbani had no intention of actually doing so. Third, Atalanta claims that promissory estoppel binds Galbani to its promise to grant a five-year extension of the Distribution Agreement.

Galbani moves for dismissal based on Atalanta's alleged failure to state a claim, C.P.L.R. § 3211(a)(7), and alleged failure to plead fraud with particularity, C.P.L.R. 3016(b). The parties agreed at oral argument that New York law governs. (Tr. at 2-3.)

When deciding a motion to dismiss pursuant to C.P.L.R. § 3211(a)(7), the facts as alleged in the complaint must be accepted as true. A court must accord the plaintiff "the benefit of every possible favorable inference." *E.g., Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 (2001); *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

Factual claims inherently incredible or flatly contradicted by documentary **evidence**, however, are not entitled to such consideration. *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 27 (2005). “The motion must be denied, if from the pleading[’s] four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law.” *Richbell Info. Servs., Inc. v. Jupiter Partners, L.P.*, 309 A.D.2d 288, 289 (1st Dep’t 2003). In assessing a motion under C.P.L.R. § 3211(a)(7), a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint. *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635 (1976). Affidavits, however, “may be received for a limited purpose only, serving normally to remedy defects in the complaint,” and will “seldom if ever warrant the relief [the defendant] seeks unless...the affidavits establish conclusively that plaintiff has no cause of action.” *Id.* at 636. “The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” *Leon*, 84 N.Y.2d at 88.

*Count I: Breach of Duty to Negotiate in Good Faith:*

Atalanta claims that it properly alleged a cause of action for breach of duty to negotiate in good faith because, according to its complaint, the December 5, 2002 Memorandum was sufficiently definite with respect to material terms, and thus, Galbani was bound to negotiate a new distribution agreement.

Galbani argues that there can be no valid action for breach of duty to negotiate in good faith because numerous material terms of the December 5, 2002 Memorandum were unresolved. Therefore, Galbani argues, it was under no enforceable obligation to negotiate a new distribution agreement with Atalanta.

Parties must be in sufficiently definite agreement with respect to the material terms of a contract in order to reach a binding preliminary contract. *180 Water St. Assocs. v. Lehman Bros. Holdings, Inc.*, 7 A.D.3d 316, 317 (1st Dep't 2004) (holding that there was an adequate basis for determining whether the parties agreed to conduct negotiations in good faith, because a letter was sufficiently definite as to the material terms of a lease, except duration); *SNC, Ltd. v. Kamine Eng'g & Mech. Contr. Co.*, 238 A.D.2d 146, 146 (1st Dep't 1997). It must be sufficiently certain and specific so that what was promised can be ascertained. *Martin Delicatessen v. Schumacher*, 52 N.Y.2d 105, 109 (1981). This "doctrine of definiteness" serves two related purposes. First, unless a court can determine what the agreement is, it cannot know whether an agreement has been breached, and it cannot fashion a proper remedy. *Cobble Hill Nursing Home v. Henry & Warren Corp.*, 74 N.Y.2d 475, 482 (1989). Second, the requirement of definiteness assures that courts will not impose contractual obligations when the parties did not intend to conclude a binding agreement. *Id.* That said, not all terms of a contract need be fixed with absolute certainty. *Cobble Hill*, 74 N.Y.2d at 483.

On the face of its complaint, supplemented by the Gellert Affidavit, Atalanta contends that Atalanta and Galbani agreed upon all of the material terms of a new distribution agreement. The terms upon which the parties allegedly agreed included territory, royalty arrangements, price, a grant of exclusivity, duration of the agreement, and payment and intellectual property protection. (Gellert Aff. ¶ 29.) Atalanta alleges that "there were only two open issues in the Distribution Agreement to [clearly define];

[sic] a non-competition clause and the format for determining what constitutes “competing products” that is acceptable to both parties.” (Gellert Aff. ¶ 28).

It is true than an agreement to agree, in which material terms are left for future negotiations, is unenforccable unless a methodology for determining the material terms can be found within the four corners of the agreement or “the agreement refers to an ‘objective extrinsic event, condition, or standard by which the material terms may be determined.’” *166 Mamaroneck Ave. Corp. v. 151 East Post Rd. Corp.*, 78 N.Y.2d 88, 91 (1991) (*quoting Martin Delicatessen*, 52 N.Y.2d at 109). Drawing all factual inferences in Atalanta’s favor, however, although the non-competition clause and competing products issues were open, they were open only to the extent that their scope needed to be “clearly define[d].” (Gellert Affidavit ¶ 30.) Indeed, Atalanta stated that the open terms were resolved in the interim and renegotiations were not necessary. (Tr. at 12.)

It may well be that Atalanta will ultimately be unable to establish that the material terms were agreed upon. That is a question, however, for determination on summary judgment. It is not a question for a C.P.L.R. § 3211(a)(7) motion. *180 Water St. Assocs.*, 7 A.D.3d at 317 (1st Dep’t 2004).

Thus, Galbani’s motion to dismiss as to Count I is denied.

*Count II: Fraud in the Inducement:*

Atalanta conceded at oral argument that if I sustain Count I, breach of duty to negotiate in good faith, then Count II is dismissed. (Tr. at 18-19.) Thus, Galbani’s motion to dismiss is granted as to Count II.

*Count III: Promissory Estoppel:*

Atalanta conceded at oral argument that if I sustain Count I, breach of duty to negotiate in good faith, then Count III is dismissed. (Tr. at 18-19.) Thus, Galbani's motion to dismiss is granted as to Count III.

Accordingly, it is

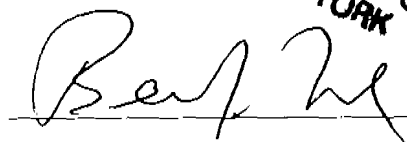
ORDERED that the motion to dismiss is denied as to Count I and granted as to Count II and Count II, and it is further

ORDERED that Galbani is directed to serve an answer to the complaint within 20 days of the receipt of this order with notice of entry; and it is further

ORDERED that the parties are to appear in Part 60 for a preliminary conference on September 6, 2006 at 2:15 p.m.

Dated: 7/17/06

ENTER:



J.S.C.

**BERNARD J. FRIED**  
J.S.C.

**FILED**  
JUL 17 2006  
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