

<b>DS Liq., Inc. v Grand-Rise Wines &amp; Liqs., Inc.</b>
2008 NY Slip Op 31138(U)
April 17, 2008
Supreme Court, Suffolk County
Docket Number: 0018648/2007
Judge: Thomas F. Whelan
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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 33 - SUFFOLK COUNTY

**P R E S E N T :**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 2/15/08  
ADJ. DATES 3/14/08  
Mot. Seq. # 001 - MG  
Mot. Seq. # 002 - XMD; CDISP

-----X  
DS LIQUOR, INC. and DONG SEIC KIM, :  
 :  
 : Plaintiffs, :  
 :  
 -against- :  
 :  
 GRAND-RISE WINES & LIQUORS, INC., :  
 :  
 : Defendant. :  
-----X

DANIEL R. MILLER, ESQ.  
Atty. For Plaintiffs  
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Upon the following papers numbered 1 to 12 read on this motion (#001) by plaintiffs for summary judgment and cross motion (#002) by defendant for leave to amend its answer ; Notice of Motion/Order to Show Cause and supporting papers 1 - 3 ; Notice of Cross Motion and supporting papers 4-9 ; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 10-12 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion (#001) by the corporate plaintiff for summary judgment on said plaintiff's pleaded claims for a judgment directing the defendant to specifically perform a contract for the sale of a business is granted to the extent set forth below; and it is further

**ORDERED** that the cross motion (#002) by the defendant for an order granting leave to serve and file an amended answer, is denied.

This action arises out of the corporate plaintiff's execution of a contract to purchase the defendant's retail liquor business and its inventory. Pursuant to the terms of the August 22, 2005 contract, the corporate plaintiff agreed to pay the defendant \$60,000.00 upon execution of the contract; \$340,000.00 in cash at the closing; and to issue a promissory note for the value of the inventory on the date of closing. The contract also contained a liquor license contingency clause, pursuant to which, either the buyer or the seller could cancel the contract if the corporate plaintiff failed to secure approval of a retail store liquor license within 18 weeks from the date the buyer's attorney received a fully executed copy of the contract of sale. The seller promised to cooperate with the buyer and assist it in obtaining the liquor license. In the event of a cancellation under this contingency clause, the seller was obligated to return the buyer's \$60,000.00 down payment and no further liability would attach to either the buyer or the seller unless certain material misrepresentations by the buyer were sued upon by the seller. The contract provided that the sale would close within ten (10) business days of receipt of the approval of the liquor license by the buyer's attorney and his receipt of the landlord's consent to the seller's assignment of the lease.

The corporate defendant obtained conditional approval of a liquor license from the New York State Liquor Authority on January 3, 2006. The corporate plaintiff advised the defendant of said approval by correspondence dated January 11, 2006. On January 12, 2006, the corporate plaintiff secured the landlord's approval of the defendant's assignment of its lease to the plaintiff. By correspondence dated January 20, 2006, the defendant advised that it was cancelling the contract due to the corporate plaintiff's failure to obtain its liquor license approval within the 18 week period specified in the contract and the down payment was returned. The corporate plaintiff immediately rejected the defendant's purported cancellation and demanded a closing. The defendant seller refused to close upon the grounds that the corporate plaintiff breached the terms of the contract of sale by its failure to timely obtain approval of the liquor license.

The plaintiffs then commenced this action in the Supreme Court of Queens County. In an prior order issued in March of 2007 in connection with prior motion practice, the court found that the "Liquor Authority's approval was timely" (*see* March 22, 2007 order of the Hon. Janice A. Taylor, JSC, Queens County Supreme Court)<sup>1</sup>. The defendant's claim that the corporate plaintiff breached the contract due to its failure to secure liquor license approval within the 18 week time limitation specified therein was thus found to be unmeritorious by the court. Said finding serves as the law of the case with respect to the matters embraced therein and precludes reconsideration of any such matters by this court.

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<sup>1</sup> The March 22, 2007 order of Justice Taylor also dismissed the claims interposed herein by the individual plaintiff, Dong Seic Kim, and granted the defendant's further application to change the venue of this action to this Court.

Now before this court is the instant motion (#001) by the corporate plaintiff for an order awarding it summary judgment on its pleaded claim for specific performance. In support of said motion, the plaintiff claims that it substantially performed all of its obligations under the contract. Plaintiff further alleges that it was ready, willing and able to perform the agreement of sale and performance by offering to pay the purchase price upon closing but was precluded from doing so by the defendant's breach and refusal to close. The plaintiff admits, however, that the conditional approval of a liquor license that it obtained on January 3, 2006, has now expired and cannot be further extended. The corporate plaintiff must thus re-apply for said license.

The defendant opposes the plaintiff's motion and cross moves (#002) for an order permitting it to amend its answer to assert two counterclaims against the corporate plaintiff. The first is a claim for declaratory relief with respect to the defendant's rightful cancellation of the contract. The second is a claim for rescission of the contract due to the plaintiff's anticipatory breach of the executory provisions of said contract, namely, payment of the monies due under the terms of the note which was to have been executed by the corporate defendant at the closing or for the purchase of the inventory.

The court first considers the defendant's cross motion (#002) for leave to amend its answer as aforesaid. The cross motion is procedurally defective in as much as no copy of the first answer served and filed by the defendant was included in any of the papers submitted to the court on the pending applications. In any event, the proposed new counterclaim for rescission of the contract by reason of the plaintiff's purported anticipatory breach thereof is devoid of merit and palpably insufficient for want of allegations of fact regarding the corporate defendant's definite and final communication of its intention to forego performance of an existing contractual obligation (*see Norcom Power Partners v Niagara Mohawk Power Corp.*, 92 NYS2d 458, 682 NYS2d 664 [1998]; *Rachmani Corp. v 9 East 96<sup>th</sup> St. Apt. Corp.*, 211 AD2d 262, 624 NYS2d 382 [1<sup>st</sup> Dept 1995]). Accordingly, the cross motion by the defendant for leave to serve and file the amended answer attached to the cross moving papers is denied (*see Marcus & Co., Ltd. v Pescitelli*, 48 AD3d 646, 850 NYS2d 924 [2d Dept 2008]).

Left for determination is the motion-in-chief by the plaintiff for summary judgment on its pleaded claim for specific performance of the contract. It is well established that a plaintiff seeking specific performance of a contract of sale must establish that it was ready, willing and able to perform on the original law day or on a subsequent date fixed by the parties (*see Ober v Bey*, 266 AD2d 441, 698 NYS2d 876 [1999]).

Here, the plaintiff established its prima facie entitlement to judgment as a matter of law by proof that it had substantially performed its obligations under the contract and that it was ready,

willing and able to close the subject sale within the time limitations set forth in the contract (*see Marcantonio v Picozzi*, 46 AD2d 522, 846 NYS2d 647 [2d Dept 2007]; *Nuzzi Fairly Ltd. Liability Co. v Nature Conservancy*, 304 AD3d 631, 758 NYS2d 364 [2d Dept 2003]).

It was then incumbent upon the defendant to demonstrate that genuine questions of fact exist with respect to the plaintiff's entitlement to the summary judgment on its pleaded claim for specific performance of the subject sales contract. Review of the defendant's submissions reveal, however, that no such questions of fact were raised. The defendant's claim that the plaintiff failed to timely obtain approval of a liquor license is without merit. As indicated above, the prior order of Justice Janice A. Taylor issued on prior motions determined that the approval received by the plaintiff in January, 2006 was timely under the terms of the contract of sale.

The defendant's further contention that the conditional nature of the approval by the State Liquor Authority of the plaintiff's liquor license application rendered it non-compliant with the liquor license contingency clause set forth in the contract of sale is rejected as unmeritorious. The administrative conditions set forth in the State Liquor Authority's approval letter of January 3, 2006 were merely conditions subsequent to the issuance of the liquor license, which had been approved therein (*see Benicasa v Garrulo*, 141 AD2d 636, 529 NYS2d 797 [1998]; *see also Board of Educ. of Half Hollows School Dist. No. 5 v Statewide Vending Corp.*, 84 AD2d 754, 443 NYS2d 760 [2d Dept 1981] *aff'd* 58 NY2d 718, 458 NYS2d 545 [1982]). The court thus finds that the approval issued to the plaintiff on January 3, 2006 satisfied the liquor license contingency clause in the subject contract.

The defendant's further claims of breach on the part of the plaintiff due its failure to obtain the liquor license contemplated by the January 3, 2006 approval letter from the State Liquor Authority are equally unavailing. It is well established that a defendant may not rely upon the plaintiff's failure to satisfy a condition where said failure is attributable to the defendant's own conduct (*see ADC Orange, Inc. v Coyote Acres, Inc.*, 7 NY3d 484, 824 NYS2d 192 [2006]; *see also, Rachmani Corp. v 9 East 96<sup>th</sup> St. Apt. Corp.*, 211 AD3d 262, *supra*). The plaintiff's ability to satisfy the conditions set forth in the State Liquor Authority's approval letter of January 3, 2006 was dependent upon the defendant's cooperation and performance of certain paperwork such as the surrender of its existing liquor license and its production of an inventory list. The defendant's wrongful cancellation of the contract prior to closing precluded the plaintiff's satisfaction of these conditions.

In view of the foregoing, the court finds that the corporate plaintiff is entitled to summary judgment on its pleaded claim for specific performance of the subject contract. The remedy of specific performance being equitable in nature may be fashioned by the court as equity and justice

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may require (*see EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 774 NYS2D 39 [1<sup>ST</sup> Dept 2004]). Here, the plaintiff must obtain, *inter alia*, State Liquor Authority approval of a retail liquor license before it can close the sale under the terms of the contract. Since the plaintiff's prior approval was lost, due in part to conduct on the part of the defendant, the plaintiff should be entitled to the full 18 week time period to obtain said license which was set forth in the contract of sale. Accordingly, the plaintiff's motion for specific performance on the first cause of action set forth in its complaint is granted to the extent that the contract of sale is hereby revived and re-established as though the same were executed on the date of this order. The parties are directed to specifically perform the obligations imposed upon them under the terms of their August 22, 2005 contract for the sale of the defendant's retail liquor store business and inventory.

The Clerk of the Calendar Department shall, upon receipt of this Order, make the within action disposed, as no pleaded claims for relief demanded by the parties remain unresolved.

DATED: 4/17/08

  
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THOMAS F. WHELAN, J.S.C.