[* 1]

SHORT FORM ORDER

INDEX NO.: 19481-09

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

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 8-25-09
SUBMITTED: 10-22-09
MOTION NO.: 001-MOT D
002-MOT D

HABITAT, LTD.,

Plaintiff,

-against-

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

Defendants.

STUART A. JACKSON, P.C.
Attorney for Plaintiffs
70 East 55th Street
New York, New York 10022

MENDES & MOUNT, LLP
Attorneys for Defendant the Art of the Muse, Inc. d/b/a Oly Studio
750 Seventh Avenue
New York, New York 10019

JONES DAY
Attorneys for Defendant Mecox Gardens & Pottery, Inc.
222 East 41st Street
New York, New York 10017

Upon the following papers numbered 1 16 read on these motions to dismiss ; Notice of Motion and supporting papers 1-6; 9-14 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 7; 15 ; Replying Affidavits and supporting papers 8; 16 ; it is,

ORDERED that the motions by the defendants for an order dismissing the complaint are granted to the extent that the first, third, and fourth causes of action are dismissed; and it is further

ORDERED that the motions are otherwise denied; and it is further

ORDERED that a preliminary conference shall be held on January 15, 2010 at 9:45 a.m., Supreme Court, Courtroom 7, Arthur M. Cromarty Criminal Court Building, 210 Center Drive, Riverhead, New York 11901.

The following facts have been taken from the memorandum and order of the United States District Court for the Eastern District of New York (Hurley, J.) dated March 25, 2009, in the federal action between the parties, as well as the plaintiff's complaint in this action.

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. According to the plaintiff, Oly's furniture is one-of-a-kind:

> Oly is an industry leader for the manufacture and distribution of faux antique furniture because of the superior design, reasonable price and quality of its Products. Oly's Products are highly-sought-after pieces in the current market. Oly's products are a fresh blend of clean lines and antique motifs synchronizing traditional with contemporary. Oly's Products are hand-crafted, unique and are considered a "must-have" for any serious retailer or decorator of faux antique furniture in the current market; in fact, defendant's Products make a market in and of themselves. No other company rivals the quality, pricing or the extent of Oly's products....

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 the 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 alleged to be 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 get out of the business of selling faux antique furniture at its retail stores, which caused it to lose a great deal of revenue. The plaintiff alleges that the defendants acted in concert to boycott the plaintiff in order to maintain their monopolistic power over the Suffolk County market for faux antique or Oly furniture, to drive the plaintiff out of the faux antique furniture business, to use their enormous market power to prevent competition in Suffolk County, and to discourage other retailers in the faux antique furniture business from expanding. The plaintiff further alleges that the defendants' actions have harmed consumers in Suffolk County, who now have fewer market options for the purchase of Oly's products because the plaintiff, a retail competitor of Mecox, has been forced out of business and other small competitors in Suffolk County may not seek to purchase large orders of Oly products for fear that their purchase agreements with Oly will be similarly terminated. Finally, the plaintiff alleges that, as a result of the defendants' actions, the output of Oly's products has been reduced in the relevant market of Suffolk County, that the price for Oly's products in Suffolk County has increased, and that the quality of customer service for Oly's products in Suffolk County has decreased. Accordingly, the plaintiff alleges that the defendants' actions have unlawfully created or attempted to create and maintain a monopoly in Suffolk County, which has adversely affected competition.

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, on the ground that the plaintiff's allegations failed to demonstrate market-wide injury to competition. The District Court found that the plaintiff's allegations were a run-of-the-mill exclusive distributorship controversy in which a former distributor was attempting to protect its competitive position vis-a-vis its supplier. The District Court further found that, since exclusive distributorship arrangements are presumptively legal, it was incumbent upon the plaintiff to demonstrate that the defendants' actions had an adverse effect on competition in the relevant market, which the plaintiff had failed to do. 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. The first cause of action for violation of the Donnelly Act is asserted against both defendants. The second and third causes of action for breach of contract and promissory estoppel, respectively, are asserted against the defendant Oly, and the fourth cause of action for tortious interference with commercial relations is asserted against the defendant Mecox. The defendants separately move to dismiss the complaint insofar as asserted against each of them pursuant to CPLR 3211(a)(5) and (7).

The court agrees with the defendants that the first cause of action for violation of the Donnelly Act must be dismissed on collateral estoppel grounds. In order to invoke the doctrine of collateral estoppel, there must be an identity of issue which was necessarily decided in the prior action and which is decisive of the present action, and there must have been a full and fair opportunity to contest the prior determination (**Schwartz v Public Administrator of County of Bronx**, 24 NY2d 65, 71). The party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of issues in the present litigation and the prior determination. The party attempting to defeat its application has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action (**Kaufman v Eli Lilly & Co.**, 65 NY2d 449, 456). When, as here, the parties in the state and federal actions are identical and the merits of the plaintiff's claims were decided by the federal court after the plaintiff was afforded a full and fair opportunity to litigate them, collateral estoppel precludes relitigation of such claims (*see*, **Browning Ave. Realty Corp. v Cross County Square Assocs.**, 207 AD2d 263, 266).

In any event, even if collateral estoppel does not apply, the plaintiff's complaint fails to state a cause of action under the Donnelly Act. The Donnelly Act, which is generally construed in accordance with the federal Sherman Act, requires identical basic elements of proof as the Sherman Act for claims of monopolization or attempt to monopolize. In fact, the Donnelly Act was modeled on the Sherman Act (**Benjamin of Forest Hills Realty v Austin Sheppard Realty**, 34 AD3d 91, 94). To state a claim under the Donnelly Act, a party must (1) identify the relevant product market, (2) describe the nature and effects of the purported conspiracy, (3) allege how the economic impact of that conspiracy is to restrain trade in the market in question, (4) and show a conspiracy or reciprocal relationship between two or more entities (**Id.** at 94).

The court finds that the plaintiff's allegations fail to demonstrate market-wide injury to competition for the reasons stated by the District Court and that the additional facts alleged in the complaint in this action are too conclusory to establish such an injury (*see*, **Victoria T. Enters. v Charmer Indus.**, 63 AD3d 1698; **Sands v Ticketmaster - N.Y., Inc.**, 207 AD2d 687, 688; **Home Town Muffler v Cole Muffler**, 202 AD2d 764, 766). Furthermore, a Donnelly Act violation to restrain trade can only occur when the conspirators are in competition with one another or with the plaintiff (**Sands v Ticketmaster - N.Y., Inc.**, *supra* at 688). It is not a violation of the Donnelly Act for Oly to determine not to do business with the plaintiff

see **Discon, Inc. v NYNEX Corp.**, Sup Ct. NY County, Dec 29, 2000, Kane, J. [2000 WL 33512196], *citing* **Locker v Am. Tobacco Co.**, 121 App Div 443, 447, *affd* 195 NY 565). A company has a right to select a person with whom it does business and to refuse to deal or continue to deal with anyone for reasons sufficient to itself (**Benjamin of Forest Hills Realty v Austin Sheppard Realty**, *supra* at 97). Moreover, a supplier may terminate a distributor in response to complaints by other distributors (**Home Town Muffler v Cole Muffler**, *supra* at 766).

Finally, the plaintiff has identified the relevant market as Oly's products in Suffolk County. Identification of a relevant market must include all products that are reasonably interchangeable and all geographic areas in which such reasonable interchangeability occurs (**Benjamin of Forest Hills Realty v Austin Sheppard Realty**, *supra* at 95-97). Even if the court accepts the plaintiff's contention that Oly's products are so unique as to be a market in and of themselves, their sale is not limited to Suffolk County. The record reveals that they are sold nationally through Mecox. Since the plaintiff's identification of the relevant market is patently underinclusive, the plaintiff cannot establish impairment of competition in a relevant geographic market sufficient to support its claim of a Donnelly Act violation (**Id.** at 97). Accordingly, the first cause of action is dismissed.

Liberally construing the complaint, accepting the alleged facts as true, and giving the plaintiff the benefit of every possible favorable inference (**Leon v Martinez**, 84 NY2d 83, 87), the court finds that the plaintiff has set forth sufficient factual allegations to survive dismissal of its second cause of action for breach of contract. The plaintiff alleges the existence of an agreement with Oly to supply it with products for resale. The plaintiff further alleges that both parties performed under the agreement until Oly terminated their business relationship without notice, causing the plaintiff to suffer damages. The plaintiff does not allege that its agreement with Oly contained a term certain for its duration. Thus, it was terminable at will and not subject to the implied duty of good faith and fair dealing (*see*, **Interweb, Inc. v iPayment, Inc.**, 12 AD3d 164, 165 [and cases cited therein]). However, Oly was required to provide reasonable notification to the plaintiff prior to termination (*see*, UCC 2-309[2], [3]; **Walck Bros AG Service v Hillock**, 5 AD3d1058, 1059; **Sto Corp. v Henrietta Bldg. Supplies**, 202 AD2d 969). What is a reasonable time to take any action depends on the nature, purpose, and circumstances of such action (**Id.** at 1059). Whether the plaintiff received reasonable notice of the termination of its agreement with Oly cannot be determined at this juncture. Accordingly, the motion is denied as to the second cause of action.

The plaintiff's third cause of action for promissory estoppel is duplicative of the second cause of action for breach of contract. In any event, to establish a viable cause of action sounding in promissory estoppel, a plaintiff must allege (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury sustained in reliance on the promise (**Rogers v Town of Islip**, 230 AD2d 727). The court finds that the at-will relationship between the plaintiff and Oly renders unreasonable the plaintiff's

claimed reliance on Oly's alleged promise to supply it with products for resale in Suffolk County and warrants dismissal of the promissory estoppel claim (*cf.*, **Skillgames, LLC v Brody**, 1 AD3d 247, 250; **Salvatore v Kumar**, 12 Misc 3d 1157[A] at *3, *mod on other grounds* 45 AD3d 560). Accordingly, the third cause of action is dismissed.

In order to recover damages for tortious interference with commercial relations or a contract terminable at will, the plaintiff is required to show that Mecox used wrongful means. Such means include physical violence, fraud, misrepresentation, civil suits, criminal prosecution, or some degree of economic pressure (**Home Town Muffler v Cole Muffler**, *supra* at 766). The use of persuasion alone, even if knowingly directed at interfering with the contract, does not constitute wrongful means (**Id**. at 766, *citing* **Guard-Life Corp. v Parker Hardware Mfg. Corp.**, 50 NY2d 183, 191). The plaintiff's allegations show, at best, that Mecox persuaded Oly to terminate its relationship with the plaintiff, which is not enough to withstand a motion to dismiss (**Id**. at 766-767). Accordingly, the fourth cause of action is dismissed.

In view of the dismissal of the plaintiff's Donnelly Act claim, the plaintiff may not recover punitive damages or legal fees.

The question of whether sanctions should be imposed against a party or an attorney is addressed to the sound discretion of the court (*see*, **Kamen v Diaz-Kamen**, 40 AD3d 937; **Wagner v Goldberg**, 293 AD2d 527). In the exercise of its discretion, the court declines to impose sanctions on the plaintiff or its counsel. Accordingly, the branch of the motion by Mecox which is to sanction the plaintiff for frivolous conduct is denied.

Finally, the court notes that the defendants' motion papers do not include citations to the official New York law reports, as required by Justice Emerson's individual part rules (Rule 4). Any future submissions to the court shall include citations to the official New York law reports.

Dated: December 14, 2009

HON. ELIZABETH HAZLITT EMERSON

J.S.C.