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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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LAST TIME BEVERAGE CORP., et al.,

Plaintiffs,

-against-

F & V DISTRIBUTION COMPANY, LLC and HORNELL BREWING CO., INC.,

Defendants.

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J.C. TEA, INC., A.K. DISTRIBUTION CORP., G&G BEVERAGE CO., INC., and LAWRENCE PUGLISI,

Plaintiffs,

-against-

F & V DISTRIBUTION COMPANY, LLC and HORNELL BREWING CO., INC.,

Defendants.

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TRIAL/IAS PART: 22
NASSAU COUNTY

Index No: 011778-00
Motion Seq. No: 4
Submission Date: 11/2/09

Papers Read on this Motion:

Notice of Motion, Affirmation in Support and Exhibits (Referee's Decision, Plaintiffs' Pre-Trial Memorandum of Law, Plaintiffs' Interlocutory Trial Memorandum of Law, Plaintiffs' Post Trial Memorandum of Law and Plaintiffs' Reply to Defendants' Post-Trial Memorandum of Law).....x
Affirmation in Opposition and Exhibits.....x
Defendants' Memorandum of Law in Opposition.....x
Plaintiffs' Reply Memorandum of Law.....x
Transcripts.....x

This matter is before the court on the motion by Plaintiffs Last Time Beverage Corp., together with those named in Schedule A ("Last Time Plaintiffs" or "Plaintiffs"), and Plaintiffs J.C. Tea, Inc., A.K. Dist. Corp., G&G Beverage Co. Inc. and Lawrence Puglisi ("Parol Plaintiffs") filed on July 6, 2009 and submitted on November 2, 2009, for an Order confirming the Report ("Report") of the Honorable Thomas V. Dana, Special Referee ("Referee") dated June 17, 2009. The Court grants Plaintiffs' motion and confirms the Report. The Court refers the issue of damages to the Referee to hear and determine per the prior Order of Justice Leonard B. Austin in open court on February 14, 2007.

BACKGROUND

A. Relief Sought

Plaintiffs move for an Order, pursuant to CPLR § 4403, confirming the Report. Plaintiffs also seek an award of costs and disbursements.

Defendants oppose Plaintiffs' motion.

B. Referee's Findings of Fact

Last Time Plaintiffs are independent distributors who are former members of Met Bev, Inc., an entity engaged in distributing Royal Crown Cola products ("RC") in the New York area. Prior to forming Met Bev, Plaintiffs were experienced distributors of Coke and Pepsi products.

Plaintiffs were party to written distribution agreements with MetBev which gave them an exclusive right to distribute RC products within a specific geographical region, with certain specific exceptions. In December of 1996, Met Bev transferred and assigned its rights as the franchiser of RC products to the Defendant F&V Distribution Company, LLC ("F&V"), without modification of the distribution agreement with the Last Time Plaintiffs.

The Parol Plaintiffs were former employees and/or distributors for F&V who were told that, upon assignment of the Met Bev RC rights to F&V, they would receive the same exclusive distribution rights that the Met Bev Plaintiffs enjoyed.

F&V, a beverage distributor, and Hornell Brewing Co., Inc. ("Hornell"), a wholly owned subsidiary of the Arizona Ice Tea Brand, holder of an exclusive license to the Arizona name, were parties to the transfer agreement. Don Vultaggio is a majority controlling shareholder in the Defendant closely held corporations.

As assignees of Met Bev's distribution agreement, Defendants assumed its obligations to Plaintiffs. In addition, in exchange for a computer tracking program and an established RC

distribution system suitable for Arizona products, Plaintiffs were told that they would have exclusivity for the Arizona product and equity in their routes, including the Arizona case sales, which equity could be sold to third parties. The representations were made prior to, during and after the assignment.

F& V added the five Parol Plaintiffs to the Met Bev routes by F&V, which did not have a substantial distribution system in the territory until the Met Bev assignment integrated RC and Arizona case sales.

C. Referee's Conclusions of Law

The Referee concluded that 1) the Uniform Commercial Code ("UCC") applies in light of the fact that the transactions involve the "sale of goods, amongst sophisticated merchants in the soft drink industry, and 'custom and usage' of the trade is 'critical' in determining legal conclusions;" 2) all Plaintiffs had an "exclusive right to distribute the RC and Arizona products" with certain specific products and customers reserved to Defendants; 3) Defendants "are estopped to deny their unambiguous promises of Arizona exclusivity" upon which all Plaintiffs "relied to their detriment"; 4) the language of the Met Bev/F&V assignment required F&V to offer "new products" exclusively to the Plaintiffs; 5) the oral agreement with the Parol Plaintiffs was not subject to the Statute of Frauds (UCC §2-201; GOL § 5-701) based upon their full, unobjected- to performance in reference to the oral agreement; 6) Plaintiffs' inability to produce records evidencing lost case sales was attributable to Defendants, as record retention was their responsibility; 7) the Plaintiffs' business failures were due to the several breaches of contract by Defendants, and formal termination "without apparent cause;" 8) F&V lost all franchise rights to RC Cola as of December 31, 1999 because it interfered with Plaintiffs' ability to meet sales milestones; 9) Defendants committed "multiple" breaches of "the Metbev/F & V assignment contracts;" 10) Plaintiffs "expected to build the equity in their routes" and thereafter to "sell" them, and under the doctrine of "futile acts" they were not required to seek permission once it became apparent that permission would not be forthcoming; 11) Defendants are "alter-egos" and both liable to Plaintiffs; 12) Plaintiffs' agreement is not dependent upon the payment of franchise fees; 13) Plaintiffs are entitled to prejudgment interest at the statutory rate from a single reasonable intermediate date for breach of contract; and 14) Defendants have committed multiple egregious acts by which they were unjustly enriched.

It is the Referee's general recommendation that "defendants F&V and Hornell be found

jointly and severally liable to both plaintiffs and to the Parol[] plaintiffs on the theory of breach of contract, and/or alternatively on the theories of promissory estoppel, and unjust enrichment (Report p. 7)."

D. Appropriateness of Referee's Determinations

CPLR § 4403 provides that the court "may confirm or reject, in whole or in part, the verdict of an advisory jury or the report of a referee to report; may make new findings with or without taking additional testimony; and may order a new trial or hearing." Despite this seemingly broad scope of the Court's review, the determination of a referee appointed to hear and report is entitled to great weight, particularly where conflicting testimony and matters of credibility are at issue. This is because the Referee, as the trier of fact, had the opportunity to see and hear the witnesses and to observe them on the stand. Accordingly, the findings of the referee will not be disturbed if supported by the evidence in the record. *Slater v. Links at North Hills*, 262 A.D.2d 299 (2d Dept. 1999); *Frater v. Lavine*, 229 A.D.2d 564 (2d Dept 1996). Moreover, to the extent that the referee clearly defined the issues, resolved matters of credibility and made findings that were substantially supported by the record, such findings will be credited by the court. *Poster v. Poster*, 4 A.D.3d 145 (1st Dept. 2004), *lv. app. den.*, 3 N.Y.3d 605 (2004).

Here, the Referee properly resolved credibility issues, defined and discussed the relevant legal issues, and his findings are amply supported by the record, particularly with respect to 1) the custom and trade in the soft drink industry, 2) Don Vultaggio's control of the Arizona companies, and 3) Defendants' responsibility for the failure of the RC/Arizona enterprise. The ultimate conclusions regarding the facts are supported in the record, and are supported by evidence of the sound business agreements and pursuits of experienced soft drink distributors which were frustrated by Defendants, all in violation of contract. In exchange for an exclusive equity right to distribute Arizona products in their RC territories where they had established good will, the Met Bev Plaintiffs surrendered parts of their established and exclusive RC distribution routes to F&V, thus allowing F&V to increase the number of distributors in the territory. Certain F&V employees joined the Met Bev distributors, and were promised the same exclusive equity rights. Like the Met Bev distributors, they did not have the benefits of an employee for whom the employer supplied the truck, gasoline, insurance and medical costs (T. 1207). Rather, they too were entrepeneurs bearing all costs for the business they transacted. The reduction of their territory meant fewer RC case sales for the Met Bev Plaintiffs and, therefore,

loss of income and equity, as the case sale number is multiplied by a dollar figure to establish resale value, and is clearly the basis for commissions. Acquisition of exclusive equity rights to the Arizona product was the necessary *quid pro quo*.

Critically, it is custom and practice in the beverage industry for distributors to have equity and sale rights in their exclusive routes. It is this profitable equity right that drives a distributor to increase the number of customers and case sales in order to build equity, thus benefitting not only himself, but also the product manufacturers and licensees.

The Met Bev Plaintiffs also provided F&V with a Norad computer system. The system permitted distributors to enter sales upon delivery with a hand held computer, which in turn relayed the information to a central system. The central system recorded and tracked sales, and used the daily information to determine the following day's product needs for packing trucks the following morning. The Met Bev Plaintiffs also increased Arizona product sales in the Long Island market as Arizona did not have extensive distribution in the territory.

In return for the consideration provided by Plaintiffs, Defendants aver that they did not have to provide an exclusive equity right to Arizona sales in the territory. The contract, as well as testimony and custom and practice, indicate otherwise. In sum, the Court rejects the Defendants' contentions and adopts and confirms the Report. The Referee did not err in recognizing that this defense rested upon a sole fact witness who had "marginal" credibility. The Plaintiffs, on the other hand, relied upon twenty-seven fact witnesses, some former employees of Defendants, whose testimony was consistent and exceeded the burden of proof. Plaintiffs also offered the testimony of three expert witnesses familiar with industry custom and practice. While the Court must defer to the Referee's credibility determinations, this Court's review of the record – even *de novo* – would result in this Court making similar factual findings to those of the Referee.

E. The Referee Properly Applied the Law

The Court confirms the Referee's conclusions of law, particularly those which are central to the liability of Hornell for the contractual obligations and breaches of F & V. The first is piercing the corporate veil.

Generally, a corporation exists independently of its owners, who are not personally liable for the corporation's obligations. Moreover, individuals may incorporate for the express purpose of limiting their liability. *East Hampton v. Sandpebble*, 884 N.Y.S.2d 94, 98 (2d Dept. 2009),

citing *Bartle v. Home Owners Coop.*, 309 N.Y. 103, 106 (1955) and *Seuter v. Lieberman*, 229 A.D.2d 386, 387 (2d Dept. 1996). The concept of piercing the corporate veil is an exception to this general rule, permitting, under certain circumstances, the imposition of personal liability on owners for the obligations of their corporations. *East Hampton*, 884 N.Y.S.2d at 98, citing *Matter of Morris v. N.Y.S. Dept. Of Taxation*, 82 N.Y.2d 135, 140-41 (1993).

A plaintiff seeking to pierce the corporate veil must demonstrate that a court should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue. Plaintiff must further demonstrate that, in exercising this complete domination, the owners of the corporation abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that caused injury to plaintiff. *East Hampton,* 884 N.Y.S.2d at 98, citing, *inter alia, Love v. Rebecca Dev., Inc.* 56 A.D.3d 733 (2d Dept. 2008). In determining whether the owner has "abused the privilege of doing business in the corporate form," the Court should consider factors including 1) a failure to adhere to corporate formalities, 2) inadequate capitalization, 3) commingling of assets and 4) use of corporate funds for personal use. *East Hampton,* 884 N.Y.S.2d at 99, quoting *Millennium Constr., LLC v. Loupolover*, 44 A.D.3d 1016, 1016-1017 (2d Dept. 2007).

Here, Dominic Vultaggio and co-owner Ferlito own Arizona and its licensee and its distributor. Vultaggio dominates and runs the companies as one, by his own admission. Don Vultaggio, the majority shareholder of both companies, who was not reticent regarding his authority and control, admitted that "F&V and Hornell are one and the same," that they have "the same ownership, the same stockholders" and that he has "treated them as one company." (T. 3906).

The Referee properly concluded that Defendants are alter-egos, and thus Hornell can be held for all the promises made by F&V. Both corporations are thus liable for the breaches of the distributor agreements. The breaches resulted in a drastic loss of RC case sales and prevented Plaintiffs from reaping the anticipated equity sales of their routes.

Specifically, Defendants withheld promotions which had rendered RC 2 liter prices approximately 20 cents cheaper than Coke and Pepsi, a necessary differential to keep RC competitive. They also failed to keep the distributors adequately stocked with RC product, causing serious shortages which resulted in days without product, customer loss of faith and loss of valuable preferred placement in stores.

By way of example, RC case sales for Gary Amlinger, a top salesman, were continually reduced from 1996 to 1999 and went from 84,000 per year to 27,127 (T. 1349, 1360). With respect to product shortages, he testified that in 1995 and 1996 he never had an issue, and that product shortages did not occur "until Don Vultaggio got into the picture." (T. 1502). One of his accounts, Cookies 'N More, which sold soft drinks to school cafeterias, received a 1200 case transhipment. Amlinger had increased sales from 200 per week to 1,000 per week with this account, replacing Snapple with Arizona in the schools (T. 1392, 1395). In 2000, notwithstanding the reduced case sales of RC and the denial of an equity interest in Arizona case sales, Amlinger found a buyer for his route for a price of $275,000. F&V withheld approval of the sale, averring that Amlinger did not own the route (T. 1433, 1424, 1427, 1440). Amlinger severed his relation with F& V in 2000 when F&V lost the RC franchise and took away the profitable Cookies account which Amlinger had opened up for Arizona (T. 1460).

The second critical legal issue concerns the obligations of Defendants to the Parol Plaintiffs. Defendants aver that the Parol Plaintiffs' assertion of an oral agreement subject to the same terms as the Met Bev plaintiffs is barred by the Statute of Frauds. The Referee properly concluded that the Statute of Frauds does not prevent enforcement of the oral agreement.

Section 9.04(A) of the written Distribution Agreement states that: "Distributor may sell or otherwise assign or transfer the franchise conveyed hereby, all or part of the territorial rights conveyed hereby, the franchised Business or any interest therein to a third party with the prior written consent of the Franchisor..." Section 9.04(B) provides that such consent shall not be "unreasonably withheld." Section 2.02 provides for the exclusive right to distribute RC products. And Section 5.03(A) provides that the Franchisor shall afford Distributor the opportunity of offering and selling any new Beverage(s) which Franchisor becomes authorized to distribute in Distributor's Territory."

The foregoing contract provisions provide that the Plaintiffs were entitled to equity in their routes for Arizona (a "new beverage") and RC. The contract provisions applied to the Parol Plaintiffs, as the terms of the agreement were fully performed. The Statute of Frauds affects only executory and not executed contracts. *Schenley Distillers Corp. v. R.C. Williams & Co.*, 64 N.Y.S.2d 561 (Supreme Court, New York County 1946); *Green v. Le Beau*, 281 A.D. 836 (2d Dept. 1953)(statute of frauds did not vitiate oral partnership agreement that had been wholly or partially executed).

With respect to modifications, a fully performed oral modification "must be 'unequivocally referable' to the alleged oral modification to avoid the Statute of Frauds. *Bensen v. American Ultramar Ltd.*, 1997 WL 66780, *8 (S.D.N.Y. 1997). The Parol Plaintiffs altered their employment with the Defendants after promises that they would receive the same terms as the Met Bev Plaintiffs. They shared the Met Bev territory with the Met Bev Plaintiffs and acted as independent distributors as did the Met Bev plaintiffs. Their distribution of Arizona and RC was the same as that of the Met Bev Plaintiffs. Thus the modification of the employment terms with F&V is unequivocally referable to the written Met Bev agreement. All terms were known and relied upon by the Parol Plaintiffs and they provided full performance.

Promissory estoppel presents an additional ground which vitiates the effect of the Statute of Frauds. The doctrine of promissory estoppel is properly reserved for that limited class of cases where the circumstances are such as to render it unconscionable to deny the promise upon which the plaintiff has relied. *Buddman Distributors v. Labatt Importers*, 91 A.D.2d 838, 839 (4th Dept. 1982). The Referee identified the following unconscionable conduct:

> 1) defendants deliberately took former Coca Cola, Pepsi Cola and other highly experienced route salesmen (the plaintiffs) in order to construct a substantial distribution system for RC and especially Arizona products, which did not exist prior to that time, the plaintiffs selling to their former customers the RC and Arizona products, all without just compensation to them;
>
> 2) notwithstanding plaintiffs' contracts (and Parole plaintiffs' promises of RC and Arizona exclusivity), defendants unreasonably denied plaintiffs the opportunity to sell the equity of their routes, upon which plaintiffs strongly relied as their ultimate objective;
>
> 3) defendants forced a number of plaintiffs to give up their prior case sales of other soft drinks, all without compensation in order for them to be embraced by the F&V assignment with its standardized routes;
>
> 4) defendants coerced several plaintiffs to accept reduced commissions on their case sales, so as to obtain defendants' future promotions which were defendants' contractual responsibility, but which never occurred. Additionally, if some plaintiffs did not accept said coerced, commission reductions, their former customers would become "house accounts" of F&V;
>
> 5) defendants oftentimes shipped competing product in plaintiffs' exclusive territories at prices lower than they sold the same

product to plaintiffs for resale to their customers; and

6) finally there were regular, substantial shortages of the RC product, leaving plaintiffs' customers selling other soft drinks to their clientele.

The Court confirms the Referee's conclusion that "the foregoing acts of defendants were in clear breach of plaintiffs' written contracts, [and] defendants' multiple oral promises, upon which plaintiffs relied to their severe, financial detriment." (Report pp. 24-26).

Based upon the foregoing the Court confirms the report of Referee Thomas V. Dana and refers the issue of damages to him to hear and determine, as previously directed by Justice Austin in his prior Order in open court on February 14, 2007 . The Court directs counsel for the parties to appear before this Court on March 25, 2010 at 9:30 a.m., at which time the Court will schedule the damages phase of this matter.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
February 25, 2010

HON. TIMOTHY S. DRISCOLL
J.S.C.