

Tuscan/Lehigh Diaries, Inc. v Beyer Farms, Inc.

2013 NY Slip Op 31341(U)

June 7, 2013

Sup Ct, Queens County

Docket Number: 700994/2013

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

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TUSCAN/LEHIGH DIARIES, INC., Number 700994/2013
Plaintiffs, Motion
Date April 25, 2013
-against-
BEYER FARMS, INC., Motion Seq. No. 3
Defendant.

-----x
BEYER FARMS, INC.,
Third Party Plaintiff,
-against-
DEAN FOODS COMPANY,
Third Party Defendants.
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The following papers numbered 1 to 15 read on this motion by plaintiff and third-party defendant granting summary judgment in plaintiff's favor, and dismissing defendant's counterclaims and third party complaint.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1-6
Statement of Facts.....	7
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Counterstatement of Material Facts.....	13
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Upon the foregoing papers it is ordered that the motion is determined as follows:

The parties in this case are plaintiff, Tuscan/Lehigh Dairies, Inc. (Tuscan), which is in the business of supplying milk and milk products in New York and New Jersey. Defendant/third-party plaintiff, Beyer Farms, Inc. (Beyer), is a wholesale distributor of dairy and other food products in New York and New Jersey. Third party-defendant, Dean Foods Company (Dean), the corporate parent of plaintiff, is a supplier and distributor of milk and milk products.

Since the submission of this motion, Tuscan notified the court that Beyer is the subject of an involuntary bankruptcy proceeding, filed by Tuscan and Dean on May 2, 2013 and that an automatic stay is in effect. Beyer maintains that the automatic stay does not apply to its counterclaims and the third-party action.

As a general rule, the commencement of a bankruptcy case stays all actions and proceedings against the debtor; however, the debtor can file and continue to assert affirmative claims in litigation without need for relief from the stay (11 USC 362[a][1]).

Thus, prosecution of Tuscan's action is stayed and Tuscan's motion for summary judgment is held in abeyance pending notification from the parties that the bankruptcy stay is no longer in effect. However, as Beyer's counterclaims and third-party complaint are not stayed, the court considers that part of the motion to dismiss the counterclaims and third-party complaint.

Accordingly, the counterclaims and third-party action are hereby severed.

Now the court turns to the motion to dismiss. On June 26, 2003, Tuscan sold its wholesale distribution business to Beyer and entered into a distribution agreement, wherein Beyer assumed Tuscan's "obligations under all agreements, contracts, commitments and other arrangements or understanding to customer's" on specified routes to distribute milk and other dairy products. While Beyer was given the right to serve Tuscan's customers, it also had to notify Tuscan of any new customers it obtained. Beyer also agreed to purchase those dairy products from Tuscan and make "milk payments," which included a fixed monthly fee, a handling fee, an amount for the products purchased and a shortfall fee if it failed to meet purchase minimums. Tuscan agreed to license Beyer to sell those products with Tuscan's trademarks. Moreover, Beyer's consideration included monthly payments of \$51,157.95 for ten years commencing on July 1, 2004 in addition to providing a promissory note to Tuscan in the sum of \$672,922.32. The promissory note

provided for monthly installments in the sum of \$8,842.05 commencing on July 1, 2004 for ten years, at which time the outstanding balance would become due and payable. The promissory note further provided a security interest in the collateral stated therein, which was perfected by Tuscan on July 25, 2003 with the filing of a UCC Financing Statement with the NYS Department of State, Uniform Commercial Code Division. A continuation of its UCC Financing Statement was filed on February 26, 2008.

In the amended answer with counterclaims and third-party action, Beyer alleges, *inter alia*, that Tuscan and Dean sought to destroy its business and Tuscan has been in direct competition with it in violation of the distribution agreement. Beyer asserts two counterclaims: the first is for breach of contract alleging that Tuscan's termination does not comport with the terms of the distribution agreement; and the second is for breach of duty of good faith and fair dealing when Tuscan failed to provide reasonable notice of the termination of the distribution agreement and refused to release holds on the outstanding accounts receivable of Beyer's customers. The third party action against Dean asserts a cause of action for tortious interference with the contracts Beyer had with its customers. Beyer alleges that Dean intentionally caused its customers to breach those contracts, gave the customers instructions on where to make payments on the accounts receivable, and offered to supply the customers with milk.

Neither Tuscan nor Dean have answered the counterclaims and third-party complaint, respectively, but have timely interposed this pre-answer motion to dismiss.

Tuscan and Dean move to dismiss pursuant to CPLR 3211(a)(1) and (7) on the grounds that a defense is founded upon documentary evidence and the pleading fails to state a cause of action. CPLR 3211(a)(1) gives this court the authority to dismiss an action if the movant presents proof that a defense is based on documentary evidence. To prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim" (*Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2d Dept 2003] quoting *Trade Source v Westchester Wood Works*, 290 AD2d 437 [2d Dept 2002]).

Generally, on a CPLR 3211(a)(7) motion to dismiss, the pleadings are afforded liberal construction, the facts alleged in the complaint are accepted as true, and the plaintiffs are accorded the benefit of every possible favorable inference, so long as the allegations are not bare or conclusory (*Leon v Martinez*, 84 NY2d 83 [1994]; *Morone v Morone*, 50 NY2d 481, 455 [1980]; *Guwenheimer v*

Ginzburg, 43 NY2d 268 [1997]; *Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]; *Lakeville Pace Mechanical, Inc. v Elmar Realty Corp.*, 276 AD2d 673 [2d Dept 2000]; *Kantrowitz & Goldhamer v Geller*, 265 AD2d 529 [2d Dept 1999]; *Scomello v Caronia*, 210 AD2d 214 [2d Dept 1994]). In addition, affidavits submitted by a plaintiff may be considered by the court to remedy any defect in the complaint (see *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]; *Leon v Martinez*, supra; *Rovello v Orofino Realty Co.*, supra).

With respect to the first counterclaim for breach of contract, Tuscan and Beyer rely on different sections of the distribution agreement to support their claim that termination was valid or invalid. Applying Delaware law in accordance with the parties choice of law in the distribution agreement, "when interpreting a contract, a court will give priority to the parties' intentions as reflected in the four corners of the agreement" (*GMG Capital Invs., LLC v Athenian Venture P'rs I, L.P.*, 36 A3d 776, 779 [Del. 2012]). "A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction" (*Rhone-Poulenc Basic Chemicals Co. v Am. Motorists Ins. Co.*, 616 A2d 1192, 1195 [Del. 1992]). Rather, an ambiguity exists only when a contract is fairly susceptible to two or more reasonable interpretations (see *GMG Capital Investments, LLC v Athenian Venture Partners I, LP.*, 36 A3d 776, 780 [Del. 2012]); *Rhone-Poulenc*, 616 A2d at 1196.

Tuscan maintains that Beyer's owes over \$19,000,000 and that it properly terminated in accordance with section 18(c) by sending a notice of termination to Beyer on December 6, 2012 and by sending default notices to Beyer on February 20, 2012, July 23, 2012 and August 29, 2012. It is noted that the only default notice actually sent by Tuscan on its letterhead was on July 23, 2012. All other notices or correspondence was sent by Dean. Section 18(c) provides that "[t]he parties agree that time is of the essence for payment obligations. [Tuscan] shall have the right to terminate this Agreement in the event [Beyer] fails to make payments due to [Tuscan] or due under the Assumed Leases within five (5) days after written notice of such failure is delivered to [Beyer] and [Beyer] has failed to make such payment within the 5-day period."

Conversely, Beyer claims that the termination was invalid relying on section 18(e) of the agreement, which provides that "[Tuscan] shall have the right to terminate this Agreement immediately upon notice to [Beyer] if [Tuscan] has previously notified [Beyer] of five breaches under Section 18(c) within six consecutive months, whether or not such individual breaches were subsequently cured."

There is nothing under section 18 that indicates that the parties may choose any paragraph a method to terminate the agreement. Therefore, each paragraph cannot be read independently. Reading section 18 as a whole, termination for failure to make payments may be made by Tuscan pursuant to section 18(e) provided five notices have been given within a six month period under (c). Consistent with this reading, it is noted that the agreement also provides for termination upon a material breach other than for payment obligations by section 18(d) provided notice of two breaches within a six month period has been given under (a). Accordingly, Tuscan's interpretation is not a reasonable construction warranting denial of the branch of the motion seeking dismissal.

Tuscan also seeks dismissal of the counterclaim for breach of the duty of good faith and fair dealing. All contracts imply a covenant of good faith and fair dealing in the course of performance (*Chamison v HealthTrust, Inc.— The Hospital Co.*, 735 A2d 912, 920 [Del. Ch. 1999]). Under Delaware law, the implied covenant requires "a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits" of the bargain (*Wilgus v Salt Pond Inv. Co.*, 498 A2d 151, 159 [Del. Ch. 1985], construing Restatement § 205). However, a claim for breach of the implied covenant cannot be based on conduct authorized by the terms of the agreement (*In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 975 F. Supp. 584, 616 [D.N.J. 1996]; see also *Duquesne Light Co. v Westinghouse Elec. Corp.*, 66 F3d 604, 617 [3d Cir. 1995]).

Tuscan argues, *inter alia*, that since the distribution agreement authorizes it to terminate the contract, the duty of good faith and fair dealing was not breached. Nevertheless, the need for further discovery preclude dismissal of this claim as Beyer has established that additional discovery would disclose essential facts.

Finally, Dean seeks dismissal of the third party complaint which alleges tortious interference with the contracts Beyer had with its customers. The elements of tortious interference with contract are (1) the existence of a valid contract between plaintiff and a third party, (2) defendant's knowledge of that contract, (3) the intentional procurement of the breach by defendant without justification, and 4) damages (*Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413 [1996]). Economic self-interest justification is a valid defense to a claim of tortious interference (*Foster v Churchill*, 87 NY2d 744 [1996]).

Dean argues that the complaint does not plead the elements of this claim, including actual breach of a contract. Dean further argues that the complaint does not alleged intent and that its conduct was with justification as the notices sent were authorized by the Uniform Commercial Code § 9-607. In opposition, Beyer submits the affidavit of Henry Beyer, who alleges that Dean, Beyer's competitor, essentially undertook a course of conduct to terminate the distribution agreement so as to eliminate Beyer as a competitor, and supply and distribute dairy products to Beyer's customers.

Contrary to Dean's contention, the complaint pleads the elements of tortious interference with contracts, including allegations of the specific conduct Dean undertook to cause breaches of the relevant contracts. Furthermore, while Dean may have an economic self-interest as corporate parent of Tuscan, Beyer has sufficiently alleged the intentional procurement of the breach by Dean without justification. Thus, dismissal of the third-party action is denied.

Dated: June 7, 2013

ORIN R. KITZES, J.S.C.