

**Matter of Rockwood Pigments NA, Inc. v Elementis
Chromium LP**

2014 NY Slip Op 32127(U)

August 4, 2014

Sup Ct, New York County

Docket Number: 651617/2014

Judge: Melvin L. Schweitzer

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

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In the Matter of the Application of	:
ROCKWOOD PIGMENTS NA, INC.,	:
	:
Petitioner,	:
	:
For a Temporary Restraining Order and	:
Preliminary Injunction Pursuant to CPLR 7502 (c),	:
	:
-against-	:
	:
ELEMENTIS CHROMIUM LP,	:
	:
Respondent.	:
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Index No. 651617/2014
DECISION AND ORDER
Motion Sequence No. 001

MELVIN L. SCHWEITZER, J.:

Rockwood Pigments NA, INC. (RPNA), moved for preliminary injunction in aid of arbitration, pursuant to CPLR 7502 (c), to enjoin respondent Elementis Chromium LP (Elementis) from terminating and otherwise breaching a distribution agreement for the marketing and sale of certain pigmentary grade chromium oxide compounds used in the chemical industry. Respondent filed a cross-motion to dismiss RPNA’s complaint. Petitioner’s motion for preliminary injunction is granted. Respondent’s cross-motion is denied.

Background

RPNA is an affiliate of Rockwood Specialties Group, Inc. (Rockwood Specialties), a large, diversified multinational company that makes and sells a broad range of specialty chemicals.

Elementis is an affiliate of Elementis Holdings Ltd. (Elementis Holdings), a large multinational maker and supplier of various chemical products and advanced materials to institutional customers around the world.

In May 2007, Rockwood Specialties purchased and assumed the operation of a business division from Elementis Holdings. As part of the transaction, Rockwood Specialties and Elementis Holdings agreed to cause affiliates to enter into an exclusive distribution agreement under which an Elementis Holdings affiliate would exclusively supply certain pigmentary grade chromium oxide products to a Rockwood affiliate (RPNA) and the Rockwood affiliate would market and sell them to its institutional customers.

On August 31, 2007, RPNA and Elementis entered into a Distribution Agreement (Distribution Agreement). The Distribution Agreement designates RPNA as the exclusive distributor of certain pigmentary grade chromium oxide products used in a variety of commercial coloring and coating applications (Products) in a certain territory, and requires RPNA to promote and sell the Products in a “commercially reasonable manner.” Section 2.4 of the Distribution Agreement states:

Distributor shall promote the sale and use of the Products throughout the Territory in a commercially reasonable manner generally consistent with past practices of the Business.

Pursuant to the Distribution Agreement, RPNA has been selling the Products. The Distribution Agreement further provides that if RPNA purchases less than four million pounds of Products in a given year, then the exclusivity provisions “shall automatically (without any action required by either party) be converted to an appointment as a non-exclusive distributor.”

Section 2.5 states:

If at any time following the third anniversary of the Effective Date, the sales volume of Products purchased by [RPNA] from [Elementis] hereunder during the immediately preceding twelve (12) month period is less than four million (4,000,000) pounds, then (a) [RPNA's] appointment as the exclusive distributor of [Elementis] and its Affiliates as set forth in Section 2.1 above shall automatically (without any action required by either party) be converted to an appointment as a non-exclusive distributor...

RPNA's total purchases of Products in the twelve-month period (12-Month Aggregate Purchases) ending on September 30, 2012 amounted to 3,966,144.945 pounds, less than the 4,000,000 threshold that RPNA was required to meet to maintain exclusivity. Accordingly, RPNA's exclusivity automatically terminated no later than September 30, 2012.

Prior to September 2013, RPNA and Elementis met on three separate occasions to discuss the state of RPNA's sales of Products as well as various market conditions and customer specific issues that impacted sales levels. As of September 1, 2013, the parties executed an Addendum, which provides that the parties agree to jointly market the Products to certain customers and that certain other customers shall be transferred entirely to Elementis. The Addendum further provides:

The Distributor shall include the Seller in commercial decisions involving quotations or any changes to pricing or volume of the Products to the Construction Customers and mutually agree on the conditions of the sale.

The terms of the Distribution Agreement run until August 7, 2015. Either party has an unconditional right to terminate the Distribution Agreement with timely notification, effective August 31, 2015. For terminations prior to August 7, 2015, the parties agreed that the Distribution Agreement could only be terminated under limited circumstances: (i) by agreement, which did not happen here, (ii) by notice upon certain default events, which are not applicable here, and (iii) upon a "material breach" not cured within forty-five days of written notice. The Distribution Agreement expressly stipulates that no such "material breach" termination may be effective on less than forty-five days written notice. Specifically, paragraph 6.2(c) states:

If either party shall materially breach this Agreement or be in material default of any material provision hereof, in addition to any other rights or remedies available hereunder or under applicable legal requirements, the other party may terminate this Agreement by written notice of termination sent to the party in breach or default, not less than forty-five (45) days before such termination is to

become effective, and such termination shall become effective on the date specified in said notice unless such breach or default, if capable of being cured or corrected, is cured or corrected within forty-five (45) days of the giving of such notice of termination.

The Distribution Agreement also provides that no party shall be liable by reason of, among other things, termination for damages on account of the loss of prospective profits on anticipated sales. Specifically, 6.5 states:

Neither Seller nor Distributor shall be liable to the other by reason of termination, expiration, or non-renewal of this Agreement, for compensation, reimbursement or damages on account of the loss of prospective profits on anticipated sales or on account of expenditures, investments, leases or commitments in connection with the business or goodwill of Seller or Distributor or otherwise.

In a letter dated May 9, 2014, Elementis President Dennis Valentino notified RPNA that it was terminating the Distribution Agreement for material breach because RPNA's performance under the Distribution Agreement had been unacceptable and demonstrated a complete failure to use commercially reasonable efforts generally consistent with past practices, as is required by Section 2.4 of the Distribution Agreement. Elementis attempted to terminate the Distribution Agreement, effective May 31, 2014.

On May 22, 2014, Elementis blasted emails to RPNA's chrome oxide customers, notifying them that the relationship between Elementis and RPNA had terminated and RPNA may no longer provide the Products to customers effective May 31, 2014. Those emails carry the subject line "Chrome Oxide Pigment Transition Letter" and advise customers that Elementis has designated a new affiliate (Elementis Specialties) to be their distributor. Those emails further advise that "[y]ou will be receiving a communication directly from Elementis Specialties with instructions on where to place your orders for chrome oxide pigment grade products" and

the letter will “contain customer service and sales account manager contact information.”

Customers have called or written to RPNA with concern and confusion.

Pursuant to Paragraph 15.1 of the Distribution Agreement that [a]ll disputes arising out of or relating to this Agreement shall be finally settled by arbitration under the American Arbitration Association Commercial Arbitration Rules, RPNA has requested and initiated expedited arbitration in New York.

On May 27, 2014, RPNA petitioned the court for a temporary restraining order and preliminary injunction in aid of arbitration, pursuant to CPLR 7502 (c). RPNA claimed that respondent attempted to terminate the Distribution Agreement for a non-existent material breach, that respondent violated the provisions of express notice and opportunity to cure, that the consequences for RPNA in the marketplace are considerable and not answerable in money damages and that an injunction pending arbitration is absolutely necessary to ensure that petitioner’s remedy in arbitration is not rendered worthless. RPNA seeks injunctive relief immediately to stave off termination of the Distribution Agreement so that the status quo may be maintained as the parties proceed to arbitration.

On May 28, 2014, the parties appeared before the court for a hearing on the requested Temporary Restraining Order. On May 28, 2014, the court granted a TRO.

Discussion

In order for a preliminary injunction to be issued pursuant to CPLR 7502(c), the petitioner must demonstrate (1) a likelihood of success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, (3) a balancing of the equities which favors the issuance of injunctive relief, and (4) that the award to which the applicant may be entitled may

be rendered ineffectual without such provisional relief. *CanWest Global Communications Corp. v Mirkaei Tikshoret Ltd.*, 9 Misc 3d 845 (Sup Ct NY 2005).

Likelihood of Success on the Merits

RPNA has demonstrated a likelihood of success on the merits. RPNA has not materially breached the Distribution Agreement warranting termination and Elementis violated the termination clause of the Distribution Agreement by providing a termination notice with less than forty-five days before termination and denying any opportunity for cure.

Elementis asserts it terminated the Distribution Agreement because RPNA failed to use commercially reasonable sales efforts generally consistent with past practice, as is required by Section 2.4 of the Distribution Agreement. Primarily, Elementis cites RPNA's sales of the Products falling below the 4,000,000 threshold as a complete failure to use commercially reasonable efforts. Falling below the 4,000,000 threshold has a remedy in the Distribution Agreement, namely an automatic conversion from exclusive to non-exclusive distribution rights. It cannot constitute a material breach affording Elementis the right to terminate. The court finds that as of September 30, 2012, the Distribution Agreement became non-exclusive.

Elementis claims that RPNA would not adjust the price appropriately, given the current market conditions. Elementis claims such non-adjustment is a breach because it is inconsistent with commercially reasonable efforts. RPNA testified that there was extensive discussion regarding pricing at the time when the Addendum was signed. The parties agreed to a collaborative pricing mechanism that took effect on September 1, 2013. After signing the Addendum, RPNA lowered the price of the Products. This undercuts Elementis' contention that it terminated the Distribution Agreement because RPNA would not make price adjustments. Elementis' claim that RPNA was not willing to lower the price is not convincing. The court

finds it more likely that Elementis terminated the Distribution Agreement out of frustration at the declining volume of sales of the Products. As the court pointed out above, decreased sales volume is not a sufficient basis for termination. The court finds that Elementis did not sufficiently cite a material breach, as is required for termination.

Additionally, Elementis deprived RPNA of its right to cure. The termination clause of the Distribution Agreement requires that written notice of termination be sent to the party in breach or default, not less than forty-five days before such termination is to become effective. It further provides that such termination shall become effective on the date specified in said notice unless such breach or default, if capable of being cured or corrected, is cured or corrected within forty-five days of the giving of such notice of termination. Elementis gave RPNA only 21 days notice.

In this connection, Michael Corcoran of RPNA, who is involved in setting prices at which RPNA offers Elementis products to its customers, testified at the hearing that certain pricing decisions involving the lowering of prices needed the approval of RPNA's president, Andy Ross. In such situations, Mr. Corcoran testified that he did bring these decisions to Mr. Ross. In response to a series of questions from RPNA counsel, Mr. Corcoran testified that RPNA did not ever refuse to discuss lowering prices and that RPNA did, in fact, lower prices from time to time. To be sure, when faced with a termination notice and their backs against the wall, the court finds it difficult to accept the view that it would have been futile to have a serious discussion between RPNA and Elementis that could have led to a significant reduction in prices as a cure or correction on a going forward basis.

Elementis also deprived RPNA of the right to cure by blasting emails to RPNA's customers immediately after sending the termination notice. The email blasts notified RPNA's

customers that the Distribution agreement between RPNA and Elementis would be terminated in twenty-one days. It immediately prevented petitioner from implementing a possible cure.

Irreparable Harm

RPNA has also established a sufficient basis for finding irreparable harm in the event that the relief is not granted. First, mutual waiver of lost profits in the Distribution Agreement by itself establishes the irreparable harm requirement. *See Daily Bread Café Inc. v City Lights at Queens Landing Inc.*, 17 Misc 3d 1126(A) (Sup Ct, Queens County 2007). Paragraph 6.5 of the Distribution Agreement expressly prohibits RPNA from recovering damages on account of the loss of prospective profits on anticipated sales. Clear prohibition of recovery of damages that would arise from the termination of the contract prevents a money damage remedy.

The threat to RPNA's good will and creditworthiness is sufficient to establish irreparable injury warranting the granting of injunctive relief. *See e.g. Four Times Sq. Assoc. v Cigna Invs.*, 306 AD2d 4 (1st Dept 2003). As noted, after Elementis sent its termination notice on May 9, 2014, on May 22, 2014, Elementis blasted emails to RPNA's customers, notifying them that RPNA could no longer provide the Products, effective May 31, 2014. Those emails further advise that those customers would receive a communication from Elementis with instructions on where to place future orders. Without any notice to RPNA, RPNA's existing institutional client relationships were disturbed. Customers have called petitioner with concern and confusion after reading the email from Elementis.

Since it will take RPNA six to nine months to secure an alternative supply of the Products and to qualify that supplier with its customers, the six to nine month disruptions will force RPNA's customers to establish relationships with competitors. For such reasons, RPNA will be irreparably harmed through the loss of goodwill.

Balance of the Equities

Absent a preliminary injunction, RPNA risks the harm of losing revenue and its customer relationships. It is likely that RPNA will sustain irreparable harm. There is no material prejudice or harm to Elementis if a preliminary injunction is granted. RPNA will continue to perform under the Distribution Agreement and sell the Products. It is in both parties' interests to sell as much volume of the Product as possible. Leaving RPNA in place to continue to perform poses no material prejudice to Elementis. The balance of equities tilts in RPNA's favor.

Elementis claims that it will lose sales if an injunction is granted because the current price is above market prices. This argument fails because the parties agreed to a set price which can be changed annually by agreement.

Award Rendered Ineffectual

Absent a preliminary injunction, RPNA's ability to service its customers' needs may be destroyed. In the absence of a preliminary injunction, there will be nothing left for the arbitrators to resolve. The loss of customers would likely render the arbitration result irrelevant.

Conclusion

Accordingly, it is hereby

ORDERED that RPNA's motion for a preliminary injunction is granted, and the cross-motion of Elementis to dismiss the petition is denied.

Dated: August 4, 2014

ENTER:


J.S.C.

MELVIN L. SCHWEITZER