

CLS Prods. NY Inc. v Ehrlich
2015 NY Slip Op 32352(U)
December 14, 2015
Supreme Court, New York County
Docket Number: 650495/2015
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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CLS PRODUCTS NY INC.,

Plaintiff,

- v -

DAN EHRLICH and
POWERHOUSE BEVERAGE COMPANY, LLC,

Defendants.

-----X
HON. EILEEN A. RAKOWER, J.S.C.

Index No.
650495/2015

**DECISION
and ORDER**

Mot. Seq. 001

This action arises out of an alleged agreement between plaintiff, CLS Products NY, Inc. (“CLS” or “Plaintiff”), a distributor of juices and other products within the City of New York, and defendant, Powerhouse Beverage Company, LLC (“Powerhouse”), the manufacturer and supplier of a juice product known as “IQ Juice” (“IQ Juice”), to market, promote, and distribute IQ Juice for a period of five years. Plaintiff claims that Powerhouse failed to comply with, *inter alia*, the Distribution Agreement’s pricing procedures, non-competition provisions, and early termination terms. In addition, Plaintiff claims that Powerhouse, through its managing member, individual defendant, Dan Ehrlich (“Ehrlich”) (and together with Powerhouse, collectively, “Defendants”), entered into a separate distribution contract with another distributor in violation of the Distribution Agreement’s non-competition provision. Plaintiff asserts causes of action for breach of contract, breach of fiduciary duty, and declaratory judgment against Defendants.

Defendants now move for an Order, pursuant to CPLR §§ 3211(a)(1), and (7), dismissing Plaintiff’s complaint on the basis of documentary evidence and failure to state a cause of action.

Plaintiff opposes.

As an initial matter, CPLR § 3211(e) provides that “[a]t any time before service of the responsive pleading is required, a party may move [to dismiss a cause

of action] on or more of the grounds set forth in subdivision (a)". (CPLR § 3211[e]). Pursuant to CPLR § 3012(a), service of an answer "shall be made within twenty days after service of the pleading to which it responds." (CPLR § 3012[a]). However, under CPLR § 3012(d), the court may extend the time to appear or plead "upon such terms as may be just and upon a showing of reasonable excuse for delay or default." (CPLR § 3012[d]).

Here, Plaintiff argues that Defendants filed the instant motion to dismiss on May 8, 2015, more than 60 days after service of Plaintiff's complaint on March 5, 2015, and that this motion is not timely filed under CPLR § 3211(e). However, Defendants contend that Plaintiff orally agreed to extend Defendants' time to answer Plaintiff's complaint for an additional 30 days. Defendants submit a copy of an email dated May 1, 2015, from Defendants' counsel to Plaintiff's counsel memorializing the oral stipulation to extend Defendants' time to answer Plaintiff's complaint. This email states, in relevant part: "[t]hank you for your prior agreement to a 30-day extension to respond to the complaint. I expect to file a responsive pleading early-mid next week. Per agreement, we will not object to jurisdiction/venue." (Reply Aff. Ex. 1). Accordingly, Defendants' motion is accepted as timely.

As for the merits of Defendants' motion, CPLR § 3211 provides, in relevant part:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence; or

(7) the pleading fails to state a cause of action; or

(CPLR §§ 3211[a][1], [7]).

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true . . . and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep't 2003] [internal citations omitted]; CPLR § 3211[a][7]). On a motion to dismiss pursuant to CPLR § 3211(a)(1), "the court may grant dismissal when documentary evidence submitted

conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324 [2007] [internal citations omitted]). A movant is entitled to dismissal under CPLR § 3211(a)(1) when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dep’t 2007] [citation omitted]). When evidentiary material is considered, “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]).

As for Plaintiff’s first and fifth causes of action, for breach of the Distribution Agreement, “[t]he elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant’s failure to perform, and resulting damage.” (*Flomenbaum v New York Univ.*, 71 A.D. 3d 80, 91 [1st Dep’t 2009]).

Plaintiff’s complaint alleges that “[o]n or about February 25, 2014, Plaintiff CLS and Defendant Powerhouse entered into a distribution agreement for CLS to distribute IQ Juice, the juice product produced by Powerhouse.” (Compl. ¶ 10). Plaintiff’s complaint further alleges that the Distribution Agreement, “provided for a five (5) year term between the parties and further provided for Non-Competition by either party, a Pricing procedure, and for a Termination Fee payable to CLS if Powerhouse terminated the agreement prior to the end of the five year term.” (*Id.* ¶ 12). Plaintiff’s complaint alleges that, “[p]ursuant to the agreement between the parties, CLS undertook to market, promote, and distribute IQ Juice, the sole product of defendant Powerhouse.” (*Id.* ¶ 21). Plaintiff’s complaint asserts:

On or about July 29, 2014, Defendants Powerhouse and Ehrlich breached the distribution agreement between Defendants and CLS by:

- (a) failing to notify CLS of price increases as per the Distribution Agreement;
- (b) imposing illegal price controls over CLS as a condition of delivery of products, in contravention of the Distribution Agreement;
- (c) shipping or attempting to ship directly to CLS customers in CLS Territory without written consent from CLS in contravention of the Agreement;

(d) attempting to impose restraints upon CLS in order to service CLS customers and bypass CLS in contravention of the Agreement.

(*Id.* ¶ 13).

Plaintiff's complaint further asserts:

Further, on or about August 7, 2014, Defendants Powerhouse, by Defendant Ehrlich, entered into another contract with another distributor to distribute IQ Juice products in the area of the agreement with Plaintiff CLS in contravention of their Distribution Agreement and damaging, harming CLS and otherwise breaching the Agreement between Plaintiff and Defendants.

(*Id.* ¶ 14).

Defendants argue that Plaintiff's breach of contract claim fails because Defendants' documentary submissions conclusively demonstrate that Plaintiff failed to perform under the Distribution Agreement. Specifically, Defendants argue that their documentary submissions conclusively demonstrate that Plaintiff failed to make payments as required under the Distribution Agreement, in March 2014 and in April 2014. In addition, Defendants argue that, pursuant to the express termination provisions set forth in the Distribution Agreement, Plaintiff's failure to make payments as required under the Distribution Agreement terminated the Distribution Agreement prior to Defendants' alleged misconduct asserted in Plaintiff's complaint.

Pursuant to the Distribution Agreement:

Termination *may* occur for cause as follows: . . . By Supplier for cause immediately in the event of a material breach by Distributor of any provisions of this Agreement. With the exception of Section 13.2 hereof for which no cure period is required, Supplier shall provide Distributor with written notice, which notice shall (i) indicate the nature of such cause for termination, and (ii) provide Distributor an opportunity to cure such breach within forty

five (45) days of Distributor's receipt of such written notice.

(Defs.' Ex. 1 § 13.1 [Distribution Agreement] [emphasis added]). Under Section 13.2 of the Distribution Agreement, such termination may occur "By Supplier for cause immediately in the event of: . . . Distributor failing, or being unable to pay its obligations as they become due; or . . . Distributor failing to pay any sums due to Supplier when due." (Defs.' Ex. 1 §§ 13.2[d], [f] [Distribution Agreement]).

In addition, the Distribution Agreement's payment term states:

Payment - Distributor shall pay for the Products within thirty (30) days from the Products are received by Distributor or on such terms as may be otherwise specified on Supplier's invoice. At Supplier's option [sic]

(Defs.' Ex. 1 § 5.2 [Distribution Agreement]). Defendants submit eight invoices (collectively, the "Invoices") issued to Plaintiff between March 2014 and August 2014, along with copies of Plaintiff's checks paying certain of those invoices (collectively, the "Checks"). These submissions indicate that the invoice dated March 20, 2014 was 29 days delinquent, as was the following invoice, dated April 23, 2014, and that the invoices dated July 10, 2014 and July 14, 2014, were six days delinquent and one day delinquent, respectively. However, Defendants do not dispute that the invoices dated May 20, 2014, June 25, 2014, and June 30, 2014, were each paid on time. Defendants contend that Defendants' eighth and final invoice, dated August 6, 2014, was never paid.

Here, accepting Plaintiff's allegations as true, Plaintiff's complaint adequately alleges the formation of the Distribution Agreement, Plaintiff's performance of distribution and marketing services pursuant to the Distribution Agreement, Powerhouse's failure to comply with various provisions of the Distribution agreement, and damages. Accordingly, accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff's complaint adequately plead a cause of action for breach of the Distribution Agreement as against Powerhouse.

In addition, accepting Plaintiff's allegations as true, Defendants' documentary submissions do not, as a matter of law, conclusively establish a defense to Plaintiff's breach of contract claims as against Powerhouse. Although § 13 of the Distribution Agreement *permits* the supplier to terminate the Distribution Agreement in the event

of the distributor's non-payment, this section does not, as Defendants contend, automatically *require* termination in such circumstances. Indeed, Defendants' Invoices demonstrate that, notwithstanding Plaintiff's failure to pay certain Invoices within the thirty-day window provided in § 5.2 of the Distribution Agreement, Powerhouse continued to supply juice products to Plaintiff. As Powerhouse issued invoices—and accepted payment—for juice products delivered to Plaintiff even after Plaintiff failed to make certain payments within the time frame required under the Distribution Agreement, Defendants' documentary submissions fail to conclusively establish that the Distribution Agreement was “immediately” terminated upon Plaintiff's failure to pay certain invoices within thirty days of receipt. Accordingly, Defendants' documentary submissions do not flatly contradict the factual allegations and legal conclusions asserted against Powerhouse in Plaintiff's complaint and Plaintiff's first, third, and fifth causes of action against Powerhouse stand.

However, with respect to individual defendant Ehrlich, it is the general rule that a corporate officer is not liable for contracts entered into on the corporation's behalf “unless there is clear and explicit evidence” of the individual officer's intention to be personally bound. (*Mencher v. Weiss*, 306 N.Y. 1, 4, 114 N.E.2d 177 [1953]). In order to pierce the corporate veil to impose a corporation's contractual obligations upon an individual officer, the party seeking to pierce the corporate veil must show: (1) the officer exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury. (*Cobalt Partners, L.P. v GSC Capital Corp.*, 97 A.D.3d 35, 40 [1st Dep't 2012] quoting *Morris v. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 141 [1993]). Where a party seeks to hold an individual officer liable for the contractual obligations of the corporation, allegations of control, “unaccompanied by allegations of consequent wrongs”, are insufficient to plead a cause of action as against the officer individually. (*Cobalt Partners, L.P. v GSC Capital Corp.*, 97 A.D.3d 35, 40 [1st Dep't 2012]).

Here, Plaintiff's complaint alleges that Ehrlich signed the Distribution Agreement “in his capacity as ‘Chair Man’ [sic] of Powerhouse.” (Compl. ¶ 11). Thus, even accepting Plaintiff's allegations as true, Plaintiff's complaint does not plead that Ehrlich executed the Distribution Agreement in his individual capacity. To the extent that Plaintiff's complaint seeks to pierce the corporate veil to impose Powerhouse's obligations upon Ehrlich individually, even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff's complaint fail to plead facts sufficient to suggest that Ehrlich, through his domination, “abused the privilege of doing business in the

corporate form to perpetrate a wrong or injustice against [Plaintiff], such that a court in equity will intervene.” (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 140, 142 [1993]). Accordingly, even accepting Plaintiff’s allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff’s complaint fail to state claim for breach of the Distribution Agreement against Ehrlich individually.

As for Plaintiff’s second cause of action, the elements of a cause of action for breach of fiduciary duty include (1) the existence of a fiduciary relationship; (2) misconduct; and (3) damages caused by the misconduct. (*Armentano v. Paraco Gas Corp.*, 90 AD3d 683, 935 NYS2d 304 [2nd Dep’t 2011]). A cause of action sounding in breach of fiduciary duty must be pleaded with particularity. (CPLR 3016[b]). A fiduciary relationship “exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.” (*EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19 [2005] quoting Restatement [Second] of Torts § 874, Comment a). “Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm’s length business transactions.” (*Id.*).

In determining whether a fiduciary relationship exists between parties who have entered into a contract, “courts look to that agreement ‘to discover . . . the nexus of [the parties’] relationship and the particular contractual expression establishing the parties’ interdependency”’. (*EBC I, Inc.*, 5 N.Y.3d at 19 quoting *Northeast Gen. Corp. v. Wellington Adv.*, 82 N.Y.2d 158, 160 [1993] [alterations in the original]). “If the parties . . . do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them”. (*EBC I, Inc.*, 5 N.Y.3d at 19 quoting *Northeast Gen. Corp.*, 82 N.Y.2d at 162 [alterations in the original]). Although “the same conduct which may constitute the breach of a contractual obligation “may also constitute the breach of a duty arising out of the relationship created by contract but which is independent of the contract itself”, (*Mandelblatt v. Devon Stores*, 132 A.D.2d 162, 167-68 [1st Dep’t 1987]), a cause of action for breach of fiduciary duty which is “merely duplicative” of a breach of contract claim “cannot stand.” (*William Kaufman Org., Ltd. v. Graham & James LLP*, 269 A.D.2d 171, 173 [1st Dep’t 2000]).

Here, Plaintiff’s complaint alleges:

The actions of defendant Ehrlich as a member of Powerhouse were, upon information and belief, without authority by a majority of the other members of Powerhouse, in detriment to the rights of those members, and served no valid corporate purpose and were designed solely for defendant Ehrlich's own benefit, in violation of the fiduciary duties owed by defendants Powerhouse and Ehrlich to Plaintiff CLS.

(Compl. ¶ 31). Plaintiff's complaint further asserts:

By virtue of these actions, defendant Ehrlich has acted in bad faith, has engaged in intentional misconduct, self-dealing, and has failed to perform his duties with the reasonable ordinary care, diligence, independent business judgment and skill and in conducting the affairs of Powerhouse, and has violated his duty of loyalty in his dealings with Plaintiff as an owner of Powerhouse.

(*Id.* ¶ 32).

Even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff's complaint do not plead a relationship of higher trust between Plaintiff and Ehrlich, or between Plaintiff and Powerhouse. Absent a fiduciary relationship between the parties, Plaintiff's second cause of action fails.

As for Plaintiff's third and fourth causes of action, CPLR § 3001 permits the court to render a declaratory judgment, "having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." (CPLR § 3001). To the extent that Plaintiff's third and fourth causes of action seek a declaration of the rights, obligations, and interests of Plaintiff and Powerhouse under the Distribution Agreement, Plaintiff's third and fourth causes of action are sufficient to withstand a motion to dismiss at the pleadings stage. However, to the extent that Plaintiff's third and fourth causes of action also seek declaratory relief respecting Ehrlich's rights, interests, and obligations, absent a justiciable controversy between Plaintiff and Ehrlich, Plaintiff's claims for declaratory relief with respect to Ehrlich fail.

Wherefore, it is hereby

ORDERED that Defendants' motion to dismiss Plaintiff's complaint is granted only to the extent that Plaintiff's complaint as against Ehrlich is dismissed and Plaintiff's second cause of action is dismissed as against Defendants and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Plaintiff's first, third, fourth, and fifth causes of action as against Powerhouse are severed only to the extent indicated above and shall proceed; and it is further

ORDERED that Powerhouse is directed to answer Plaintiff's complaint within twenty (20) days of service of a copy of this Order with Notice of Entry.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: December 14 2015

DEC 14 2015



EILEEN A. RAKOWER, J.S.C.