

**GS Plasticos Limitada v Bureau Veritas Consumer
Prods. Servs., Inc.**

2016 NY Slip Op 31432(U)

July 20, 2016

Supreme Court, New York County

Docket Number: 650242/09

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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GS PLASTICOS LIMITADA,
Plaintiff,

INDEX NO.
650242/09

-against-
BUREAU VERITAS CONSUMER
PRODUCTS SERVICES, INC.,

Defendant.

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JOAN A. MADDEN, J.:

Defendant Bureau Veritas Consumer Products Services, Inc. (“BVCPS”) moves for an order granting it summary judgment dismissing the second amended complaint or, in the alternative, limiting the damages to \$500,000 in purported consequential damages.¹ Plaintiff GS Plasticos Limitada (“GS”) opposes the motion.

Background

GS is a Brazilian manufacturer of toy “premiums” for the promotional market, which are small plastic toys like those found McDonald’s Happy Meals. BVCPS is a provider of testing and inspection services for consumer products. On or about August 11, 2006, Kellogg Brazil, a subsidiary of the Kellogg Company (“Kellogg”), issued a purchase order to GS, in which other Kellogg subsidiaries in other Latin American countries also participated by purchase orders, for

¹BVCPS also moves to submit certain documents submitted in connection with the summary judgment motion under seal. By order dated May 22, 2015, the court sealed the documents pending further order of the court, and provided a briefing schedule with respect to the sealing. By interim decision and order dated October 19, 2015, the court denied the motion to seal, with leave to renew with respect to those documents that BVCPS asserted contain sensitive business information upon submission of an affidavit demonstrating a basis for sealing. By decision and order dated _____, the court granted renewal and, upon renewal, denied the motion to seal.

the manufacture of 4,698,960 units of a triangular stamp premium (the “Stamps”) at a price per unit of US \$.017, for a total price of \$798,823 (“the Contract”) (Second Amended Complaint ¶ 8). The Stamps were to be use as inserts for a Kellogg’s Back to School Triangular Stamp-In Pack promotion.

This action arises out of allegations that, *inter alia*, between August 2006 and October 2006, the Buffalo laboratory of BVCPS issued various reports to Kellogg which incorrectly found that the Stamps contained dangerously high levels of arsenic. It is alleged that as a result of these reports, which were subsequently determined to be false, Kellogg cancelled the Contract, and causing damage to GS, including the loss of future business with Kellogg.

The original complaint asserted causes of action for negligence, *res ipsa loquitor*, tortious interference with existing contractual relations, and tortious interference with prospective business relations. BVCPS moved to dismiss the complaint on various grounds. In its decision and order dated April 7, 2010, this court granted the motion to the extent of dismissing all of GS’s claims, except for the claim seeking to recover for tortious interference with existing contractual relations.

By decision and order dated October 13, 2011, the Appellate Division, First Department affirmed the court’s April 7, 2010 decision and order. See *GS Plasticos Limitada v. Bureau Vertas*, 88 AD3d 510 (1st Dept 2011). Following certain discovery, GS moved to amend its complaint to assert claims for negligence, and violations of the Donnelly Act, and to add certain allegations in connection with its existing claim for tortious interference with contract. By decision and order dated November 8, 2012, the court denied GS’s motion to amend, except to the extent of permitting GS to include additional allegations in connection with its claim for tortious interference with contract with respect to damages to its reputation.

Accordingly, the only claim remaining in this action is for tortious interference with contract. To succeed on such a claim, a plaintiff must show: 1) the existence of a valid contract, 2) defendant's knowledge of the contract, 3) defendant's intentional procurement of a breach of the contract, 4) actual breach of the contract, and 5) damages. See Foster v. Churchill, 87 NY2d 744, 749-750 (1996).

Discovery is now complete. Unless otherwise noted, the following summary is based on the parties' statements of undisputed facts,² and the documentary evidence. On or about August 16, 2006, BVCPS was engaged by Kellogg as a third party conformity testing laboratory, and such engagement was memorialized in a Quality Assurance Sampling and Testing Plan ("QAP"), revised on September 8, 2006,³ under which BVCPS undertook to test the conformity of the Stamps with applicable Kellogg standards and international children's product safety rules. (BVCPS Ex. 63). The purchase orders for the Stamps provided that such purchase orders would not be honored if BVCPS did not report that the Stamps complied with the QAP. (See e.g. BVCPS Ex. 60). The QAP provided for both preproduction and production testing for, *inter alia*, heavy metals content, including arsenic and mechanical hazards. The QAP for the Stamps set a limit for arsenic in conformance with EN 71,⁴ and Kellogg's own specification, of 25 milligrams per kilogram (mg/kg) which is equivalent to 25 parts per million (ppm). The QAP also provided

²The summary is based on the facts set forth in BVCPS' Statement of Undisputed Facts and GS's admissions (Docket No. 716), and GS's response to that Statement of Facts (Docket No. 750), which sets forth those facts which GS agrees are undisputed.

³The parties each state the QAP was revised on August 25, 2006, but the document states it was revised on September 8, 2006. (BVCPS Ex. 63).

⁴EN 71 is the European Standard which specifies safety requirements for toys. Compliance with the standard is legally required for all toys sold in the European Union. See Wikipedia, EN 71, <http://en.wikipedia/wiki/EN71> (as of March 18, 2016). The testing for heavy metals, such as arsenic is performed under Part 3.

under the heading "Age Labeling" that "[t]he age level of this item is to be determined. However, by virtue of the distribution mode, the product must be safe for children of all ages. Therefore all components will be subjected to the mechanical hazards requirements for children of all ages. No Small Parts are permitted before or after use and abuse testing." (BVCPS Ex. 63).

Three test reports were issued by BVCPS for the Stamps in the preproduction stage, that is before the actual production of the Stamps began. On August 24, 2006, BVCPS issued Test Report No. (5106)228-0140, which reported that seven of the samples passed testing for heavy metals with a sample of red dye reported with a corrected result (CR)⁵ of 20 mg/kg. A sample of composite of orange felt with ink from the stamp pad failed with a result of 68 mg/kg.⁶ The report states that "the sample(s) DO NOT meet ...[t]he heavy metal content requirements of the client's (i.e. Kellogg's specifications." (BVCPS Ex. 55)(emphasis in original). On September 11, 2006, BVCPS re-issued the report as Test Report No. (5106)228-0140 (Revision). The report was revised to indicate, *inter alia*, that "the sample(s) MEETS ...the mechanical hazards requirement of the client's specifications. The test report notes that "[t]his revision was the result of the client informing us that samples tested were representative of production samples." (BVCPS Ex. 37)(emphasis in original). On September 12, 2006, BVCPS issued its last preproduction report, Test Report No. (5106)251-0168 (RETEST), which reported that the tested preproduction samples

⁵CR which stands for "corrected analytical result" is indicated after each of the testing results at issue here. Throughout its factual statement GS asserts that CR results reported were lower than the actual test results. In one instance (see footnote 8 below), GS alleges that the actual results were much higher than the reported CR results.

⁶The record indicates that GS would not guarantee that the orange ink used in the preproduction sample tested for heavy metals would meet the heavy metals requirement. In this connection, GS points to evidence that after the testing, it informed Kellogg that the orange ink provided was only to be used in mechanical testing and not heavy metals testing (BVCPS Ex. 40, at 12).

of ink pad fabric swatches passed testing, including for heavy metals. (BVCPS' Ex. 49).

BVCPS issued nine test report during the production stage. On September 21, 2006, BVCPS issued Test Report No. (5106)255-0139 for the first intervention of production; it reported that six samples passed testing for heavy metals and one sample of the stamp pad with red ink failed with a reported result of 340 mg/kg.⁷ (BVCPS, Ex. 51). The report also stated that the samples met the mechanical hazard requirements. On September 21, 2006, GS engaged a Brazilian testing laboratory, Falcão Bauer, to test the Stamps and received a report on or about September 25, 2006, that the Stamps had passed testing for arsenic. On September 27, 2006, BVCPS issued Test Report No. (5106)264-0119, which reported that the samples of the red ink with pad failed with a reported result of 80 mg/kg, 56 mg/kg and 52 mg/kg. (BVCPS Ex. 57). On September 27, 2006, GS engaged a second Brazilian testing laboratory, Analytical Solutions, to test the Stamps and received a report on September 28, 2006 that the Stamps passed testing for arsenic

On October 4, 2006, BVCPS issued Test Report No. (5106)276-0026, which reported that a production sample of the blue ink with pad passed heavy metals testing with a reported result for arsenic of 19 mg/kg. (BVCPS Ex. 58). On October 6, 2006, GS submitted samples of the Stamps directly to BVCPS's sister laboratory, Bureau Veritas Hong Kong Limited ("BVHK"), for heavy metals testing. On October 10, 2006, BVHK issued Test Report No. (5206)279-0052, which reported that the samples of the Stamps, including a sample of red ink with white felt, passed testing for heavy metals, including arsenic. (BVCPS Ex. 39). BVHK sent the report to Kellogg on October 12, 2006. (BVCPS Ex. 26).

⁷GS notes that while 340 mg/kg was "the corrected analytical result," it points to allegations in its Second Amended complaint that the "uncorrected arsenic finding was 860 ppm i.e. 860 mg/kg.

On October 10, 2006, GS requested and received a meeting with Eduardo Henriques, Kellogg's Operations director in Brazil during which GS informed Mr. Henriques that three laboratories, BVHK, Falcão Bauer and Analytical Solutions, found that the Stamps passed testing for arsenic. In or about late October 2006, Mr. Henriques had Kellogg staff collect samples of the Stamps and send them to Specialized Technology Resources, Inc (STR), a third-party testing laboratory that performed quality and safety testing for Kellogg, for testing for arsenic, and STR reported that the Stamps passed such testing.

On or about October 25, 2006, BVCPS issued three test reports. Test Report No. (5106)282-0084 reported that five samples from the Stamps passed testing and a sample of the blue ink and a sample of clear ink failed testing for arsenic with results of 40 mg/kg and 160 mg/kg, respectively. (BVCPS Ex. 109). Test Report No. (5106)285-016 reported that a sample of blue ink with felt pad and adhesive from the Stamps failed testing for arsenic with a result of 100 mg/kg. (BVCPS Ex. 48). Test Report No. (5106)285-0177 reported that a sample of composite of blue dye with felt and adhesive from the Stamps failed testing for arsenic with a results of 72 mg/kg. (BVCPS Ex. 83).

On or about October 26, 2006, BVCPS issued three additional test reports. Test Report No. (5106)297-0066 reported that a sample of blue ink with felt pad and adhesive from the Stamps failed testing for arsenic with a result of 100 mg/kg. (BVCPS Ex. 45). Test Report No. (5106)297-0067 reported that a sample of blue ink with felt pad and adhesive from the Stamps failed testing for arsenic with a result of 30 mg/kg. (BVCPS Ex. 46). Test Report No. (5106)297-0068 reported that a sample of blue ink with felt pad and adhesive from the Stamps passed testing for arsenic with a result of 18 mg/kg. (BVCPS Ex. 47).

The record contains evidence of an investigation conducted by BVCPS beginning in early

November 2006 regarding the reasons for its positive findings for arsenic in the Stamps. (BVCPS Ex. 30-31, 33). By email dated November 1, 2006, James Keast of BVCPS sent samples of the Stamp Pads which the Buffalo lab found to fail the arsenic tests to BVHK (BVCPS Ex. 80, BVCPS 002330). By email dated November 3, 2006, BVHK informed BVCPS that samples had passed heavy metals testing. (Id, BVCPS 002329). On November 7, 2006, Elizabeth Hausler, who was then BVCPS's Manager of Analytical Services, communicated to other BVCPS personnel by email, comparing the "Buffalo's failing arsenic results...[and] STR/KB passing or lower results," and requested "all the data (including ICP results, calibration books, standardization books) for my review." (BVCPS, Ex. 27). On November 9, 2006, Ms. Hausler sent a second email to BVCPS personnel, noting the result of the investigation, including that BVCPS's Buffalo lab retested a new series of samples and sent samples to BVHK and that the Buffalo lab once again detected arsenic while BVHK (and STR) did not. (BVCPS Ex. 81).

Documentary evidence shows that BVCPS' investigation concluded that the false arsenic findings were the result of a problem with the ICP/OES instrument,⁸ and that the presence of glycerin in the ink pad may have been interfering with the reported results, potentially due to the glycerin preventing adequate rinsing of the tubing used in the testing. (BVCPS Ex. 29, 33, 82, 52, 53). A Corrective Action Report issued by BVCPS states that BVCPS' short term solution was to evaluate any report of detected arsenic by the ICP machine, and if arsenic was detected, the sample would be reviewed to determine if glycerin or another similar organic compound was present. If glycerin was present, the sample would be rerun on a different machine (atomic absorption spectrophotometer) that did not experience the same type of interference issues where

⁸ICP/OES stands for Inductively Coupled Plasma Optical Emission spectrometry, which is an instrument used to detect trace metals.

glycerin was present in the sample (Ex 31).⁹

On November 10, 2006, Kellogg instructed BVCPS to test the Stamps for mechanical hazards. (BVCPS Ex. 64). The record also contains email from Ms. Hausler to BVCPS personnel indicating that in a conference call on held on November 17, 2006, BVCPS reported to Kellogg that the arsenic issues “may be due that the incorrect tubing was used in Buffalo to try to run this type of sample (This type of sample being a glycerin/organic solution).” (BVCPS Ex. 78 (BVCPS 001887-89). Internal documents from Kellogg reflect that the company knew no later than November 23, 2006, that BVCPS’ tests showing arsenic in the Stamps were false. (BVCPS Ex. 86, KELLOGG 000221-22); (Ex. 87, KELLOGG 000272-73)].¹⁰

On November 16, 2006, STR emailed to BVCPS photos of the Stamps that had failed mechanical hazards testing at STR. (BVCPS Ex. 77 (BVCPS 001886). On November 21, 2006, STR issued a report to Kellogg (STR Report No. US06T1795) indicating that the Stamps failed mechanical hazards testing for sharp points, small parts, torque/tension, and bite specifications. (BVCPS Ex. 106). On November 22, 2006, BVCPS issued Test Report No. (5106)256-0120 for the third production intervention which reported that the samples of the Stamps failed for mechanical hazards. (BVCPS Ex. 61).

In a document entitled “Back To School Promotional Summary” dated November 28, 2006, Kellogg set forth the sequence of events relating to the promotion (GS Ex. 6).¹¹ The

⁹While GS generally disputes the facts in this paragraph, it provides no evidence to controvert the documentation supporting them.

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¹¹The Exhibit attached to the Sassarego Affidavit are referred to as GS Ex., whereas the Exhibits attached to GS’ Memorandum in Opposition is referred to as Opp Ex.

summary indicates, *inter alia*, that in October, “due to delay of the project, Guatemala decided to cancel their order,” and that in November, “the Kellogg team decided to cancel promotion because it was not possible to determine where the contamination was occurring (results inconsistent), at this point it would be unrealistic to meet original time table.” The next entry in November, states that “Corporate Team (at Kellogg) decided to perform Mechanical Hazard testing to the sister samples at both labs (i.e. BVCPS and STR). Only intervention #3 samples were tested obtaining a FAIL at both labs due to Small parts and Sharp points.” A November entry describes a conference call between BVCPS, STR and Kellogg in which it was confirmed that “[a]ll failure reports due to Arsenic content are not correct.” It further states the BVCPS “lab was found to be inconsistent due to equipment interference when analyzing [heavy metals]; results were reported as Failure due to arsenic content on samples.” The last paragraph the summary states that: “[t]he actual status of production is as follows: Intervention #1: Accepted, Intervention #2: Pending Completion of Analysis, Intervention #3 Rejected (due to MH [i.e. mechanical hazard] failure), Intervention #4: Pending to complete analysis.”

On December 7, 2006, BVCPS issued Test Report No. (5106)255-0160 for the second production intervention which reported that the samples of the Stamps failed for mechanical hazards. (BVCPS Ex. 62). On December 12, 2006, BVCPS issued Test Report No. (5106)264-0108 for the fourth production intervention which reported that the samples of the Stamps failed for mechanical hazards. (BVCPS Ex. 54).

In an email dated December 22, 2006, Mr. Henriques of Kellogg, informed GS that BVCPS had recognized that there were errors in the analysis of the Stamps for arsenic and that the Stamps met the requirements for arsenic in the Kellogg QAP. (BVCPS Ex. 43). However, he also stated that “[p]ursuant to the agreement with GS, the inserts may only be approved for

purchase when totally in compliance with the QAP. The analyses performed by Kellogg's accredited laboratories highlight mechanical flaws that create small parts, which failed 3 of the batches produced. Only 1 produced batch was totally approved and therefore compliant with the QAP. This batch represents 300,000 units." Kellogg purchased the 300,000 units from the first intervention. GS informed Kellogg in January 2007, that it had tested the Stamps itself and found a choking hazard when the two halves of the Stamp were lined up. (Ex. 41; Sassarego Dep at 374).

On February 1, 2007, Kellogg cancelled the second, third and fourth interventions (900,000 Stamps total), but agreed to pay GS R\$324,313.91 (US\$154,986.37), and GS and Kellogg executed a formal agreement to that effect. (BVCPS Ex. 38). Concurrently with the cancellation in February 2007, Kellogg reordered another 3 million stamps that were eventually reconfigured to eliminate mechanical hazards. (BVCPS Ex 88, Ex. 91, Ex. 19 (Sessarego Dep at 380-381)).

Summary Judgment Motion

BVCPS moves for summary judgment, arguing that the remaining claim for tortious interference with contract must fail as a matter of law as: 1) GS did not comply with the terms of the Contract as the Stamps failed satisfy the mechanical hazard tests; 2) Kellogg did not breach the Contract and was justified in cancelling that part of the purchase order for Stamps that failed to meet Kellogg's mechanical requirements; 3) there is no evidence that BVCPS induced Kellogg to breach the Contract; 4) GS cannot show that "but for" BVCPS' conduct any breach would not have occurred, asserting that the record shows that on December 21, 2006, when Kellogg informed GS that it was terminating the purchase order, Kellogg knew that BVCPS' test results showing arsenic in the stamps was inaccurate; (5) there is no evidence that BVCPS acted

intentionally or that the test reports were falsified, and the inaccurate test reports alone are insufficient to show such intent; 6) even if GS were able to demonstrate that the test reports were falsified by BVCPS employees, such conduct cannot be imputed to BVCPS since the employees did not act within the scope of their employment; 7) GS did not suffer damages as a result of the cancellation of the original stamp purchase order; 8) to extent it can be shown that GS suffered damages, such damages must be limited to consequential damages of \$500,000 identified in GS's interrogatory responses, and any damages for alleged harm to GS' reputation are speculative and relate to a dismissed claim of tortious interference with perspective relations.¹²

In further support of its argument that the record shows that Kellogg did not breach the Contract, and that any breach was not the result of the incorrect arsenic test results, BVCPS submits the affidavit of Lourdes Ibarguengoitia ("Ibarguengoitia"), the current Quality Director for Kellogg Latin America who, from 2006 and 2007, who was employed by Kellogg as the Latin America Programs Manager. In her affidavit, Ibarguengoitia states the following with respect to the events leading up to the termination of the Contract. After BVCPS's test results in the fall of 2006 revealed the one or more samples of the stamps failed to meet Kellogg's requirements for arsenic, "GS disputed the results, and, in early October 2006, presented to Kellogg test results from other laboratories, including BVCPS' Hong Kong affiliate, that met Kellogg's requirements for arsenic" (Ibarguengoitia Aff., ¶ 5). "Kellogg ordered additional testing to be done by STR, another testing company [and]... in or around late October 2006, STR issued test results to Kellogg which indicated that the Stamps met Kellogg's requirements for arsenic levels." (Id, ¶ 6).

¹²BVCPS also argues that to the extent GS seeks to recover for harm to its reputation, it is a claim is for defamation, and is barred by the one-year statute of limitations applicable to such a claim. The court will not consider this argument, which it previously rejected in its decision and order dated November 8, 2012.

Then, “[i]n November 2006, BVCPS reported to Kellogg that its Hong Kong affiliate had also found the Stamps met Kellogg’s arsenic requirements (Id, ¶’s 7). “Anticipating that the arsenic issue would be resolved, on or about November 10, 2006, Kellogg ordered testing of the Stamps for mechanical hazards [and such testing] has nothing to do with arsenic testing [and] was designed to determine whether the Stamps suffered from structural or mechanical hazards or defect that make them dangerous” (Id). Then “in a conference call on approximately November 17, 2006, BVCPS reported to Kellogg orally that it had determined that the failed arsenic tests were not accurate due to problems related to equipment methodology” (Id, ¶ 9)

“In November and December 2006, both STR and BVCPS reported that the Stamps did not meet Kellogg’s requirements for mechanical hazards ...[specifically] the second, third and fourth interventions failed testing for mechanical hazards. As a result, the Stamps had consistent safety hazards and Kellogg could not include them in cereal boxes” (Id ¶ 10). “In December 2006, Kellogg made a final determination to cancel the Stamp purchase order as a result of the mechanical hazards test results for the Stamps.” (Id, ¶ 11).

Ibarguengoitia states:

If the Stamps had not had mechanical hazards in the second, third and fourth interventions, and had the Stamps ultimately passed the other tests as outlined by Kellogg in the QAP, dated August 16, 2006 and revised August 25, 2006, then Kellogg would have proceeded with the purchase order and purchased all the Stamps that met is QAP requirements. At the time of the final determination to cancel the Stamp purchase order, Kellogg was aware that the failed arsenic test results were not accurate and that arsenic was not present at the levels above those permitted by the Kellogg’s ...QAP for the Stamps. However, as agreed to by GS Plasticos, the Stamps may only be approved for sale if they are entirely in accordance with the QAP, including its mechanical hazards requirements. The analyses carried out by STR and BVCPS found mechanical failures that created small parts, which caused three of the lots produced to be rejected.

(Id ¶’s 12, 13).

She further states that “[a]ccordingly, Kellogg agreed to purchase and did purchase the first intervention of Stamps, totaling 300,000 units, which had originally failed for arsenic tests (and were ultimately found to have passed), but which had passed mechanical hazards testing. Kellogg then rejected the next three interventions of Stamps which failed to meet mechanical hazards testing and cancelled the remainder of the purchase order because of the Stamp’s repeated failure to meet Kellogg’s QAP requirements.” (Id, ¶ 14).

As for its position that it did not intentionally issue the false test results, BVCPS relies on the affidavit of Shari Piskorz (“Piskorz”), BVCPS’ supervisor in the heavy metals lab since 2004. Piskorz describes the process involved in testing the Stamps for heavy metals and states that based on the process involved “it is highly unlikely that the false positive arsenic test results were the result of operator error or deliberate operator interference. The [GS] Samples were reanalyzed on various different occasions with different individuals conducting the testing, particularly during the period that BVCPS was investigating errors and attempting to determine the root causes. All repeat testing produced the same type of error. Moreover, most of the time, those individuals performing the various parts of the test process did not have information about the samples being tested, save the BV number, [which is the identifying number provided when the samples are logged in].” Piskorz Aff., ¶ 29.

GS opposes the motion, arguing that the existence of various factual issues precludes a grant of summary judgment in BVCPS’ favor. GS argues that the evidence shows that the mechanical hazard failures, which BVCPS asserts caused Kellogg to terminate the purchase order, did not occur until after Kellogg ordered GS to cease production of the Stamps on October 24, 2006, and after Kellogg decided to terminate the Stamp promotion in November 2006. In support of this argument, GS points to evidence that Kellogg first ordered mechanical testing on

November 10, 2006. GS also argues that the record raises issues of fact as to whether GS was in breach of the Contract with respect to mechanical hazards testing, particularly as during the pre-production problem solving phase, no problems with the stamps were found as evidenced by three reports issued by BVCPS on September 11, 2006, September 12, 2006 and September 21, 2006.

In support of its opposition, GS submits the affidavit of its officer and owner, Enrico Sessarego who states that, as indicated on the Back to School Promotional Sheet (GS Ex. 1), the Back To School Stamp promotion required GS to deliver the Stamps by November 2006, so that the insert could be on the shelf by January 2007 (Sessarego Aff. ¶ 3). Sessarego states that because of BVCPS' arsenic findings, "Kellogg would not accept shipments and we could not ship the Back to School Stamps according to schedule. Production was stopped 24 October 2006. We later found Kellogg would not accept any Back to School Stamps as early as October 2006 due to arsenic and timing."¹³ (Id. ¶ 5). With respect to the mechanical hazards testing, Sessarego states, "small parts (mechanical hazards) did not become an issue until weeks after

¹³In support of his statements that production stopped in October 2006, Sessarego points to an October 24, 2006 email from Fernando Cabral of Kellogg to Wladimir Ohy of GS, which states that "[l]ike I said to you a short while ago over the phone, unfortunately I inform you of the decision made by Kellogg's Procurement Department (Ecuador and Venezuela), who are following Guatemala and are cancelling their purchase orders due to the problems that occurred previously and that were discussed earlier on you 10/12/16 visit. Please be reminded that the purchases or the purchase orders for the Mercosur countries are still firm" (GS Ex. 16). However, Mr. Ohy responded by email dated October 25, 2006, as follows: "Before I consider your request I would like to know the results of the samples collected at our factory by Patricia Martins for BV and STR were. I also ask that you kindly provide information on the result of the first samples sent to STR, which samples were left by me during my visit to you on 10/16/06 and which was also sent by GS to BV" (Id). While there is evidence in the record that Guatemala cancelled its purchase order, it is unclear if Ecuador and Venezuela or any other Latin American country cancelled the purchase order in October prior to the failure of the mechanical hazard testing.

Kellogg stopped accepting shipments. During the pre-production problem solving phase, no problems with small parts were indicated. At that point, 10/24/06, we had no expectation of small parts issues because only BVCPS tests matter and BVCPS passed the Back to School Stamps.” (Id. ¶ 6). In connection with the mechanical hazards issue, Sessarego asserts that Kellogg blamed BVCPS for the delay in reporting the results of such tests, relying on an internal Kellogg email dated November 23, 2006, in which Kellogg wrote that “[o]ur concern is the delay in the mechanical hazards. If they were communicated on time both KBR and GS would be able to work on alternatives to resolve this issue (different materials, different molds/shapes).”

With respect to whether there was intent to procure the breach of the Contract, GS asserts that such intent can be implied from the testimony of BVCPS’ witness, Robert Sobaszek that in mid-2006, prior to the false arsenic reports, BVCPS knew that the test machines (ICP-OES) detected arsenic when no arsenic was present. GS also relies on the deposition testimony of Piskorz, that the arsenic test results were “abnormal” and GS argues that Ms. Piskorz’s testimony, together with that of Mr. Sobaszek, show that while the test results could have been verified by testing in another machine no effort was made to do so. In addition, GS points to evidence that although other samples were tested in the ICP-OES, only the Stamp samples were affected by the defects. In further support of its argument that BVCPS knew prior to the testing of the Stamps that the ICP-OES machines had trouble testing arsenic, GS also relies on a Questionnaire and Response signed by Piskorz in connection with a July 2006 Global Correlation Study, and particular an “Observation” that “Reporting limits for Antimony, Mercury & Arsenic exceeded the corresponding detection limit requirements as specified in EN 71 Part 3.” GS notes that when asked for a, “PROPOSED IMPROVEMENT ACTION,” BVCPS responded, “None. (GS Ex. 12, at 2).

As for the issue of damages, GS argues that the record raises triable issues of fact as to whether GS' claim for compensatory damages are based on impermissible calculations that fail to take into account mitigation. With regard to GS's request for consequential damages, including damages its reputation, GS argues that such request is not based on its dismissed claim for tortious interference with perspective business relations and is supported by GS's responses to BVCPS' interrogatory requests and by case law permitting the recovery of consequential damages, including damages to reputation, for tortious interference with contract.

In response to GS' argument that BVCPS knew that the ICP-OES machines had trouble testing arsenic, BVCPS submits a reply affidavit from Piskorz, who responded to the Global Correlation Questionnaire relied upon by GS. According to Piskorz, the test referred to in the Questionnaire tested the proficiency of the ICP for detecting certain metals, including arsenic. Piskorz explains that the Questionnaire was issued by BVHK, which was coordinating the Global Correlation Study, and "questioned whether the detection limit for Buffalo ICP instruments exceeded the detection limits for ... Arsenic under EN-71 Part 3¹⁴ (i.e. the European testing standards) and issued a Questionnaire." (Piskorz Reply Aff. ¶ 8). Piskorz states that "while the Buffalo lab did deviate from the clause 9 requirement, EN-71 Part 3 includes other detection limit requirements for instruments that deviate from clause 9, including clause 10c." (Id, ¶ 9). With respect to clause 10c, Piskorz states that "as explained in my response to the Questionnaire, the Buffalo lab applied the techniques for determining detection limits under clause 10c which resulted in 'detection limits that are less than the maximum listed in clause 9'"¹⁵ (Id). Piskorz

¹⁴See footnote 4.

¹⁵The response to the Questionnaire BVCPS indicates that in reporting the detection limits as per clause 10c, "[o]ur detection limits are determined by calculating 3 times the standard deviation of a standard which is 3-5 times the estimated detection limit." It then lists

also refers to an attached submission of BVCPS Buffalo's proficiency testing to the American Association for Laboratory Accreditation ("A2LA"), which reviewed the Buffalo lab's proficiency testing, including the Global Correlation Study, and indicated that there were no "Outlying Results." (Id., ¶ 11).

According to Piskorz, not only did the Buffalo lab satisfy the detection limits, such limits, "have nothing to do with the accuracy of the results and would not produce false positive results." (Id., ¶ 10). Specifically, Piskorz states that detection or reporting limits:

are a function of the particular instruments at each laboratory [and that] [r]eporting limits are what labs report for any element that does not have detectable reading. ICP instruments can only detect as low as they can analyze for an element. We cannot report zero mg/kg on an element as the ICP can only detect as low as the detection limit. For arsenic for example, any result of 14 mg/kg or lower is a passing result and is reported as a pass, even if the laboratory cannot report the exact level of the passing result with sufficient precision below the limit of detection.

(Id., ¶ 7).

She further states that "in the left hand corner, the Global Correlation Study indicates that the Buffalo lab was rated 'Satisfactory' in its testing of the black leather sample used for the report, and that it did not have any inaccurate or outlying results (Id., ¶ 4). Piskorz notes that the study "used as a correlation sample a black leather substrate material, which does not contain glycerin and is very different from the glycerin ink pad samples that caused the problems in testing the GS Plasticos stamp pad samples." (Id., ¶ 3). Moreover, according to Piskorz, "[f]alse positives, such as was the case for some of the samples of the GS Plasticos stamp pads, would have been marked 'FPR' ...but none of the results from the Buffalo lab were marked 'FPR' as

the values for a variety of substances, including 03 for Arsenic (Ar), and states that it has "achieved detection limits that are less than the maximum limits listed in clause 9."

there were no false positives.”

Based on Piskorz’s reply affidavit, BVCPS argues that the Global Correlation Study Questionnaire does not support GS’ argument that given the makeup of the Stamps, BVCPS knew that ICP instrument would produce inaccurate test results for arsenic, or support an inference that BVCPS intended to induce Kellogg to breach the Contract. Significantly, GS submits no expert or other evidence to refute the statements in Piskorz’s reply affidavit.

Discussion

It is well established that “[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court’s directing judgment in its favor as a matter of law.” Ryan v. Trustees of Columbia Univ. in the City of N.Y., Inc., 96 AD3d 551, 553 (1st Dept. 2012) (internal quotation marks and citation omitted). “Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment.” Id. “Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution.” Giuffrida v. Citibank Corp., 100 NY2d 72, 81 (2003). “Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to raise a triable issue of fact. Zuckerman v. City of New York, 49 NY2d 557, 562 (1980).

As indicated above, to successfully assert a claim for tortious interference with an existing contract the following elements must be established: 1) the existence of a valid contract, 2) defendant’s knowledge of the contract, 3) defendant’s intentionally procuring of a breach of the contract, 4) actual breach of the contract, and 5) damages. See Foster v. Churchill, 87 NY2d at 749-750.

Here, there is no dispute that there was a valid contract between Kellogg and GS for the

purchase of the Stamps in connection with a Back to School Stamp promotion. In addition, there is no dispute that BVCPS knew about Contract in August 2006, when Kellogg requested a QAP from BVCPS for the promotion. Thus, putting aside the question of damages, the issues on this motion concern whether Kellogg breached the Contract and, if so, whether BVCPS intentionally procured such breach through its erroneous test reports regarding the high arsenic levels in the Stamps.

“In order for the plaintiff to have a cause of action for tortious interference of contract, it is axiomatic that there must be a breach of that contract by the other party....” Jack L. Inselman & Co., Inc. v. FNB Financial Co., 41 NY2d 1078, 1080 (1977); see also Lama Holding Co. v. Smith Barney, 88 NY2d 413, 424 (1996) (elements of tortious interference with contract include “actual breach of the contract”); Cantor Fitzgerald Associates, L.P. v. Tradition North America, Inc., 299 AD2d 204 (1st Dept 2002), lv denied 99 NY2d 508 (2003) (“[a]n essential element of such a claim is that the breach of contract would not have occurred but for the activities of the defendant”); but see, S&S Hotel Ventures, Ltd. Partnership v. 777 S.H. Corp., 108 AD2d 351,354 (1st Dept 1985)(finding cause of action for tortious interference with contract was stated where, although the contract was not breached, the defendant wrongful interfered with performance). In addition “[t]o prevail on a claim for tortious interference with a contract, it must be proven...that the contract would not have been breached but for the defendant's conduct.” Lana & Samer, Inc. v. Goldfine, 7 AD3d 300, 301 (1st Dept 2004).

Here, BVCPS has met its burden of demonstrating that Kellogg did not breach the Contract, by pointing to evidence-- including the QAP, the relevant test reports, the deposition

testimony of GS's owner and officer, Mr. Sessarego,¹⁶ and the statements in the Ibarquengoitia affidavit--showing that Kellogg had a valid basis for cancelling the purchase orders for those Stamps that failed the mechanical hazard requirements. See Women's Interart Center, Inc. v. New York City Economic Development Corp., 132 AD3d 442 (1st Dept 2015), lv dismissed, 27 NY3d 978 (2016)(summary judgment dismissing the tortious interference with contract claim was warranted where there was no "actual breach" of the agreement since defendant had a valid basis for terminating it under express terms of the agreement); Oddo Asset Management v. Barclays Bank PLC, 19 NY3d 584, 594-595 (2012)(tortious interference with contract claim was properly dismissed where defendant's expansion of investment portfolios and acquisition of additional securities was not in violation of parties' contract).

Likewise, evidence that Kellogg cancelled the Contract based on the failure of the Stamps to pass the mechanical hazards testing, and not because of the arsenic findings by BVCPS, are sufficient to make a prima facie showing that any breach by Kellogg was not the result of BVCPS' issuance of the reports stating that the Stamps failed the arsenic testing. See

¹⁶Specifically, at his deposition, Mr. Sessarego agreed that "[a]s long as Kellogg's wasn't willing to age grade the product 3 plus [which it was not, GS] could not have sold [Kellogg] anything other than the first 300,000 units." (Sessarego Dep at 648-649).

With respect to whether the Stamps met mechanical hazard testing requirements, he testified as follows:

Q: And all 3 million of those pieces [the Stamps that Plaintiff had manufactured], if a child lined the two halves up, the piece has a – it is a choking hazard?

A: If it aligned correctly.

Q: Yes.

A: From the test they made, yes.

Q: And from the test you did?

A: From the test we did, yes. That is true.

Q: And from the test that STR did?

A: Yes.

(Id, at 374)

Ullmannglass v. Oneida, Ltd., 121 AD3d 1371 (3d Dept 2014)(defendant was entitled to summary judgment dismissing the tortious interference with contract claim noting that “regardless of whether defendants acted in such a manner as to interfere with plaintiffs’ consulting contract (including by allegedly making false and disparaging remarks about plaintiffs) the record contains evidence that the contract ...was terminated for financial reasons”); Schmidt & Schmidt, Inc. v. Town of Charlton, 103 AD3d 1011, 1014-1015 (3d Dept 2013)(alleged misconduct by town’s architect for construction project, including delaying requests from plaintiff construction company for certain information and delaying the project to allegedly gain extra compensation, was not the “but for” cause of termination of the project needed to establish a claim for tortious interference with contract, where there was documented evidence of the contractor’s failure to meet certain requirements imposed by the town); Saja Music Co. v. Sony Music Entertainment, Inc., 212 AD2d 370 (1st Dept 1995)(trial court properly dismissed tortious interference with contract claim based on allegations that defendant interfered with plaintiffs’ recording artist agreement with recording artist where there was evidence that plaintiffs pre-existing breaches resulted in the termination of the agreement).

Furthermore, GS has not controverted this showing. First, GS’ argument that there are issues of fact as to whether the Stamps complied with the mechanical hazard requirements is unavailing. While there is no dispute that BVCPS found that the samples provided in the pre-production stage passed mechanical hazard tests, such evidence does not controvert proof that the Stamps tested during the second, third and fourth interventions failed these tests. In fact, as pointed out by BVCPS, Mr. Sessarego admitted during his deposition testimony, and the record shows, that the Stamps at issue failed the mechanical hazards testing conducted by GS, and that such failure provided a legitimate basis for Kellogg to terminate the Contract. Next, GS’s

apparent argument that the Stamps were not required to be safe for children of all ages is without merit as such requirement is expressly stated in the QAP.

As for GS's argument that the mechanical hazard testing requirements were irrelevant as Kellogg terminated the Contract before the testing was conducted, such argument is unsupported by the record, which shows that although Kellogg cancelled the Back to School Promotion due to timing issues, that it proceeded to attempt to fulfill its obligations under the Contract once it was determined that the arsenic findings were false. Indeed, the record shows that it purchased 300,000 units that BVCPS falsely reported tested positive for arsenic which units passed the mechanical hazards testing. Moreover, to the extent there is evidence suggesting that BVCPS was responsible for delays in mechanical hazard testing such evidence is insufficient to raise an issue of fact as to whether BVCPS intentionally induced any breach of the Contract, nor is there proof that GS would have been able to satisfy the mechanical hazard requirements had these delays not occurred.

In addition to the lack of evidence that Kellogg breached the Contract, or that such breach was induced by BVCPS' false arsenic findings, the court also finds that the record is insufficient to raise an issue of fact as to whether BVCPS acted intentionally to procure any breach. It is well established that to succeed a claim for tortious interference with contract it must be shown that "the interference [is] intentional, not merely negligent or incidental to some other, lawful, purpose." Alvord & Swift v. Muller Constr. Co, Inc., 46 NY2d 276, 281-282 (1978).

In this case, BVCPS has met its burden of showing that it did not intentionally issue false test reports based on Piskorz affidavit describing the process used to test the Stamps, and documentary evidence that BVCPS investigation of the erroneous test results determined that the problem arose out of an equipment failure related to the use of glycerin in the Stamps, which had

not previously been used in heavy metals testing. The record also contains evidence that after the investigation, BVCPS took various corrective actions including replacement of parts of its testing equipment, such as the ICP spray chamber, nebulizer, pump tubing and injector/adaptor, and that after these actions were taken no arsenic was detected. (BVCPS Ex. 31; Dep of Elizabeth Hausler, at 114-115).

Moreover, GS has failed to controvert this showing as the record is devoid of any direct or circumstantial evidence that BVCPS intended to induce Kellogg to breach the Contract. In this connection, contrary to GS's argument, the record does not raise issues of fact as to whether BVCPS deliberately tested the Stamps using the ICP-OES, as it knew that it would detect arsenic when none was present, and GS's reliance on the testimony of BVCPS employee Sobaszek in this regard is misplaced. Although Sobaszek testified to that the ICP-OES "had problems" testing for arsenic during 2006 in one instance other than the Stamps, he also testified that the other incident involved an inter-laboratory sample in which BVCPS had a lower result for arsenic than that of the other testing facilities. (Sobaszek Dep, at 108). Accordingly, the other incident, even if it occurred before the testing errors involving the arsenic in the Stamps,¹⁷ would not have put BVCPS on notice that Stamps would have falsely tested positive for arsenic and this evidence is insufficient to support an inference of a plan to intentionally produce false test results so as to interfere with the Contract. Moreover, such an intent cannot be implied from Sobaszek's testimony that BVCPS had available for use another machine, known as the atomic absorption machine, particularly as Sobaszek testified that during the relevant time period, this machine was not used to test for arsenic in the first instance, although it was used to verify the

¹⁷While Sobaszek initially testified that the early problem with arsenic testing occurred before those involving the Stamps, he later testified that the two issues with arsenic testing "may have overlapped." (Sobaszek Dep, at 111)

results of the ICP-OES. (Id. at 147).

Next, the statement in the Questionnaire in connection with July 2006 Global Correlation that the “[r]eporting limits [of the Buffalo lab] for ... Arsenic exceeded the corresponding detection limit requirements (in clause 9) as specified in EN 71 Part 3,” does not raise issues of fact as to whether BVCPS deliberately tested the Stamps using an instrument that it knew would falsely report that the Stamps tested positive for arsenic. In this connection, the Piskorz reply affidavit demonstrates that the detection limits are irrelevant to the false positives at issue in this action and that, in any event, BVCPS was found to have satisfied the required detection limits.¹⁸

As for Piskorz’s deposition testimony that she has not seen arsenic results as high as those in the samples of the Stamps during her 23 years at BVCPS, but that BVCPS did not seek to verify the results (Piskorz dep at 208), such evidence, while arguably suggestive of negligence on BVCPS’ part, standing alone, is insufficient to show the necessary intent by BVCPS to produce inaccurate test results for the Stamps. Likewise, intent cannot be implied from BVCPS’s interrogatory response that only the Stamps falsely tested positive for arsenic, particularly in light of evidence that the glycerin contained in the Stamps, which was found to be a factor in the inaccurate testing for arsenic, was not a substance normally involved in heavy metals testing.

Based on the foregoing, BVCPS is entitled to summary judgment dismissing the GS’ claim for tortious interference with contract, and the court need not reach the remaining issues raised on this motion, including those related to damages.

¹⁸Nor does GS raise an issue fact based on an internal A2LA email regarding a 2009 inspection of the Buffalo laboratory which refers to two previously assessments and an unspecified deficiency that may have related to this action and/or a previously dismissed federal action brought by GS against BVCPS (Opp Ex. 10).

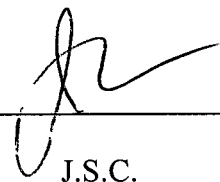
Conclusion

In view of the above, it is

ORDERED that BVCPS's motion for summary judgment is granted; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the complaint in its entirety.

DATED: July 20, 2016



J.S.C.

HON. JOAN A. MADDEN
J.S.C.