

**Tigani Liqs. LLC v Sunbelt Holding, Inc.**

2017 NY Slip Op 32020(U)

September 26, 2017

Supreme Court, New York County

Docket Number: 650572/2016

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA
Justice

PART 39

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TIGANI LIQUORS LLC, A DELAWARE LIMITED LIABILITY COMPANY, F. GREGORY TIGANI, STEVEN TIGANI, JOSEPHINE TIGANI, E. MARK TIGANI, F. GREGORY TIGANI, IN HIS CAPACITY AS TRUSTEE OF THE F. GREGORY TIGANI TRUST, U/A/D 9/19/14, STEVEN D. TIGANI, IN HIS CAPACITY AS TRUSTEE OF THE STEVEN D. TIGANI TRUST, U/A/D 5/30/01, JOSEPHINE C. TIGANI, IN HER CAPACITY AS TRUSTEE OF THE JOSEPHINE C. TIGANI TRUST, U/A/D 4/10/95, AS AMENDED, JOSEPHINE C. TIGANI, IN HER CAPACITY AS TRUSTEE OF THE J. VINCENT TIGANI, JR. RESIDUARY TRUST, U/A/D 4/10/95, STANDARD DISTRIBUTING CO., INC.

INDEX NO. 650572/2016

MOTION DATE 4/25/2016

MOTION SEQ. NO. 001

DECISION AND ORDER

Plaintiff,

- v -

SUNBELT HOLDING, INC., A DELAWARE CORPORATION,

Defendant.

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The following e-filed documents, listed by NYSCEF document number 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this application to/for SUMMARY JUDGMENT (BEFORE JOIND)

Upon the foregoing documents, it is

In this breach of contract action, plaintiffs Tigani Liquors LLC; F. Gregory Tigani; Steven D. Tigani; Josephine Tigani; E. Mark Tigani; F. Gregory Tigani, in his capacity as trustee of The F. Gregory Tigani Trust, U/A/D 9/19/14; Steven D. Tigani, in his capacity as trustee of The Steven D. Tigani Trust, U/A/D 5/30/01; Josephine C. Tigani, in her capacity as trustee of The Josephine C. Tigani Trust, U/A/D 4/10/95, as amended;

Josephine C. Tigani, in her capacity as trustee of The J. Vincent Tigani, Jr. Residuary Trust, U/A/D 4/10/95; and Standard Distributing Co., Inc. (collectively, the “Tigani Parties”) move for summary judgment, pursuant to CPLR § 3212, against defendant Sunbelt Holding, Inc. (“Sunbelt”).

The Tigani Parties and Sunbelt, a Delaware corporation with its principal place of business in New York, New York, entered into a Purchase and Sale Agreement (the “Agreement”) on December 31, 2014. Under the Agreement, Sunbelt agreed to purchase the Tigani Parties’ 49% equity interest and 50% economic interest in First State Distributing Group, LLC (“First State”). First State is a Delaware company and the sole member/owner of United Distributors of Delaware, LLC, a company engaged in the Delaware beverage business. After executing the Agreement, Sunbelt owned a 100% equity and economic interest in First State.

The Agreement, in Section 2.2, defines the Purchase Price as \$30,500,000, subject to adjustment as per Section 2.6 of the Agreement. Section 2.4 of the Agreement states that, at closing, Sunbelt was to pay the Tigani Parties “cash in an amount equal to the Purchase Price less Two Hundred and Fifty Thousand Dollars (\$250,000) (the ‘Holdback Amount’).”

In addition, the Agreement contains provisions that entitle the Tigani Parties to payments from Sunbelt for certain agreed upon undistributed earnings for 2013 and 2014. Specifically, the Agreement, Section 2.4, states:

(ii) Undistributed Earnings. First State and/or United Distributors shall pay to Tigani Liquors a sum of cash equal to Eight Million, Two Hundred Forty Seven Thousand, Three Hundred Thirty Dollars (\$8,247,330)

comprised of (1) Seven Million, Eight Hundred Forty Nine Thousand, Eight Hundred Ten Dollars (\$7,849,810), which Sunbelt Holding and the Tigani Parties acknowledge and agree is the amount of undistributed profits of First State and United Distributors to which Tigani Liquors is entitled to receive through December 31, 2013 and (2) Three Hundred Ninety Seven Thousand, Five Hundred Twenty Dollars (\$397,520), which Sunbelt Holding and the Tigani Parties acknowledge and agree is fifty percent (50%) of the estimated amount of undistributed profits of First State and United Distributors to which Tigani Liquors is entitled to receive for the period commencing on January 1, 2014 and ending on December 31, 2014 (the "Initial 2014 Undistributed Earnings Amount")

As required by Section 2.4 of the Agreement, Sunbelt paid the Initial 2014 Undistributed Earnings Amount to the Tigani Parties.

Regarding the "Remaining Undistributed Earnings," the Agreement, in Section 2.5 provides:

Remaining Undistributed Earnings. As promptly as practicable after the completion of the annual audit of the financial statements of First State and United Distributors for the fiscal year ending December 31, 2014, Sunbelt Holdings shall cause First State and United Distributors to calculate the actual portion of the undistributed earnings which Tigani Liquors was entitled to receive for the period commencing on January 1, 2014 and ending on December 31, 2014 less the Initial 2014 Undistributed Earnings Amount (the "Remaining 2014 Undistributed Earnings Amount"). Sunbelt Holdings, on the one hand, and the Tigani Parties, on the other hand, agree that the calculation of the actual portion of the undistributed earnings of which Tigani Liquors was entitled to receive for the period commencing on January 1, 2014 and ending on December 31, 2104 [sic] shall be based solely upon the audited financial statement [] of First State and United Distributors for the fiscal year ending on December 31, 2014 and shall be final and binding absent manifest error. Sunbelt Holding shall cause First State and United Distributors to pay the Remaining 2014 Undistributed Earnings Amount to Sunbelt Holding (in its capacity as a member of First State) in cash not later than the twentieth (20th) day after the calculation of the same and Sunbelt Holding shall pay such amount over to Tigani Liquors as promptly as practicable after its receipt thereof...

On May 15, 2015, the results of the Independent Auditors' Report of Ellin & Tucker, Chartered (Certified Public Accountants) ("2014 Certified Audits") were completed. According to the Agreement, 20 days after the completion of the Certified Audit – which was June 4, 2015 – "Sunbelt was required to cause First State and United Distributors to pay the Remaining 2014 Undistributed Earnings Amount to Sunbelt in cash, and as promptly as practicable thereafter, Sunbelt was required to pay the Remaining 2014 Undistributed Earnings Amount to the Tigani Parties."

The Tigani Parties assert that, based on the 2014 Certified Audits' results, the earnings of United Distributors for 2014 were \$8,389,630 and that the Tigani Parties' share was \$4,194,815 (50 percent of \$8,389,630). They further assert that, after subtracting \$2,090,922 (which represents the distributions made to the Tigani Parties for 2014) from the Actual 2014 Undistributed Earnings Amount, Sunbelt was obligated to pay the Remaining 2014 Undistributed Earnings Amount, or \$2,103,893<sup>1</sup>, to the Tigani Parties.

Sunbelt refused to pay the full amount of the Remaining 2014 Undistributed Earnings Amount. Instead, Sunbelt informed the Tigani Parties that the Tigani Parties owed \$1.9 million to First State relating to a capital call noticed by First State back on December 13, 2010. Sunbelt told the Tigani Parties that they intended to set off the \$1.9 million from the Remaining 2014 Undistributed Earnings Amount that Sunbelt owes to the Tigani Parties.

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<sup>1</sup> The Tigani Parties miscalculated this amount in the complaint and listed it as \$2,103,843.

In 2010, Tigani Liquors (then Standard) and Sunbelt each had a 50 percent economic interest in First State, which resulted in all capital calls being funded equally by Tigani Liquors and Sunbelt. Prior to the capital call, First State shared ownership of United Distributors with Delaware Beverage Co. and Century Wines & Spirits, Inc. (collectively, "Century"). To raise funds to purchase Century's interest in United Distributors and become the sole member/owner of United Distributors, First State issued a capital call notice to Tigani Liquors and Sunbelt on December 13, 2010 ("Capital Call Notice"), seeking a capital contribution of \$3,087,425 from each.

According to the Tigani Parties, at the time of the capital call, Sunbelt and Tigani Liquors agreed that \$3.8 million of the funds for the purchase of Century's interest was to be provided by United Distributors. Following the additional capital contributions of Tigani Liquors and Sunbelt, First State purchased Century's interest in United Distributors.

Sunbelt posits that the parties never agreed that \$3.8 million would be provided by United Distributors to fund First State's purchase of Century's interest. Instead, Sunbelt contends that Tigani Liquors and Sunbelt agreed that First State would retain \$3.8 million (\$1.9 million each) of undistributed earnings as "deemed distributions" to reduce the amount of Tigani Liquors' and Sunbelt's capital contributions. Sunbelt further argues that the capital amounts associated with the 2010 purchase of Century's interest are connected to the Pre-2014 Undistributed Earnings Amount and that \$1.9 million should have been deducted from the Pre-2014 Undistributed Earnings Amount even though

Sunbelt had already paid the Pre-2014 Undistributed Earnings Amount to the Tigani Parties.

Sunbelt demanded that the Tigani Parties return the \$1.9 million to First State or Sunbelt would set off this amount from the Remaining 2014 Undistributed Earnings Amount. The Tigani Parties did not agree to the setoff. Then, as per Sunbelt<sup>2</sup>, “[o]n or about May 28, 2015, Sunbelt paid the Remaining 2014 Undistributed Earnings Amount (as calculated under § 2.5 of the Agreement), net of the \$1,907,639 setoff” to the Tigani Parties.

The Tigani Parties brought this action against Sunbelt on February 2, 2016 alleging breach of contract or, in the alternative, mutual mistake. Sunbelt filed an answer, on March 11, 2016 (the “Answer”), in which it “[a]dmits that Section 2.4(ii) of the Agreement provides for the payment of the ‘Initial 2014 Undistributed Earnings Amount’ and Section 2.5 of the Agreement provides for the calculation and payment of the ‘Remaining 2014 Undistributed Earnings Amount.’” The Answer also contained counterclaims alleging that the Tigani Parties violated their contractual non-competition and non-solicitation obligations.<sup>3</sup>

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<sup>2</sup> Payment sans setoff is stated in Sunbelt’s “Response to Plaintiffs’ Statement of Material Facts Not in Dispute and Statement of Material Facts as to which there Exists a Genuine Issue to Be Tried” as well as in its’ “Memorandum of Law in Opposition to Plaintiffs’ Motion for Summary Judgment.”

<sup>3</sup> These counterclaims were not raised in Sunbelt’s “Memorandum of Law in Opposition to Plaintiffs’ Motion for Summary Judgment.”

The Tigani Parties now move for summary judgment on the complaint in the amount of \$2,103,843 plus pre-judgment and post-judgment interest and attorneys' fees.

### Discussion

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Tompa v. 767 Fifth Partners, LLC*, 113 A.D.3d 466, 470 (1st Dept. 2014). If the moving party makes a prima facie showing, then "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *Grasso*, 50 A.D.3d at 545 (citation omitted). To defeat a summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980) (citation omitted).

It is a fundamental contract principle that "when parties set down their agreement in a clear complete document, their writing should . . . be enforced according to its terms." *TAG 380, LLC v. ComMet 380, Inc.*, 10 N.Y.3d 507, 512-513 (2008) (internal quotations and citation omitted). Additionally, if the parties have put their agreement in a "clear, complete document," the terms of the writing should be enforced. *Gladstein v. Martorella*, 71 A.D.3d 427, 429 (1st Dept. 2010). "Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing." *Id.*; see also *Golden Gate Yacht Club v. Société Nautique de Genève*, 12 N.Y.3d 248, 256 (2009).

Here, the Agreement is unambiguous on its face. It states that once the 2014 annual audit of First State and United Distributors was complete, Sunbelt was to “calculate the actual portion of the undistributed earnings, which Tigani Liquors was entitled to receive...less the Initial 2014 Undistributed Earnings Amount” to determine the Remaining 2014 Undistributed Earnings Amount. Moreover, the agreement stated that this calculation was to be based “solely upon the audited financial statement [] of First State and United Distributors for the fiscal year ending on December 31, 2014.” Thus, Sunbelt’s failure to comply with this straightforward provision regarding the Remaining 2014 Undistributed Earnings constituted a breach of the Agreement.

Sunbelt’s argument that it does not owe the Tigani Parties the full Remaining 2014 Undistributed Earnings Amount, because the Tigani Parties failed to fund the 2010 capital call, is unpersuasive. First, the Agreement’s formula for calculating the Remaining 2014 Undistributed Earnings Amount owed to the Tigani Parties is clear. “The best evidence of what parties to a written agreement intend is what they say in their writing.” *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (2002) (internal quotation marks and citation omitted). The formula for calculating the Remaining 2014 Undistributed Earnings Amount does not include any reference to the 2010 capital call. In fact, nowhere in the Agreement is the 2010 capital call even mentioned.

Second, rather than pointing to anything in the Agreement itself to support its position, Sunbelt relies on the affidavit of its Chief Financial Officer, in which he states that the Agreement calculation was mistaken because it “fail[ed] to properly account for the amount of the \$3,803,276 in undistributed profits that had been previously paid by

United to First State and treated as a deemed distribution to each of Standard and Sunbelt Beverage for purposes of reducing the amount each paid in December 2010 as a capital contribution in connection with the First State Call Right.” The affidavit also references the First State LLC Agreement in support of a set-off. This extrinsic and parol evidence is inadmissible “to create an ambiguity in a written agreement which is complete, clear and unambiguous on its face.” *Gladstein*, 71 A.D.3d at 429.

Third, even assuming arguendo that Sunbelt is correct and there was a “mistaken calculation” of the undistributed earnings amount, that would not render the Agreement ambiguous. *Reiss v. Financial Performance Corp.*, 97 N.Y.2d 195, 199, (2001) (citing *Schmidt v. Magnetic Head Corp.*, 97 A.D.2d 151, 157 (1983) for the proposition that “[a]n omission or mistake in a contract does not constitute an ambiguity”).

Lastly, had the sophisticated drafters of the Agreement wanted the calculation of the Remaining 2014 Undistributed Earnings Amount to be reduced by an amount from a capital call that occurred four years prior to the Agreement, they should have stated such. I note that the Agreement is completely integrated -- Section 6.3 of the Agreement states that, “[t]his Agreement constitutes the entire agreement among the Parties with respect to the subject matter hereof and supersedes all prior understandings or agreements, oral or written, among the Parties related to the subject matter hereof.”

In sum, “[m]ere conclusory assertions, devoid of evidentiary facts, are insufficient [to defeat a well-supported summary judgment motion], as is reliance upon surmise, conjecture or speculation.” *Grullon v. City of New York*, 297 A.D.2d 261, 263-264 (1st Dept. 2002) (internal quotation marks and citations omitted). Here, Sunbelt has

not raised any triable issues of fact showing that it is entitled to a set-off based on the 2010 capital call. Thus, I grant the Tigani Parties' motion for summary judgment and find that Sunbelt must pay the full amount owed to the Tigani Parties under the Agreement (\$2,103,893 less the of \$397,520 previously paid in May 2015).

Attorneys' Fees

The Tigani Parties seek an award of their attorneys' fees as against Sunbelt, pursuant to the terms of the Agreement. The Agreement provides:

Sunbelt Holding shall indemnify, defend and hold harmless each Tigani Party... from and against all Losses based upon, arising out of, or otherwise in respect of... (b) any breach of any covenant or agreement made by Sunbelt Holding in this Agreement or any other Transaction Agreement, and (c) any and all costs and expenses (including without limitation, reasonable legal fees and accounting fees) incident to the enforcement of the provisions of this Section 4.2(ii), in each case on a current basis as incurred.

Because I find that Sunbelt has breached the Agreement, I award the Tigani Parties their attorneys' fees against Sunbelt in an amount to be determined at a hearing.

In accordance with the foregoing, it is

ORDERED that the Court grants the Tigani Parties' motion for summary judgment on liability on its first cause of action for breach of the Agreement; and it is further

ORDERED that the Tigani Parties submit a proposed judgment in their favor and against Sunbelt in the amount of \$2,103,893, less any amount previously paid by Sunbelt on or about May 28, 2015 (which judgment amount should be confirmed by affidavit of a person with knowledge), together with interest at the statutory rate from the date of June

4, 2015 until the date judgment is entered, with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Tigani Parties' request for attorney's fees as against Sunbelt is severed and the issue of the amount of reasonable attorneys' fees that the Tigani Parties may recover against Sunbelt is referred to a Special Referee to hear and report to this Court, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR § 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

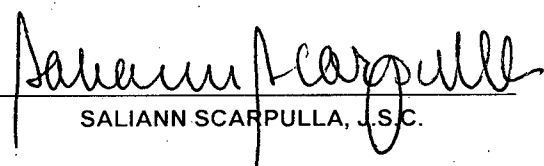
ORDERED that counsel for the Tigani Parties shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M, 60 Centre Street), who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further

ORDERED that the Tigani Parties' motion for attorneys' fees is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee, and a separate judgment will be entered for attorney's fees; and it is further

ORDERED that Sunbelt's counterclaims are also severed and shall continue.

This constitutes the decision and order of this Court.

9/26/2017  
DATE

  
SALIANN SCARPULLA, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: