

Brembo v TAW
2018 NY Slip Op 33087(U)
November 30, 2018
Supreme Court, New York County
Docket Number: 654931/17
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. Paul A. Goetz, JSC

PART 47

Brembo

-v-

TAW

INDEX No.

654931/17

MOTION DATE

MOTION SEQ. No.

006

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause - Affidavits - Exhibits _____ No(s). 1Answering Affidavits - Exhibits _____ No(s). 23+1Replying Affidavits _____ No(s). 5

Defendant T.A.W. Performance LLC moves pursuant to CPLR 2221 to reargue the motion by plaintiff Brembo S.P.A. to dismiss TAW's counterclaims for failure to state a cause of action and the motions by third-party defendants Omnia Racing S.r.l. and Carpimoto S.r.l. to dismiss TAW's third-party complaint for failure to state a claim and lack of personal jurisdiction. By order dated July 2, 2018, this court granted in part Brembo's motion to dismiss TAW's counterclaims and granted in full the third-party defendants' motion to dismiss based on lack of personal jurisdiction.

Pursuant to CPLR 2221(d)(3), a motion for leave to reargue "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry." Here, the notice of entry was served on July 3, 2018, yet TAW's motion to reargue was not filed until August 21, 2018, more than thirty days later. However, an untimely motion to reargue may be considered by the motion court, which "retains continuing jurisdiction to reconsider its prior interlocutory orders during the pendency of an action." *Liss v. Trans Auto Systems, Inc.*, 68 N.Y.2d 15, 20 (1986); *Garcia v. Jesuits of Fordham, Inc.*, 6 A.D.3d 163 (1st Dep't 2004). Thus, the court will exercise its discretion and address the merits of TAW's motion.

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With respect to Brembo, defendant TAW argues that the court erroneously dismissed its first counterclaim for breach of the 2012 oral agreement and its second counterclaim for fraudulent inducement. The court dismissed the first counterclaim based on TAW's failure to allege any consideration it provided to Brembo in exchange for Brembo's alleged promise to make TAW its exclusive distributor in the United States. TAW now argues that it did allege such consideration and cites to paragraphs 27-32 of its counterclaims, wherein TAW alleges that Wayne Rodgers, a non-party and its current president, formed TAW and TAW, using Mr. Rodgers's personal funds, purchased TAW Vehicle Concepts, in reliance on Brembo's alleged promises to make TAW the exclusive distributor of its products in the United States. However, Brembo's alleged promises were made to and the alleged detriment was incurred by Mr. Rodgers, and not TAW, the promisee, which did not even exist at the time the exclusive distribution agreement was first discussed. *Vista Food Exch. v. BenefitMall*, 138 A.D.3d 535, 536 (1st Dep't 2016) ("Consideration sufficient to create a contract consists of either a benefit to the promisor or a detriment to the promisee"; internal citations and quotations omitted). Moreover, according to TAW's own pleadings, the alleged oral agreement between TAW and Brembo was entered into in April 2012, after Mr. Rodgers's purchase of TAW Vehicle Concepts. TAW Verified Answer and Third-Party Complaint, ¶ 33 (NYSCEF Doc. # 36). In effect, TAW is attempting to assert the rights of its principal, Mr. Rodgers, a non-party, for his prior purchase of a separate entity, which cannot constitute consideration for TAW's alleged oral agreement with Brembo. In any event, even if TAW did sufficiently allege consideration, the alleged oral agreement to enter into an exclusive distributorship contract was merely an agreement to agree, which is too indefinite to be enforced. *Carney v. Carozza*, 16 A.D.3d 867 (3d Dep't 2005) ("A contract or stipulation is only enforceable if it is definite as to all material terms; 'a mere agreement to agree' is the future is unenforceable.").

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No(s). 2+3+4

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No(s). 5

TAW also argues that the court improperly dismissed the counterclaim for fraudulent inducement because it was duplicative of its breach of contract claim for failure to enforce the exclusivity provision in the contract. In support, TAW relies on Brembo's alleged promise, which pre-dated the contract, that it would re-offer the exclusive distribution contract to TAW if TAW buys out another Brembo distributor, Yoyodyne Inc., in order to settle Yoyodyne's lawsuit against Brembo. TAW Verified Answer and Third-Party Complaint, ¶ 60 (NYSCEF Doc. # 36). However, there is no dispute that after TAW purchased Yoyodyne's assets, Brembo did in fact offer an exclusive distribution contract to TAW and the parties executed an exclusive distribution agreement, which is the basis of TAW's breach of contract claim against Brembo. *Id.* at ¶¶ 62-63. Thus, TAW has failed to allege a misrepresentation by Brembo which is extraneous to the contract.

In its prior order, the court dismissed TAW's complaint against third-party defendants Omnia Racing S.r.l. and Carpinoto S.r.l., which are Brembo's distributors in Italy, based on lack of personal jurisdiction. In its motion to reargue, TAW argues that its allegations are sufficient to show that facts "may exist" to exercise personal jurisdiction over these parties. These facts include the third-party defendants' interactive websites, which allow Omnia and Carpinoto to sell products internationally, including to consumers in New York, as well as Mr. Rodgers's purchase of a Brembo product from Omnia which was shipped to New York. This is sufficient to warrant limited jurisdictional discovery concerning the third-party defendants' solicitation, sales and revenue from customers in New York State. *Ying Jun Chen v. Lei Shi*, 19 A.D.3d 407, 408 (2d Dep't 2005) (plaintiffs established "sufficient start" to warrant jurisdictional discovery).

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Accordingly, it is

ORDERED that TAW's motion to reargue is granted and upon reargument the court adheres to its prior determinations in its order dated July 2, 2018 which pertain to Brembo but vacates that part of the order which dismissed TAW's third-party complaint against third-party defendants Omnia Racing S.r.l. and Carpimoto S.r.l.; and it is further

ORDERED that TAW's third-party complaint against third-party defendants Omnia Racing S.r.l. and Carpimoto S.r.l. is reinstated; and it is further

ORDERED that TAW may conduct jurisdictional discovery with respect to the third-party defendants Omnia Racing S.r.l. and Carpimoto S.r.l. which shall be limited to the third-party defendants' solicitation, sales and revenue from customers in New York State; and it is further

ORDERED that the parties shall appear for a compliance conference on February 7, 2019.

Dated: 11/30/18

 Hon. Paul A. Goetz, JSC
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