SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

A.D.E. SYSTEMS, INC.,

Plaintiff,

- against -

QUIETSIDE CORPORATION, QUIETSIDE LLC and SAMSUNG HVAC LLC,

Defendants.

TRIAL/IAS PART 14
Index No.: 611276-17
Motion Date: 2/28/18
Sequence No.: 001 MD
DECISION AND ORDER

The following papers were read on this motion:

Notice of Motion, Affirmation and Exhibits.....1
Letter dated January 10, 2018 from Wilson Elser.....2
Affirmation in Opposition and Exhibits.....3
Affidavit in Opposition and Exhibits.....4
Reply Memorandum of Law.....5

PRELIMINARY STATEMENT

Defendant, Samsung HVAC LLC, brings this application for an order pursuant to CPLR 3211(a)(1) and (7) seeking dismissal of the complaint, as well as such other and further relief as the Court finds. Plaintiff has submitted opposition to this application.

BACKGROUND

On May 17, 2013, A.D.E. Systems, Inc. ("A.D.E.") and Quietside Corp. (now Samsung HVAC, LLC) executed an Agreement entitled Outside Corporation DVM Products Sales Representative Agreement. Denominated as a "Spec Rep", A.D.E. is a company involved in the distribution of HVAC equipment as a manufacturer's representative (Annexed as Exh. "B" to Aff. of Richard Arote, Jr. In Opposition to Motion to Dismiss).

Under the terms of the Agreement, A.D.E. was granted an exclusive territory in which to

act as Quietside's Spec Rep, to solicit orders for Quietside's DVM PLUS II, III & DVMS range of goods and services, within the Southern NY area, as set forth in § 1 of the Agreement. The prices, charges, and terms of sale were to be established by Quietside. Orders for products solicited by A.D.E. were to be forwarded to, and subject to acceptance by Quietside. The standard terms of payment was 30 days from date of invoice, where the amount is less than $50,000.00. Payments rendered within 10 days are subject to a 3% discount.

¶ 4 is entitled Minimum Business requirements, and states that (t)o maintain Spec Rep relationship, Spec Rep shall meet following business condiions (for 2013 calendar year). There then follows a series of requirements for a rolling forecast for potential orders in the next 6 months; a requirement to endeavor to provide an annual minimum sales of DVM Plus II, III, & DVMS Products; and Detail Marketing Plan.; a minimum of 3 official quotations per month; to sell at least one project per 2-month period, with DVM or Mini DVM system, Mini Splits not inluded, after July 31, 2013; to sell a minimum of 30 Refrigeration Tons of DVM Plus II, Plus III, HR, DVMS and Mini DVM per 3 month period; sell a minimum of $1 M of Samsung DVM and Samsung mini Split products by end of 2013 calendar year. It also provides that "(p)rincipal holds full authority to terminate Spec Rep relationship, once Spec Rep fails to accomplish agreed annual sales target and above onditions", and "(p)rinipal reerves the right to amend the sales target annually."

¶ 5 is entitled "Term". It provides that the Agreement was to remain in full force and effect until a Termination Date set forth in a notice given by one party to the other indicating such party's election to terminate the Agreement, which Termination shall be at least 60 days after the date notice of such election is given. Alternatively, the Agreement can be terminated at any time by mutual written agreement.

On June 23, 2015, Quietside and A.D.E. executed a "Distributor Agreement", in which Quietside appointed A.D.E. as a distributor of its HVAC products within a designated territory. The Term of this Agreement commenced as of the Effective Date (June 23, 2015), and continued until the first anniversary of the Effective Date, unless sooner terminated pursuant to Section 2.2 or Article VI. Section 2.2, entitled "Renewal Terms", provides that each Renewal Term shall automatically renew at the expiration for one year, unless and until either party terminates this Agreement at least 30 days prior to the expiration of the Initial Term or any Renewal Term, or either party terminates the Agreement pursuant to Article VI. It then states that

"(n)otwithstanding the foregoing, after the Initial Term, each party may terminate this Agreement at any time, with or without cause, upon 30 day written notification." The Initial Term was defined as commencing on the June 23, 2015 Effective Date, and continuing until the first anniversary of the Effective Date. Renewal Terms automatically renewed at the expiration of one year, unless either party terminates this Agreement pursuant to Article VI. Notwithstanding the foregoing, after the Initial Term, each party may terminate the Agreement at any time, with or without cause, upon 30 days written notification.

On March 11, 2017, beyond the expiration of the Initial Term, Samsung HVAC wrote to A.D.E., advising them that Samsung was terminating its Agreement with A.D.E. of May 17, 2013 (Exh. "4" to Motion). By letter dated March 15, 2017, A.D.E. set forth the multiple measurements by which they had surpassed goals for productivity, and requested that Samsung reverse its position, and set forth their claim for damages, amounting to $150,000 for unsold inventory, electric of $74,000 and construction of $19,000 expended by A.D.E. for training rooms and electrical upgrades for showcases for Samsung A.C. products, and $35,000 for current contract or back charges at Brookline.

DISCUSSION

A.D.E.'s position that they could only be terminated if they failed to meet expectations for sales of Samsung products, is misguided. Samsung does not take the position that A.D.E. has failed to perform in accordance with the May 17, 2013 Agreement. Rather, it relies upon the language in that Agreement which permits either party to terminate it upon 60 days written notice. A subsequent June 23, 2015 Distributor Agreement, which does not require fault, but authorizes either party to terminate the Agreement for any or no reason subject only to giving 30 days notice (Exh. "C" at ¶ 2.2). While the Agreement of May 17, 2013 (Exh. "B") sets forth minimum standards of performance at ¶ 4, it is stated to be applicable only for the 2013 calendar year.

The Affidavit of Russell Tavolacci, Samsung HVAC's Senior Vice President and Chief Operating Officer asserts, without contradiction, that Quietside Corporation was converted to Quietside, LLC in 2014, and was subsequently purchased by Samsung Electronics America, Inc. in July 1914. It thereafter changed its name to Samsung HVAC LLC. Samsung HVAC LLC therefore has standing to terminate the Agreement in accordance with its terms.

While it is less than clear why a new Distributorship Agreement was executed on June

23, 2015, whether under the May 17, 2013 or the June 23, 2015 Agreement, Samsung HVAC was authorized to terminate the Agreement by simply giving either 60 or 30 days notice of termination. Meeting the standards of the 2017 action plan provided by Samsung, did not insulate A.D.E. from the language which permitted Samsung to terminate the Agreement solely on the basis of written notice.

CPLR § 3211 (a)(1) provides as follows:

> (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;

In order to succeed in a claim based upon documentary evidence, " . . . the defendant must establish that the documentary evidence which form the basis of the defense be such that it resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim" (*Symbol Technologies, Inc. v. Deloitte & Touche, LLP,* 69 A.D.3d 191, 194 [2d Dept. 2009]); (*DiGiacomo v. Levine,* 2010 WL 3583424 (N.Y.A.D. 2d Dept.]).

When determining a motion to dismiss for failure to state cause of action, the pleadings must be afforded a liberal construction, facts as alleged in the complaint are accepted as true, and the plaintiff is accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable legal theory (*Uzzle v. Nunzie Court Homeowners Ass'n., Inc.* 70 A.D.3d 928 [2d Dept. 2010]). A pleading will not be dismissed for insufficiency merely because it is inartistically drawn; rather, such pleading is deemed to allege whatever can be implied from its statements by fair and reasonable intendment; the question is whether the requisite allegations of any valid cause of action cognizable by the state courts can be fairly gathered from all the averments (*Brinkley v. Casablancas,* 80 A.D.2d 815 [1st Dept. 1981]).

On a motion to dismiss, the court must " ' accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' " *(Braddock v. Braddock,* 2009 WL 23307 [N.Y.A.D. 1st Dept. 2009]), (*citing Leon v. Martinez,* 84 N.Y.2d 83, 87 — 88 [1994]).

A review of the Samsung's cancellation letter states that Samsung is "terminating the agreement with A.D.E. Systems dated May 17, 2013. Further, the effective termination date will be sixty (60) days from the date of this letter." The date of the letter was March 11, 2017 and the letter stated that it was sent by email and FedEx. Paragraph 5 of the agreement required that termination shall be at least sixty (60) days after the date notice of such election is given.

The notice on its face purported to cancel the May 17, 2013 agreement, sixty (60) days from March 11, 2017. There is no evidence before the Court to show when the notice was sent and received. It has not been established by any evidence that the time limits of Paragraph 5 were complied with. Thus, the Court will not dismiss the cause of action for breach of contract.

Additionally, the termination notice is specific in purporting to cancel the agreement of May 17, 2013. It does not purport to cancel the subsequent June 23, 2015 agreement between the parties. This also raises issues that cannot be resolved by the Court on a CPLR § 3211(a)(1)(7) motion.

The Cause of Action for Breach of Implied Covenant of Good Faith and Fair Dealing is duplicative of the Breach of Contract Claim, and is therefore dismissed.

The basis for an unjust enrichment claim is that defendant has obtained a benefit which "in equity and good conscience" should be paid to plaintiff (*Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777 [2012], quoting *Mandari Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173 [2011]). "It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff." *Id.* Such a claim is unavailable where it simply duplicates, or replaces, a conventional contract or tort claim *Id.*, See also, *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388-389 (1987), *Town of Walkill v. Rosenstein*, 40 A.D.3d 972, 974 (2d Dept.2007).

Plaintiff is not entitled to an Accounting, as the relationship between the parties was an arms-length business transaction, and there is no fiduciary relationship upon which a claim for an Accounting must be based (*Koster, Brady & Nagler, LLP v. Callan*, 156 A.D.3d 509 [1st Dept. 2017]; *WIT Holding Corp. v. Klein*, 282 A.D.2d 527, 529 [2d Dept. 2001]; *Akkaya v. Prime Time Transp. Inc.*, 45 A.D.3d 616 [2d Dept. 2007)].

Therefore, in view of the fact that questions of fact exist, the Court hereby denies defendant's motion to dismiss the cause of action for breach of contract, but the Court does

dismiss the other causes of action in the complaint.

To the extent that requested relief has not been granted, it is denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
May 17, 2018

ENTER:

Jerome C. Murphy

JEROME C. MURPHY
J.S.C.

ENTERED
MAY 21 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE