Obsessive Compulsive Cosmetics, Inc. v Sephora USA, Inc.
2019 NY Slip Op 32083(U)
July 17, 2019
Supreme Court, New York County
Docket Number: 652074/2015
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **IAS MOTION 53EFM**

Justice

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OBSESSIVE COMPULSIVE COSMETICS, INC.

Plaintiff,

- v -

SEPHORA USA, INC.,

Defendant.

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INDEX NO. 652074/2015

MOTION DATE 12/21/2018, 12/21/2018

MOTION SEQ. NO. 005 006

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 005) 85, 86, 87, 88, 89, 90, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 129, 131, 132

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 91, 92, 93, 94, 95, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 130, 133, 134

were read on this motion to/for JUDGMENT - SUMMARY.

This action arises from a now-terminated agreement between cosmetics retailer, Sephora USA, Inc. (**Sephora**) and vegan cosmetics brand, Obsessive Compulsive Cosmetics, Inc. (**OCC**). Two motions are before the court (Motion Seq. Nos. 005, 006).

For the reasons set forth below, Sephora's motion for partial summary judgment (Mtn. Seq. No. 005) is granted solely to the extent that the second cause of action (breach of contract) and third cause of action (promissory estoppel) in the Amended Complaint (hereinafter defined) are dismissed. Sephora's motion for partial summary judgment (Mtn. Seq. No. 006) is granted solely to the extent that (1) liability is granted in favor of Sephora for its breach of contract counterclaim regarding the Lip Animation, Double Payment, and the Destroyed Products (hereinafter defined) and (2) OCC's first and third affirmative defenses are dismissed.

The Relevant Facts and Circumstances

Pursuant to a Vendor Terms Agreement (NYSCEF Doc. No. 98, hereinafter the **Agreement**), dated May 2012, by and between OCC and Sephora, OCC sold products to Sephora from July 24, 2012 to May 8, 2015 (NYSCEF Doc. No. 22, ¶ 4). The Agreement provided that it could not be changed "except in writing signed by both of us" (NYSCEF Doc. No. 98).

During the course of the parties' relationship, OCC asserts that the parties entered into two oral modifications of the Agreement. The first modification was allegedly made on July 26, 2012 between Sephora's Associate Merchant, Averyl Andrews, and President of OCC, David Klasfeld, (NYSCEF Doc. No. 22, ¶ 28; hereinafter the **First Oral Modification**). OCC states that pursuant to the First Oral Modification, the parties agreed Sephora would be the brick and mortar exclusive retailer for OCC products and that Sephora would provide OCC with purchase orders to offset OCC's losses for rejecting purchase orders from Sephora's competitors (*id.*).

The second oral modification was allegedly made during a meeting on October 11, 2013 (the **October 11th Meeting**) with Sephora's Vice President, Alison Hahn, Sephora's Director of Nail and Color, Jennifer Lucchese, OCC's Brand Manager, Courtney Covino, and Mr. Klasfeld (NYSCEF Doc. No. 96, ¶ 5; hereinafter the **Second Oral Modification**). OCC asserts that at the meeting, Ms. Hahn agreed to OCC's request that Sephora bear 50% of the fixture costs for OCC's 2014 gondola display in twenty-six additional Sephora locations (NYSCEF Doc. No. 22, ¶¶ 10, 19; NYSCEF Doc. No. 87, ¶¶ 4-5 [explaining that a 50/50 split of costs is also referred to as a "co-op" and that a "gondola" is a rectangular fixture that can be free standing on the floor or affixed to walls]). Ms. Hahn flatly denies this assertion (NYSCEF Doc. No. 88, ¶ 8).

After the parties were unable to resolve a number of ongoing disputes, Sephora terminated the Agreement by letter, dated April 15, 2015 (NYSCEF Doc. No. 93, Exhibit 60).

OCC commenced this action on June 11, 2015. OCC then moved by order to show cause to obtain a preliminary injunction against Sephora (Mtn. Seq. No. 001), which New York State Supreme Court Justice Charles J. Ramos denied in a decision and order, dated September 14, 2015 (NYSCEF Doc. No. 24).

OCC subsequently filed an amended complaint on August 19, 2015 (the **Amended Complaint)** for (1) fraudulent inducement (first cause of action), (2) breach of contract for the First Oral Modification (second cause of action), (3) promissory estoppel related to the First Oral Modification (third cause of action), (4) breach of contract for the Second Oral Modification (fourth cause of action), (5) promissory estoppel related to the Second Oral Modification (fifth cause of action), (6) breach of contract for Sephora's cancellation of two purchase orders on May 8, 2015 (sixth cause of action), and (7) breach of contract for Sephora's 2% deduction from certain payments to OCC (seventh cause of action) (NYSEF Doc. No. 22).

In response, Sephora filed a motion to dismiss (Mtn. Seq. No. 002) arguing that the modifications to the Agreement were required to be in writing and the alleged First Oral Modification and alleged Second Oral Modification were not in writing. In a decision and order, dated August 18, 2016 (the **2016 Decision**), Justice Ramos dismissed the first cause of action for fraud, but otherwise denied the motion by holding that OCC had sufficiently ***pled*** partial performance (NYSCEF Doc. No. 36, at 5, 10).

Sephora now moves for partial summary judgment dismissing the second, third, fourth, and fifth causes of action in the Amended Complaint (Mtn. Seq. No. 005). Sephora also moves for partial summary judgment of $481,736 on its counterclaim for breach of contract and to dismiss a portion of OCC's affirmative defenses (Mtn. Seq. No. 006).

Discussion

On a motion for summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The opposing party must then "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]). A mere conclusion of fact or law is insufficient to raise a triable issue of fact (*Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]).

The court's role in a summary judgment motion is limited to issue-finding, not issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Accordingly, it is improper for the court to resolve credibility unless it appears that the issues are "not genuine, but feigned" (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). However, as in the case at *nisi prius,* the court is not "required to shut its eyes to the patent falsity of a claim" (*Carthen v Sherman*, 169 AD3d 416, 417 [1st Dept 2019] [reversing denial of defendant's motion for summary judgment as there was no triable issue of fact where the plaintiff's "internally contradictory deposition testimony … contradicts every other piece of evidence in the record"], citing *MRI Broadway Rental, Inc. v U.S. Mineral Prods. Co.*, 242 AD2d 440, 443 [1st Dept 1997]).

I. Sephora's Motion for Partial Summary Judgment (Mtn. Seq. No. 005)

A. Second and Third Causes of Action (Breach of Contract and Promissory Estoppel Regarding the Second Oral Modification)

Sephora argues that the second and third causes of action should be dismissed because (i) the Second Oral Modification is contradicted by Mr. Klasfeld's contemporaneous e-mails, which confirm that no agreement was ever reached by Sephora to share 50% of the costs of the 2014 gondola display and (ii) that the deposition testimony taken some five years later of Mr. Klasfeld and Ms. Covino directly contradicts the contemporaneous e-mails of Mr. Klasfeld (*See Carthen, supra).* In opposition, OCC argues that (i) the 2016 Decision establishes that the "law of the case" raises an issue of fact as to whether the Second Oral Modification was ever agreed to by Sephora and (ii) even if the 2016 Decision doesn't bind the court at this stage of the proceeding, there remains an issue of fact as to whether such Second Oral Modification was agreed to by Sephora. Both of OCC's arguments fail.

As an initial matter, in the 2016 Decision, Justice Ramos merely decided at that stage of the proceeding (CPLR § 3211), OCC had ***sufficiently pled*** part performance and taking the pleadings as true, dismissal was not appropriate. The standard on a motion to dismiss is distinguished from the standard on a motion for summary judgment in that the latter "examines the sufficiency of the evidence underlying the pleadings" (*Friedman v Connecticut Gen. Life Ins. Co.*, 30 AD3d 349, 349-350 [1st Dept 2006]). As a result, the court is not bound by the decision of Justice Ramos on the present motion.

The elements of a claim for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance, (3) the defendant's breach and (4) resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). A written agreement that forbids oral modification may nevertheless be modified if there is partial performance of an oral modification that is unequivocally referable to the alleged oral modification (*Rose v Spa Realty Assoc.*, 42 NY2d 338, 343 [1977]). With regard to an action for promissory estoppel, one party may be estopped from barring proof of an oral modification once it has induced another's significant and substantial reliance upon the oral modification (*id.*).

In support of its motion, Sephora provided (1) an affidavit from Ms. Hahn, which is confirmed by both her deposition and also the Klasfeld E-mails (hereinafter defined), (2) an e-mail, dated November 12, 2013, from Ms. Lucchese, and (3) six e-mails from Mr. Klasfeld (the **Klasfeld E-mails**) spanning the period directly after the October 11th Meeting, when the Second Oral Modification was allegedly agreed to, until December 2, 2014, in all of which he acknowledges that Sephora considered and then denied his request for a co-op of the 2014 gondola fixture costs – i.e., that the Second Oral Modification was never agreed to by Sephora.

Ms. Hahn's testimony is consistent in that she denies that she unconditionally agreed to split the fixture costs with OCC. At her deposition of December 20, 2018, Ms. Hahn testified that she did not agree to pay 50% of the fixture costs after being asked by Mr. Klasfeld (NYSCEF Doc. No. 99, at 16:20-25, 17:2-7). In Ms. Hahn's affidavit in support of this motion, she also denied that she agreed to a fixtures co-op and asserted that she would only agree "to consider a fixtures co-op if OCC provided additional information to Sephora" (NYSCEF Doc. No. 88, ¶ 8) –

presumably, among other things, referring to the P&L statement set forth in Ms. Lucchese's e-mail discussed below.

In an e-mail, dated November 12, 2013 (approximately 30 days following the October 11th Meeting), Mr. Klasfeld wrote to Ms. Lucchese (which e-mail confirms that Sephora had not agreed to the Second Oral Modification) to follow-up on his "continued concerns" regarding:

> Issues including BTG and ***whether or not Sephora will be able to co-op the overhaul on our gondolas come Summer 2014 remain unaddressed*** (NYSECF Doc. No. 86, Exhibit 13 [emphasis added]).

Later that same day, Ms. Lucchese responded by e-mail (which e-mail also confirms that Sephora had not agreed to the Second Oral Modification), dated November 12, 2013 (the **November 12th E-mail**) stating:

> Regarding ***the co-op of the summer gondola 2014, Alison and I requested to see the P&L from your brand before we moved forward on this*** (*id.* [emphasis added]).

In an e-mail, dated January 6, 2014 (approximately three months after the October 11th Meeting, which e-mail also confirms that Sephora had not agreed to the Second Oral Modification), Mr. Klasfeld wrote to Ms. Hahn:

> I wanted to reach out and see if there was time to schedule a conference call to revisit some of the topics we discussed when we last met in San Francisco, most importantly exclusivity and ***the gondola co-op we had requested. I also wanted to reassure you that I have not forgotten your request to see a P&L to assess with regards to the latter*** (NYSECF Doc. No. 86, Exhibit 14 [emphasis added]).

On April 3, 2014 (approximately six months after the October 11th Meeting, which e-mail also confirms that Sephora had not agreed to the Second Oral Modification), Mr. Klasfeld wrote an e-mail to Melissa Ruddie and Amy Abrams of Sephora with the subject line "Re: OCC – Sephora – ALL SYSTEMS – Summer '14 Overhaul – Rough Pricing (140028, 140218, 140179)" and stating:

> ***I would like to once again broach the topic of co-oping the expense of this update.*** Attached please find an updated P&L, which has been updated with additional costs from both ColorEdge and Rapid that we've incurred since the meeting in San Francisco." (NYSECF Doc. No. 86, Exhibit 15 [emphasis added]).

In an e-mail, dated June 20, 2014 (approximately eight months after the October 11th Meeting, which e-mail also confirms that Sephora had not agreed to the Second Oral Modification), Mr. Klasfeld wrote again to Ms. Ruddie and Ms. Abrams in an e-mail with the subject "Fixturing Costs / RTV":

- ***On October 11th, OCC meets with Alison and Jennifer Lucchese*** to discuss concerns with our merchant, ***as well as to request a fixture co-op*** bearing in mind the on-going cost to overhaul our fixtures, and the decision to repack Lip Tar.
- ***No resolution on fixture co-op is reached until Q1 2014 wherein our request is denied***, with on-going exclusivity remains a discussion, with an $11 million receipt total to be reached by Q1 2015 (NYSECF Doc. No. 86, Exhibit 16 [emphasis added]).

In an e-mail, dated September 30, 2014 (which e-mail also confirms that Sephora had not agreed to the Second Oral Modification), Mr. Klasfeld wrote to Ms. Abrams:

> I think where we obviously first encountered the problems we're dealing with now is when it was determined that an external packaging change would help us reduce fixturing

> costs. ***If I had the opportunity to change anything, it would be agreeing to that repack before getting a firm answer on fixturing co-ops*** (NYSECF Doc. No. 86, Exhibit 17 [emphasis added]).

In an e-mail, dated December 2, 2014 (which e-mail also confirms that Sephora had not agreed to the Second Oral Modification), Mr. Klasfeld wrote to Ms. Abrams:

> Tethered to the same issue is the gondola co-op we requested at the time, ***which was said to be under consideration after our meeting with Alison in October, but then denied*** after we had already incurred the expense of expanding into 72 additional doors" (NYSECF Doc. No. 86, Exhibit 18 [emphasis added]).

On December 3, 2014, Mr. Klasfeld e-mailed himself the recap from the e-mail of June 20, 2014 referred to above (NYSECF Doc. No. 86, Exhibit 20).

In their opposition papers, OCC adduced deposition and affidavit evidence, taken in 2018 and 2019 respectively (approximately five years after the October 11th Meeting), from Mr. Klasfeld and Ms. Covino, who were present for the October 11th Meeting.

At his deposition of January 11, 2018, Mr. Klasfeld testified that Ms. Hahn said "absolutely" after he advised her that OCC would need Sephora to pay 50% of the fixtures for an expansion to take place in the summer of 2014 (NYSCEF Doc. No. 86, Exhibit 4, at 299:6-25, 304:6-11). He further testified that Ms. Hahn told him there was nothing required to formalize their agreement and that she would need to inform Annie Greenfield, Sephora's Gondola Production & Visual Operations Manager, of her decision (*id.*, at 301:2-3; NYSCEF Doc. No. 96, ¶ 5). Mr. Klasfeld recalls that on February 5, 2014, Joni Liang, Sephora's Merchandise Planner, instructed OCC to

produce opening inventory for twenty-six new locations (NYSCEF Doc. No. 96, ¶ 6). In her affidavit in opposition to Sephora's motion, Ms. Covino stated that Ms. Hahn immediately and unequivocally agreed to Mr. Klasfeld's request for a 50% split of fixture costs with Sephora (NYSCEF Doc. No. 109, ¶ 4).

As set forth above, the contemporaneous documentary evidence in the record utterly refutes Mr. Klasfeld's and Ms. Covino's depositions taken years later that the alleged Second Oral Modification was ever agreed to by Sephora. It was undisputed at oral argument that the referenced P&L was never sent to Sephora prior to Ms. Lucchese's November 12th E-mail. Indeed, Mr. Klasfeld indicates in his e-mail, dated January 6, 2014, that he had "not forgotten" Sephora's request that he send the P&L. Mr. Klasfeld ultimately admits in his June 20, 2014 and December 2, 2014 e-mails that his "request" for a fixtures co-op was "denied." Put another way, Mr. Klasfeld's affidavit and Ms. Covino's affidavit in opposition to this motion are simply not credible and are directly contradicted by Mr. Klasfeld's own admissions. Under the best reading of Mr. Klasfeld and Ms. Covino's affidavits, this evidence is an attempt to feign an issue of fact as to whether the Second Oral Modification was agreed to by Sephora. It was not.

Following Ms. Lucchese's November 12th E-mail informing OCC that Sephora required a P&L before agreeing to the fixtures co-op, there could be no reasonable reliance by OCC and, therefore, OCC's third cause of action based on promissory estoppel fails and is dismissed.

Accordingly, Sephora's motion for partial summary judgment on the second and third causes of action is granted and said causes of action are dismissed against Sephora.

B. Fourth and Fifth Causes of Action (Breach of Contract and Promissory Estoppel Regarding the First Oral Modification)

Sephora argues that the fourth and fifth causes of action should be dismissed because OCC's interpretation of the alleged exclusivity agreement is illogical, Sephora performed its obligations under the alleged exclusivity agreement, and OCC's performance was not unequivocally referable to the First Oral Modification. Unlike the Second Oral Modification, Sephora does not dispute that it did not agree to the First Oral Modification (*see* NYSCEF Doc. No. 119, 40:22-25 [agreeing that there was an exclusivity agreement on behalf of Sephora]).

To the extent that the parties dispute whether Sephora upheld its end of the First Oral Modification, OCC raises a material issue of fact about the amount of loss that Sephora was meant to offset. While Sephora argues that it has compensated OCC by purchasing almost three times as much as OCC's competitors would have purchased, OCC claims that it is owed lost profits "it would have realized from minimum replenishment orders from [six] Sephora competitors over the period of time from the date of their opening orders to the date that exclusivity ended, and adding to that the lost profit from the rejected opening orders" (NYSCEF Doc. No. 96, ¶ 15; NYSCEF Doc. No. 22, ¶¶ 33, 37). Accordingly, Sephora's motion for partial summary judgment on the fourth and fifth causes of action is denied.

To the extent that Sephora argues the fourth and fifth causes of action should be dismissed as they relate to damages from OCC's sales to Birchbox and Integral Sense, which Sephora argues are not covered by the First Oral Modification, there remains a material issue of fact – *i.e.*, whether Birchbox and Integral Sense are covered by the First Oral Modification. Accordingly, this branch of Sephora's motion is also denied.

II. Sephora's Motion for Partial Summary Judgment (Mtn. Seq. No. 006)

Sephora moves for partial summary judgment on a portion of its counterclaim and to dismiss certain affirmative defenses raised by OCC in its reply to Sephora's counterclaim.

A. Sephora's Counterclaim

Sephora's counterclaim is for breach of the Agreement (NYSCEF Doc. No. 40, ¶ 96). Although the total counterclaim is for $823,617, in this motion, Sephora seeks to recover damages of approximately $481,736, leaving the remainder to be resolved at trial (NYSCEF Doc. No. 93, Exhibit 32, at 3). The damages at issue can be broken into four categories: (1) $125,143 for fixture payments, (2) $13,000 for a lip animation promotion, (3) $33,861 for a double payment by Sephora and (4) $309,732 for damaged, expired, or tester products (*id.*).

The elements of a claim for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance, (3) the defendant's breach and (4) resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

1. Fixture Advances

Sephora claims that it paid $125,142.66 to two fixture vendors on behalf of OCC in September 2014 (the **Fixture Advances**). The amounts owed consisted of $58,577.77 to Color Edge and $66,564.89 to Rapid Displays (NYSCEF Doc. No. 93, Exhibit 35). Sephora argues that it is entitled to the cost of the 2014 Fixtures because OCC is responsible for this cost pursuant to the "In-Store Collateral" provision of the Agreement, OCC failed to pay for the 2014 Fixtures, and Sephora has been damaged as a result of making payment. OCC argues that it made payment to Color Edge, and in any event, that Sephora adduced no proof that the 2014 Fixtures are not

related to the Second Oral Modification or that this work was performed on behalf of other brands.

With respect to fixtures, also referred to as "In-Store Collateral," the Agreement provides that:

> In-Store Collateral: Cost of shelf inserts, seasonal updates, graphics, customer glorifiers, or any permanently branded fixtures or space in the store, including new stores will be the responsibility of Obsessive Compulsive Cosmetics, but all physical items associated with such costs constitute the property of Sephora. All costs of in-store collateral are non-refundable and non-reimbursable (NYSCEF Doc. No. 118, at 2).

In opposition, OCC raises material issues of fact regarding Sephora's payment of the Fixture Advances. To the extent that OCC argues it paid Color Edge directly for fixtures, Sephora provides no proof to show that its payment to Color Edge did not overlap with OCC's payment to Color Edge, or that the Color Edge invoices issued to Sephora are for work completed on behalf of OCC (*compare* NYSEF Doc. No. 93, Exhibit 35, *with* NYSCEF Doc. Nos. 120-121). In addition, the affidavit of Amy Abrams, Sephora's Director of Color Merchandising, does not constitute sufficient proof of payment by Sephora when Ms. Abrams simply states that Sephora paid for the Fixture Advances (NYSCEF Doc. No. 92, ¶ 8). Although Sephora argues that Mr. Klasfeld confirmed by e-mail that he could reimburse Sephora by early November for certain "brand updates" (NYSCEF Doc. No. 93, Exhibit 34), the evidence does not establish that OCC agreed to provide payment for the specific invoices that make up the Fixture Advances. Moreover, while Sephora attached an internal e-mail with said invoices issued directly from each vendor to Sephora (NYSCEF Doc. No. 93, Exhibit 35), the record does not indicate that OCC received any request from Sephora for reimbursement of the Fixture Advances. Accordingly, Sephora is not entitled to summary judgment for the Fixture Advances.

2. Lip Animation Promotion

Sephora claims that it paid $13,000 in connection with a lip animation promotion in July 2014 (the **Lip Animation**). Sephora argues that it is entitled to this sum pursuant to the "Animations" provision in the Agreement, that OCC agreed to participate and pay for the Lip Animation, and that Sephora has not yet been reimbursed by OCC. In opposition, Mr. Klasfeld asserts that Ms. Ruddie called and told him to "forget the $13,000 payment" in June 2014 (NYSCEF Doc. No. 117, at 6; NYSCEF Doc. No. 126, ¶¶ 22-23).

With respect to "Animations," the Agreement provides that:

> Animations: Opportunities for enhanced product exposure in our stores for specific temporary promotions, and the costs associated with creating the special display collateral, can be mutually agreed to on a case-by-case basis (NYSCEF Doc. No. 118, at 2).

Sephora has adduced sufficient evidence to prove that OCC agreed to pay for the Lip Animation and that payment has not yet been provided (NYSCEF Doc. No. 93, Exhibit 38). Mr. Klasfeld's recollection of an alleged phone call with Ms. Ruddie around June 2014 does not raise a material issue of fact because this assertion is not supported by any affidavit or documentary evidence (*compare* NYSCEF Doc. No. 126, ¶ 22, *with* NYSCEF Doc. No. 117, ¶ 7). The contemporaneous documentary evidence is also clear that after the alleged call, OCC nevertheless agreed to pay for the Lip Animation when (1) Mr. Klasfeld authorized reimbursement of the $13,000 upon Sephora's request on September 3, 2014 and (2) acknowledged the "Lip Animation Co-Op" as a current and finalized liability in the chart sent to Ms. Abrams on November 25, 2014 (NYSCEF Doc. No. 96, Exhibits 19, 38). Accordingly, Sephora is entitled to summary judgment on liability for the Lip Animation.

3. Double Payment

Sephora claims that it overpaid the sum of $33,861 to OCC (the **Double Payment**). Since OCC advised Sephora of the Double Payment in an e-mail, dated August 26, 2014 (NYSCEF Doc. No. 93, Exhibit 40), Sephora has not yet received repayment for this sum. Sephora argues that it is entitled to the return of $33,861 because OCC is not contractually entitled to keep the Double Payment. OCC argues that it is entitled to raise the defense of offset and waiver because it alleges that it is owed money by Sephora as set forth in the Amended Complaint. A waiver is defined as "the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it" (*Werking v Amity Estates, Inc.*, 2 NY2d 43, 52 [1956]). OCC fails to raise a material issue of fact in opposition regarding repayment of the $33,861 or Sephora's relinquishment of its rights to the Double Payment. Accordingly, Sephora is entitled to summary judgment on liability for the Double Payment.

4. The Destroyed Products

Sephora claims $309,732 for OCC's damaged, expired, and tester products for the months of February 2014, April 2014, July 2014, August 2014, September 2014, October 2014, November 2014, December 2014, and January 2015 (NYSCEF Doc. No. 95, ¶ 41; hereinafter the **Destroyed Products**). Sephora recorded the cost of Destroyed Products in monthly reports that are referred to as Tester and Damages reports (NYSCEF Doc. No. 92, ¶ 11; hereinafter the **T&D Reports**). The acronym "DIF," which appears in the T&D Reports, means "destroyed in the field" (*id.*). The T&D Reports break down the DIF costs into three categories: damage, expiration, and testing (NYSCEF Doc. No. 93, Exhibit 41). Sephora's practice was to send vendors the monthly T&D Reports and vendors would issue a corresponding RA number, which means "return authorization" or "reimbursement authorization" (NYSCEF Doc. No. 92, ¶ 12).

The RA number allowed Sephora to debit the cost of the Destroyed Product from vendor accounts (*id.*, ¶ 12).

With respect to "Returns," "Testers," and "Damages," the Agreement provides that:

> Returns: Full reimbursement to Sephora for all discontinued, homeless or recalled product, upon return by Sephora of such product, is required prior to in-store date of new product. Any delay may jeopardize new product launches. Reimbursement will be at full cost of product
>
> ***If Obsessive Compulsive Cosmetics wishes to dispute in good faith the amount of any chargeback related to returns, testers, damages or any other kind of chargeback, Obsessive Compulsive Cosmetics must notify Sephora in writing of its objection within one (1) year of the date of such chargeback.***
>
> Testers: Testers will be created from product inventory as needed by store personnel and Obsessive Compulsive Cosmetics shall reimburse Sephora on a monthly basis for the full cost of such testers. Tester costs incurred by Obsessive Compulsive Cosmetics are non-refundable and non-reimbursable. Sephora has no obligation to return any testers in the event of termination of this Agreement. In the case of termination, all testers will be destroyed in field.
>
> Damages: Obsessive Compulsive Cosmetics shall on a monthly basis reimburse Sephora for any defective or damaged merchandise, including client returns which cannot be re-sold. Reimbursement will be at full cost of product. Such defective or damaged merchandise cannot be returned and will instead be destroyed and properly disposed of at our stores. Damage cost is non-refundable and non-reimbursable (NYSCEF Doc. No. 118, at 2 [emphasis added]).

Sephora argues that it is entitled to the cost of Destroyed Products pursuant to the Returns, Testers, and Damages provisions in the Agreement, that it has not yet been reimbursed for such costs and that OCC did not timely object to these costs. OCC argues that the sum of $309,732 is not related to the Destroyed Products and that Sephora instead sold those products listed in the T&D Reports. OCC further alleges that Sephora failed to prove the Destroyed Products were actually destroyed or returned.

Sephora adduced documentary evidence of e-mails sent to OCC, attaching T&D Reports for the Destroyed Products (NYSCEF Doc. No. 93, Exhibits 41, 43, 45, 46, 48, 50, 52, 54, 56). Sephora also attached e-mails from OCC, which provided the corresponding RA number for each T&D Report at issue (NYSCEF Doc. No. 93, Exhibits 42, 44, 47, 49, 51, 53, 55, 57). OCC's conclusory assertions fail to raise a material issue of fact for trial. The Agreement does not require that Sephora prove that returned, tested, or damaged products be destroyed before Sephora may claim reimbursement. The documentary evidence also reveals that OCC acknowledged the Destroyed Products when it issued corresponding RA numbers to Sephora. Further, OCC fails to demonstrate that it issued any timely objection to the Destroyed Products within the one-year limitation period set forth in the Agreement. Accordingly, Sephora is entitled to summary judgment on liability for the Destroyed Products.

B. OCC's Affirmative Defenses

Sephora moves to dismiss OCC's first and third affirmative defenses to its counterclaims.

1. OCC's First Affirmative Defense

The first affirmative defense alleges breach of contract, breach of the implied duty of good faith and fair dealing, estoppel, and unclean hands (NYSCEF Doc. No. 39, ¶¶ 43-51).

The breach of contract and breach of implied duty of good faith and fair dealing defenses (the **Contractual Defenses**) encompass (i) Sephora's withholding of payment for invoices owing to OCC, (ii) Sephora's demand for return and its subsequent sale and markdown of OCC inventory, and (iii) allegations that Sephora employees purchased OCC's products for the purpose of copying OCC designs (*id.*, ¶¶ 44-49).

The implied duty of good faith and fair dealing is meant to aid and further other terms of an agreement, but the duty does not imply any obligation "which would be inconsistent with other terms of the contractual relationship" (*Murphy v Am. Home Prods. Corp.*, 58 NY2d 293, 304 [1983]).

Sephora's withholding of payment for invoices does not support the Contractual Defenses because the Agreement does not expressly require that Sephora pay OCC within a given time frame. Further, OCC cites no support for its assertion that Sephora was obligated to pay OCC, when the documentary evidence indicates that OCC in fact owed Sephora almost twice as much as OCC was owed by Sephora (*see* NYSCEF Doc. No. 93, Exhibit 58).

Sephora's alleged demand for the return of OCC's products, as well as the sale and markdown of OCC inventory as of August 15, 2015 cannot support OCC's Contractual Defenses because of the "Account Termination" provision in the Agreement:

> Sephora reserves the right in its sole and absolute discretion to terminate the account at any time. ***Upon termination, Obsessive Compulsive Cosmetics is responsible for accepting return of all remaining product in Sephora's possession and reimbursing Sephora at full cost value.*** Obsessive Compulsive Cosmetics will also reimburse Sephora for the cost of all outstanding returns, testers and damaged or defective product. ***Sephora reserves the right to begin immediately selling such product at whatever price***, and using whatever promotional materials, ***Sephora determines, in its sole discretion, to be necessary to liquidate the product*** (NYSCEF Doc. No. 118 [emphasis added]).

Sephora was contractually entitled to return OCC products and markdown OCC inventory, therefore such conduct does not support the Contractual Defenses.

OCC's allegations that Sephora employees purchased OCC products for the purpose of copying new designs does not form a basis for the Contractual Defenses. The Agreement contains no restrictions on competition. Further, OCC does not adduce any proof that it possessed any legal right to the designs in issue, which were allegedly infringed upon. Accordingly, OCC's defenses in breach of contract and breach of the implied duty of good faith and fair dealing are dismissed.

With regard to OCC's defense of bad faith, OCC fails to identify any factual basis that Sephora's conduct rose to the level of bad faith (*Cohen v NY Prop. Ins. Underwriting Asso.*, 65 AD2d 71, 77 [1st Dept 1978] [explaining that bad faith occurs "where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives"]). As a result, OCC's defense of bad faith is dismissed.

Sephora argues that OCC's defense of mitigation should be dismissed because no particulars are pled in support of this assertion. In opposition, OCC asserts that Sephora's failure to mitigate refers to Sephora's failure to itemize damages in its counterclaim without crediting the amount of inventory sold by Sephora (NYSCEF Doc. No. 127, at 14). Mitigation means that a party may not recover for losses that the party "might have prevented by reasonable efforts and expenditures" (*Wilmot v State*, 32 NY2d 164, 168-169 [1973]). OCC does not provide any support for its bald assertion that the damages flowing from breach of contract for the Fixture Advances, Lip Animation, Destroyed Products can be offset by the cost of inventory sold by Sephora. Accordingly, OCC's defense of mitigation is dismissed.

Sephora argues that the defense of unclean hands should be dismissed because this doctrine does not apply in an action exclusively for damages (*see Manshion Joho Ctr. Co., Ltd. v Manshion Joho Ctr., Inc.*, 24 AD3d 189, 190 [1st Dept 2005]). The court agrees because Sephora's counterclaim is an action at law – *i.e.*, breach of contract – for which no equitable relief is sought. Accordingly, OCC's defense of unclean hands is dismissed.

OCC's defense of estoppel is dismissed because this defense was not addressed in the opposition papers or at oral argument.

In light of the reasons set forth above, OCC's first affirmative defense is dismissed.

2. OCC's Second Affirmative Defense

The second affirmative defense alleges an offset against any sums that Sephora may be awarded. Sephora relies on *L. K. Comstock & Co. v Duffy* to argue that the defense of offset is insufficient to prevent summary judgment (43 AD2d 704, 704 [2d Dept 1973] [stating that "even if a partial offset or counterclaim had been properly interposed, it would not prevent a partial summary judgment from being awarded]). OCC argues that the cited proposition from *L.K. Comstock & Co.* is dictum that should not be recognized by this court.

To the extent that *L.K. Comstock & Co.* did not deal with a proper offset, the proposition originates from the Second Department's decision in *M & S Mercury Air Conditioning Corp. v Rodolitz*, which was subsequently affirmed by the Court of Appeals (24 AD2d 873 [2d Dept 1965], *affd* 17 NY2d 909 [1966]). In the absence of any proposition to the contrary, the court

finds that OCC's defense of offset does not preclude Sephora's motion for partial summary judgment on the issue of liability only.

3. OCC's Third Affirmative Defense

The third affirmative defense alleges waiver and laches (NYSCEF Doc. No. 39, ¶ 55). OCC raises the defense of waiver in relation to Sephora's counterclaim for the Lip Animation and the Double Payment (NYSCEF Doc. No. 127, at 16, 18). As summary judgment on liability was awarded in favor of Sephora on these components of its counterclaim, OCC's defense of waiver is dismissed.

Sephora argues that the defense of laches does not apply when an action is commenced within the limitation period. This court agrees. The defense of laches is inapplicable because Sephora asserted its counterclaim within six years (*see Supt. of Ins. v Kenny (In re Am. Druggists' Ins. Co.)*, 15 AD3d 268, 268 [1st Dept 2005]; CPLR § 213(2)). Accordingly, OCC's third affirmative defense for waiver and laches is dismissed.

Accordingly, it is

ORDERED that defendant's motion for partial summary judgment (Mtn. Seq. 005) is granted solely to the extent that the second and third causes of action in the Amended Complaint are dismissed; and it is further

ORDERED that defendant's motion for partial summary judgment (Mtn. Seq. 006) is granted solely to the extent of (1) liability on defendant's counterclaim regarding $13,000 for the Lip

Animation, $33,861 for the Double Payment, and $309,732 for the Destroyed Products, and the issue of damages is severed for trial, and (2) dismissing plaintiff's first and third affirmative defenses to defendant's counterclaim; and it is further

ORDERED that said causes of action and affirmative defenses against defendant are severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant dismissing (1) the second and third causes of action in the Amended Complaint and (2) plaintiff's first and third affirmative defenses to the defendant's counterclaim, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the parties are directed to appear at 60 Centre Street, Room 238 on July 31, 2019 at 11:30 AM for a pre-trial conference; and it is further

ORDERED that such service upon the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

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7/17/2019
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	

652074/2015 OBSESSIVE COMPULSIVE vs. SEPHORA USA, INC.
Motion No. 005 006

CHECK IF APPROPRIATE: ☐ INCLUDES TRANSFER/REASSIGN ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE