A.D.E. Sys., Inc. v Energy Labs, Inc.
2019 NY Slip Op 34008(U)
October 29, 2019
Supreme Court, Nassau County
Docket Number: 604036-15
Judge: Vito M. DeStefano
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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 10
NASSAU COUNTY

A.D.E SYSTEMS, INC.,

Interlocutory Order

Plaintiff,

MOTION SEQUENCE: 21 & 22
INDEX NO.:604036-15

-against-

ENERGY LABS, INC.,

Defendant.

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
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In an action to recover damages for, *inter alia*, breach of contract, the Plaintiff moves for an order:

Pursuant to CPLR 2221(e) granting Plaintiff A.D.E. Systems, Inc. leave to renew this Court's August 5, 2017 Order (Doc. 193) based upon new facts, and upon such renewal, commanding production by Defendant Energy Labs, Inc. of the following renewal period damages discovery:

a. Purchase Orders of Energy Labs, Inc. products in the New York territory, i.e, by Gil-Bar Industries, Inc., for years 1, 2, 3, and 4 (2015-2019);

b. Priced bids by Gil-Bar Industries, Inc. for Energy Labs, Inc. products during years 1, 2, 3, and 4 (2015-2019);

c. A complete copy of the "Defendant Bookings Report by Sales Office" maintained by Defendant Energy Labs, Inc. listing sales by Gil-Bar for the years 2016-2017, 2017-2018; and 2018-2019.

The Defendant cross-moves for an order pursuant to 22 NYCRR 130-1.1(a) "imposing a punitive financial sanction on Plaintiff for engaging in frivolous conduct, in an amount to be determined by the Court, payable to the lawyers Fund for Client Protection."

Background

On April 1, 2015, the Plaintiff, A.D.E. Systems, Inc. and Defendant Energy Labs, Inc. entered into a Manufacturers Representative Agreement ("Agreement") whereby Plaintiff was to become a manufacturers' representative for Defendant's products. Arguably, the Agreement was for a one year period and contained automatic renewals.

Following the parties' entry into the Agreement, Plaintiff "publicly identified itself as a representative of" the Defendant, began marketing and promoting the Defendant's products, and expanded its employee base (Amended Complaint at ¶¶ 14-16).

Seven weeks later, by letter dated May 21, 2015, the Defendant terminated the Agreement with the Plaintiff. The following month the Plaintiff commenced the instant action asserting causes of action for breach of contract; anticipatory breach of contract; breach of the implied covenant of good faith and fair dealing; and fraud in the inducement.

Procedural History

Thereafter, numerous motions were made including discovery motions, three of which were decided by the court in an order dated August 15, 2017 (the "prior order"). Insofar as is relevant to the instant motion, the court held in its prior order:

With respect to Motion Seq. No. 2, Motion Seq. No. 3 and Motion Seq. No. 5, the following is noted: the subject contract was entered into in 2015. The Defendant should provide all information and documents relevant to the issues of Defendant's alleged breach, bad faith, damages arising from the breach and any defenses to Plaintiff's claims. The court is cognizant of the liberal discovery rules prevalent in New York, however, at bar, numerous discovery motions, contentiousness, and the prospect of imminent dispositive motions, warrant that discovery be limited in a manner that the court believes is proportionate to the issues and circumstances presented herein.

It is significant that the "main issue", which will be the subject of a dispositive motion, is whether Plaintiff may recover damages for "renewal periods" not renewed by the Defendant. Given the great importance of this issue, the court, as an exercise of discretion, and in view of the party's contentions, will preclude discovery on "renewal contract" damages pending the outcome of dispositive motions. That said, *discovery on all* issues relevant to contract damages incurred from the alleged breach during the initial year, and *other issues relating to the breach and with respect to whether there was a policy of renewing contracts so as to render such a claim non-speculative, is permissible* (Ex. "A" to Motion) (emphasis added).

In August 2018, Plaintiff filed a motion to renew (seeking the same relief as that in the instant motion). In its affirmation in support of its prior motion for renewal, Plaintiff states, *inter alia*:

2. Documents Produced After the August 15th Order Now Establish [Plaintiff] had a Reasonable Expectation That the Distributor Contract Would be Renewed. Discovery relating to contractual renewal issues was initially bifurcated by this Court's August 15th Order. This Court-Ordered production of documents relating to [Defendant's] business practice of renewing its distributor contracts, but stayed discovery on damages associated with any contract renewal period because the existing evidence had not sufficiently developed that [Defendant] has a practice of renewing its distributor contracts. Documents wrongfully withheld from production by [Defendant] establish that [Plaintiff] had a reasonable expectation its distributor agreement would be renewed after year one, and was to be, in practice, a multi-year, renewable agreement.

3. Recent e-mail productions from [Defendant], evidence of [Defendant's] nationwide distributor contract renewal practice, and evidence of text message spoliation warrant this Court granting [Plaintiff's] Motion seeking evidence of contract renewal damages:

a. First, despite being wrongfully withheld for literally years, Court Ordered productions of e-mails, both internal to [Defendant] and with Gil-Bar Industries, Inc. (the successor New York distributor to [Plaintiff]) ("Gil-Bar") establish Defendant was committing to a multi-year relationship with its New York distributor;

b. Second, renewal damages discovery is warranted based on admitted spoliation by [Defendant] of critical text messages; one adverse inference to be drawn from such spoilation is that the destroyed text messages related to Defendant's long-term commitment with Gil-Bar.;

c. Third, contrary to Defendant's representations to this Court, Defendant's nationwide distributor contracts produced by Court Order, confirm Defendant's routine course of dealings in renewing distributor contracts and its *de facto* renewal policy and/or custom and practice; and

d. Finally, considerations of judicial economy upon consolidation of this action with the Gil-Bar Action warrant renewal damages discovery.

4. <u>Discovery Requested</u>: <u>ADE requests, upon modification and/or renewal, that discovery proceed on contractual renewal damages, specifically that Defendant produce the following:</u>

a. Purchase Orders of Energy Labs, Inc. products in the New York territory, i.e., by Gil-Bar, for years 1, 2 and 3 (2015-2018);

b. Priced bids by Gil-Bar for projects during years 1, 2, and 3 (2015-2018); and

c. A complete copy of the "Defendant Bookings Report by Sales Office" maintained by Defendant listing sales by Gil-Bar for the years 2016-2017 and 2017-2018.

* * *

14. Finally, Defendant and Gil-Bar's performance under the New York distributor contract only reinforces the point - Gil-Bar has been serving as the New York HVAC distributor for Defendant for three years. Each year, Defendant has renewed the contract - a contract whose terms are identical to the contract at issue in this case.

> * * *
>
> **21. Conclusion.** The Court Ordered productions by Defendant demonstrates the parties' expectations for a multi-year commitment for the New York territory, and that millions of dollars in annual sales would be generated. Moreover, it demonstrates Defendant has almost uniformly extended the distributor agreements with it distributers in other territories nationwide. Thus, the evidence of Defendant's course of dealings demonstrates that there was a reasonable likelihood that the distributor partnership with Defendant was one to last for more than one year, and the contract would be renewed on a yearly basis. Finally, Defendant's discovery misconduct by withholding and now, possibly destroying documents should not be rewarded (Ex. "1" to Cross Motion at ¶¶ 2-4, 14, 21).

By order dated January 4, 2019, the court, *inter alia*, denied Plaintiff's prior motion to renew as follows:

> It is hereby ordered that the motion by the plaintiff pursuant to CPLR 2221 "modifying and/or renewing this court's August 15, 2017 order * * * and upon such modification and/or renewal, commanding production * * * of * * * [certain] renewal period damages," and the cross motion by the defendant pursuant to CPLR 2221(e) to renew, in part, a prior motion to dismiss, which was resolved by decision and order of the court dated June 21, 2017, are denied. Neither the motion nor the cross motion present proper basis for renewal and modification is not warranted given the rulings contained in the aforementioned orders (*see generally, Mount Sinai Hosp. v Dust Transit, Inc.*, 104 AD3d 823 [2d Dept 2013]).

Plaintiff moves again to renew. According to Plaintiff, since the court's prior order denied the prior motion to renew, it discovered new evidence which, if offered on the prior motion to compel, would have changed the court's determination. The new facts obtained include evidence that: Plaintiff's predecessor S.R.S. Enterprises, Inc. ("SRS") obtained six renewals of its one year contract[1]; non-party Gil-Bar renewed its one year contract with Defendant four times; 95% of Defendant's distributors nationwide were renewed; and Defendant projected a long-term commitment to Plaintiff.

Based on the new evidence, Plaintiff "seeks the following limited renewal periods damages discovery" from Defendant:

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[1] It appears that SRS, Gil-Bar and Plaintiff had identical contracts with the Defendant.

a. Purchase Orders of Energy Labs, Inc. products in the New York territory, i.e., by Gil-Bar Industries, Inc., for years 1, 2, 3, and 4 (2015-2019).

b. Prices bids by Gil-Bar Industries, Inc. for Energy Labs, Inc. products during years 1, 2, 3, and 4 (2015-2019); and

c. A complete copy of the "Defendant Booking Report by Sales Office" maintained by Defendant Energy Labs, Inc. listing sales by Gil-Bar for the years 2016-2017; 2017-2018; and 2018-2019 (Affirmation in Support at ¶ 10).[2]

The Court's Determination

A motion for leave to renew must be based upon new or additional facts which, although in existence at the time of the original motion, were not made known to the party seeking renewal, and therefore, were not made known to the court (see CPLR 2221[e]; *Granato v Waldbaum's, Inc.*, 289 AD2d 289 [2d Dept 2001]).

"Leave to renew is not warranted where the factual material adduced in connection with the subsequent motion is merely cumulative with respect to the factual material submitted in connection with the original motion (*Orange and Rockland Utils. v Assessor of Town of Haverstraw*, 304 AD2d 668, 669 [2d Dept 2003] quoting *Stone v Bridgehampton Race Circuit*, 244 AD2d 403 [2d Dept 1997]).

In support of the motion, the Plaintiff argues that the court ordered the:

[P]roduction of documents relating to [Defendant's] business practice of renewing its distributor contracts, but stayed and bifurcated discovery on damages associated with contract renewal periods because the existing evidence had not - *at that time* - sufficiently developed that this Court was convinced [Defendant] had a practice of renewing its distributor contracts. Thus, the Prior order deferred multi-year damages discovery, subject to a showing that renewal of [Plaintiff's] distributor contract was *plausible* (Affirmation in Support at ¶ 3) (emphasis in original).

According to the Plaintiff, the newly discovered evidence, to wit, that SRS renewed its

[2] The discovery sought in the instant motion is the same as that sought in the prior motion to renew with the exception that the instant motion seeks discovery for the additional 2018-2019 year.

one-year contract with Defendant six times; Gil-Bar renewed its one year contract with Defendant four times; that 95% of Defendant's distributors nationwide were renewed; and that Defendant projected a long-term commitment to Plaintiff, demonstrates the "plausibility that Defendant would have renewed Plaintiff's contract"(Affirmation in Support at ¶ 3) and that the "new evidence relating to [Defendant's] renewals of New York territory distributor contracts is highly probative to its policy of contract renewals and [Plaintiff's] prospects of contract renewal" (Reply Affirmation at ¶ 12[c]).

A comparison of the "new evidence" submitted on Plaintiff's prior motion to renew (which was denied) with the "new evidence" constituting the basis of the instant motion, reveals that the new evidence in both motions is the same with one exception: the instant motion brings to the court's attention new evidence which consists of documentation evidencing the renewal of SRS's distributor contract with the Defendant. However, the six-time renewal of the SRS contract is cumulative of the evidence submitted to the court with Plaintiff's prior motion for renewal. Specifically, the numerous renewals of the SRS distributor agreement is further evidence that, prior to and after the agreement between Plaintiff and Defendant, the Defendant had renewed distributor agreements as it did with Gil-Bar and other companies nationwide (which was evidence before the court on the prior motions).

Inasmuch as Plaintiff's new evidence, consisting of SRS's six renewals of its contract with Defendant, was consistent with, and cumulative of, the evidence submitted on the Plaintiff's prior motion to renew, which was previously denied by this court, it is hereby

Ordered that the instant motion seeking leave to renew is granted and, upon renewal, the court adheres to its prior determination (see Carmody Wait 2d, NY Prac Sec 8:78 [in making a motion to renew, a party must present additional facts or evidence which is material, not merely cumulative]; *Cammeby's Equity Holdings LLC v Mariner Health Care, Inc.*, 106 AD3d 563 [1st Dept 2013] [defendants' "new" evidence in support of renewal was merely cumulative and would not have changed the prior determination]; *Siegel v Monsey New Square Trails Corp.*, 40 AD3d 960 [2d Dept 2007]; *City of New York v St. Paul Fire and Marine Ins. Co.*, 21 AD3d 982 [2d Dept 2005]).

This constitutes the decision and order of the court.

DATE: October 29, 2019

Hon. Vito M. DeStefano, J.S.C.

ENTERED
NOV 06 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE