

**Oak Beverages, Inc. v D.G. Yuengling & Son, Inc.**

2022 NY Slip Op 35024(U)

May 9, 2022

Supreme Court, Nassau County

Docket Number: Index No. 606799/2021

Judge: Sharon M.J. Gianelli

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU - Commercial Division - Part 8  
Present: Hon. Sharon M.J. Gianelli

\_\_\_\_\_  
OAK BEVERAGES, INC., and BOENING BROS., INC., X

*Plaintiffs,*

Index No. 606799/2021

-against-

Mot Seq. Nos.  
001, 002, & 003

D.G. YUENGLING & SON, INC., and  
MANHATTAN BEER DISTRIBUTORS,

Decision & Order  
XXX

*Defendants.*

\_\_\_\_\_  
Papers submitted: X

Mot. Seq. No. 001

- Defendant Yuengling Notice of Motion \_\_\_\_\_ X
- Defendant Yuengling Affirmation in Support w/Exh. \_\_\_\_\_ X
- Defendant Yuengling Memorandum of Law in Support \_\_\_\_\_ X
- Plaintiffs Memorandum of Law in Opposition \_\_\_\_\_ X
- Defendant Yuengling Memorandum of Law in Reply \_\_\_\_\_ X

Mot. Seq. No. 002

- Plaintiffs Notice of Cross-Motion \_\_\_\_\_ X
- Plaintiffs Memorandum of Law in Opposition and  
in Support of Cross-Motion w/Exh. \_\_\_\_\_ X
- Plaintiffs Affidavit in Support of Cross-Motion w/Exh. \_\_\_\_\_ X
- Plaintiffs Affidavit in Opposition and  
in Support of Cross-Motion w/Exh. \_\_\_\_\_ X
- Plaintiffs Affirmation in Support of Cross-Motion w/Exh. \_\_\_\_\_ X
- Plaintiffs Memorandum of Law in Opposition \_\_\_\_\_ X

Mot. Seq. No. 003

- Defendant Manhattan Notice of Motion \_\_\_\_\_ X
- Defendant Manhattan Affirmation in Support w/Exh. \_\_\_\_\_ X
- Defendant Manhattan Memorandum of Law in Support \_\_\_\_\_ X
- Plaintiffs Affidavit in Opposition \_\_\_\_\_ X
- Plaintiffs Affirmation in Opposition w/Exh. \_\_\_\_\_ X
- Plaintiffs Memorandum of Law in Opposition \_\_\_\_\_ X
- Defendant Manhattan Memorandum of Law in Reply \_\_\_\_\_ X

Mot. Seq. No. 001

This is Defendant D.G. Yuengling & Son, Inc.'s ("Defendant Yuengling") motion for an Order, pursuant to CPLR 3211(a)(1) and (a)(7), dismissing all causes of action against Defendant Yuengling in Plaintiffs' Amended Complaint, specifically causes of action one through six, and eight, in their entirety and with prejudice, and granting Defendant Yuengling costs, fees, expenses and interest.

Mot. Seq. No. 002

This is Plaintiffs' cross-motion for an Order of the Court granting Plaintiffs leave to file an Amended Complaint, pursuant to CPLR §3025(b).

Mot. Seq. No. 003

This is Defendant Manhattan Beer Distributors LLC's ("Defendant Manhattan") motion for an Order of the Court, dismissing the Seventh (Tortious Interference with Contract) and Eighth (Violation of the Donnelly Act) causes of action against Manhattan in the Amended Complaint, pursuant to CPLR §3211(a)(1) and (a)(7), on the grounds that the claims fail to state a cause of action and/or are barred by documentary evidence.

*Background*

Plaintiffs commenced this action on May 28, 2021, by the filing of a Summons and Complaint. On or about September 13, 2021, Plaintiffs filed an Amended Complaint.

In the underlying action, Plaintiffs Oak Beverages, Inc. ("Plaintiff Oak") and Boening Bros. Inc. ("Plaintiff Boening") seek damages related to Defendant Yuengling's and

Defendant Manhattan's (Collectively "Defendants") alleged improper termination of their respective distribution agreements.

Plaintiffs allege that they were granted the exclusive right to distribute Yuengling brand beer in certain New York metropolitan counties. Plaintiffs Oak and Boening are family-owned distributors and allege that they were the exclusive distributors for Defendant Yuengling Products for approximately twenty (20) years.

Plaintiffs further allege that during the Covid-19 pandemic, Plaintiffs were supporting the Yuengling brand while Defendant Yuengling used the pandemic to drive down the brand's price. Additionally, Plaintiffs allege, on information and belief, that Defendant Yuengling conspired with Defendant Manhattan, Plaintiffs' competitor, to force Plaintiffs to transfer their Yuengling distribution rights to Defendant Manhattan at a reduced value to permit Defendant Manhattan to continue its pursuit of a monopoly of the beer distribution business in the New York metropolitan area.

According to Plaintiffs, Defendant Yuengling engaged in improper acts to devalue Plaintiffs' distribution rights with the goal of obtaining the goodwill that Plaintiffs have developed at a reduced price and transferring it to one of Plaintiffs' competitors.

Plaintiffs maintain that the improper acts include: failing to provide Plaintiffs with marketing support, rebates or billbacks for Yuengling Products which are offered to other wholesalers, and favorable F.O.B. pricing that Defendant Yuengling provides to other wholesalers. According to Plaintiffs, Defendant Yuengling most recently used the

negative impact of the pandemic on Plaintiffs' sales of on-premise Yuengling Products, such as kegs sold to bars and restaurants, and which constitutes the majority of sales for the Yuengling brand, in order to submit low-ball offers to purchase back its brand.

According to Plaintiffs, upon information and belief, upon a transfer of Plaintiffs' distribution rights to a successor wholesaler, Defendant Yuengling and its co-conspirator plan on substantially increasing the marketing investments in the brand in Plaintiffs' prior territory, so as to recoup the value that has been lost due to Defendant Yuengling's intentional devaluing actions.

Plaintiffs further allege, upon information and belief, that Defendant Yuengling is transferring Plaintiffs' distribution rights to one of Plaintiffs' competitors, Defendant Manhattan, who has continuously sought to disrupt Plaintiffs' relationships with their manufacturers and monopolize the beer distribution business in the New York metropolitan counties. Plaintiffs' allegations continue with their claim that Defendant Yuengling's transfer of these distribution rights is part of its scheme with Defendant Manhattan to put Plaintiffs out of business and assist Defendant Manhattan to obtain a monopoly of the beer distribution business in the New York metropolitan counties.

Plaintiffs contend further, upon information and belief, that Defendants have entered into an arrangement in which Defendant Yuengling designated Defendant Manhattan as the sole successor wholesaler and encouraged Plaintiffs to trade with Defendant Manhattan and that Defendant Manhattan deliberately refused to engage in a like-kind brand exchange with Plaintiffs. Plaintiffs further contend that the sole purpose of

Defendant Manhattan's refusal to engage in a like-kind brand exchange was to force a termination and transfer of Plaintiffs' distribution rights of Defendant Yuengling Products to Defendant Manhattan at a reduced value, because Defendant Manhattan believes that without the exclusive distribution rights of Defendant Yuengling Products, Plaintiffs would not have sufficient volume of cases to stay in business.

Plaintiffs allege that despite Plaintiff Oak notifying Defendant Yuengling about Defendant Manhattan's motives, Defendant Yuengling continues to move forward with this plan. Plaintiffs allege that Defendant Yuengling's and Defendant Manhattan's concerted actions aimed at creating a monopoly are a violation of antitrust laws, including General Business Law § 340, the Donnelly Act, which makes every "contract, agreement, arrangement" that results in the establishment of a monopoly or restraint of competition in business, "illegal and void".

On February 23, 2021, Defendant Yuengling sent a letter to Plaintiff Oak regarding the termination of Plaintiff Oak's distribution rights under their agreement. The letter referenced the absence of a written agreement as required by Alcoholic Beverage Control Law ("ABC") § 55-c, as well as referenced Plaintiff Oak's refusal to execute a written agreement. Further, the letter provided Plaintiff Oak an opportunity to provide a cure plan to address the deficiencies Defendant Yuengling alleged existed in Plaintiff Oak's handling of its Yuengling Products territory.

Plaintiff Oak responded by letter dated March 22, 2021, alleging that Defendant Yuengling's February 23, 2012 letter was ineffective due to improper service, lack of a distribution agreement breach, and that Plaintiff Oak had no contractual obligations with respect to the alleged breaches.

By letter dated April 8, 2021, Defendant Yuengling advised Plaintiff Oak that its distributions rights would be terminated, effective June 7, 2021. By letter dated May 18, 2021, Plaintiff Oak responded by maintaining that Defendant Yuengling's termination was not effective and failed to provide a cure plan.

By letter dated May 19, 2021, Plaintiff Boening separately responded to Defendant Yuengling and asserted that Defendant Yuengling did not proceed in accordance with ABC § 55-c procedures for service and notice to Plaintiff Boening and that Plaintiff Boening had no opportunity to cure.

By letter dated May 24, 2021, Defendant Yuengling responded to both Plaintiffs and restated that their distribution agreements would be terminated effective June 7, 2021.

On June 10, 2021, Defendant Yuengling sent another letter via certified mail and email to Plaintiffs and enclosed its February 23, 2021 letter to cure the purported service deficiencies.

By letter dated September 9, 2021, Defendant Yuengling sent Plaintiff Boening a letter advising that Plaintiff Boening had breached its distribution agreement with Defendant

Yuengling by participating in this action and making “untrue, salacious and libelous allegations” about Defendant Yuengling, and advising that consequently, Defendant Yuengling would be terminating the agreement.

Plaintiffs allege that on or about April 8, 2021 and May 24, 2021, Defendant Yuengling notified Plaintiffs Oak and Boening that their distribution rights would be terminated effective June 7, 2021, pursuant to ABC § 55-c(4)(a). On or about September 9, 2021, Defendant Yuengling sent another letter to Plaintiffs that their distribution agreement would be terminated effective September 10, 2021.

Plaintiffs’ Amended Complaint alleges eight (8) Causes of Action: (1) ABC § 55-c, by Plaintiff Oak against Defendant Yuengling; (2) ABC § 55-c, by Plaintiff Boening against Defendant Yuengling; (3) Breach of Contract – Improper Termination, by Plaintiff Oak against Defendant Yuengling; (4) Breach of Contract – Improper Termination, by Plaintiff Boening against Defendant Yuengling; (5) Misappropriation of Proprietary Information/Trade Secrets, by Plaintiffs against Defendant Yuengling; (6) Breach of the Covenant of Good Faith and Fair Dealing, by Plaintiffs, in the alternative against Defendant Yuengling; (7) Intentional Interference with Contract, by Plaintiffs against Defendant Manhattan; and (8) Violation of Donnelly Act, by Plaintiffs against Defendants Yuengling and Manhattan.

Defendant Yuengling counters that the termination of Plaintiffs’ respective distribution agreements with Defendant Yuengling was warranted, as (1) Plaintiffs failed to properly market and sell the Yuengling brands in Plaintiffs’ assigned territories; (2) failed to

adequately forecast and provide inventory for sales over an extended time period leading to a loss of sales, products being out of stock, and disgruntled customers; and (3) failed to use commercially reasonable efforts to appropriately market and sell Defendant Yuengling Products.

Defendant Yuengling argues that all of Plaintiffs' Causes of Action against Defendant Yuengling (Causes of Action One through Six, and Eight) should be dismissed.

Defendant Yuengling contends that fatal to Plaintiffs' case is the absence of an allegation or proof that a written agreement exists, as required by ABC § 55-c. Defendant Yuengling argues that as a result, Plaintiffs' First and Second Causes of Action must fail as a matter of law. Further, even assuming the existence of such agreements, the Amended Complaint does not allege that the agreements contain the statutorily required terms. According to Defendant Yuengling, Plaintiffs' allegations are conclusory as they plead that Defendant Yuengling lacked good cause to terminate the agreements under ABC § 55-c because they were not in breach.

Defendant Yuengling further contends that Plaintiffs' Third and Fourth Causes of Action for Breach of Contract fail because the Amended Complaint does not allege the material terms of the contracts and how Defendant Yuengling allegedly breached them. Further, Defendant Yuengling argues that the breach of contract claims are duplicative of the ABC § 55-c claims.

Likewise, Defendant Yuengling contends that Plaintiffs have failed to properly support their claim under the Fifth Cause of Action for alleged Misappropriation of Trade

Secret/Proprietary Information. Moreover, the Sixth Cause of Action for the Breach of the Covenant of Good Faith and Fair Dealing fails because it is duplicative of the breach of contract claim and because Plaintiffs fail to allege bad faith on the part of Defendant Yuengling.

As to Plaintiffs' Eighth Cause of Action under New York's General Business Law § 340, also known as the Donnelly Act, Defendant Yuengling contends that it fails to state a claim as it is based on allegations based "upon information and belief", which Defendant Yuengling asserts has been established as insufficient as a matter of law in New York courts to sustain a Donnelly Act claim. Moreover, Plaintiffs have failed to set forth how Defendant Yuengling thwarted competition, or any conspiracy, and the relevant market affected.

Defendant Manhattan asserts that Plaintiffs' two Causes of Action against it (Tortious Interference and violation of the Donnelly Act) are not sufficiently pled by Plaintiffs to survive a motion to dismiss.

According to Defendant Manhattan, fatal to Plaintiffs' pleading is their failure to properly allege that Defendant Manhattan intentionally procured Defendant Yuengling's alleged breach of contract and but for Defendant Manhattan's actions, Defendant Yuengling would have continued its agreements with Plaintiffs. In support, Defendant Manhattan points to the fact of Defendant Yuengling's years-long contention and dissatisfaction with Plaintiffs, as evidenced by the undisputed correspondence.

Secondly, Defendant Manhattan argues that the Donnelly Act claim is conclusory as it is pled almost entirely on information and belief, and the only act cited is the claim that Defendant Manhattan failed to agree to a like-kind brand exchange with Plaintiffs.

Defendant Manhattan argues that this refusal on its own cannot constitute an antitrust violation, since the required elements of a conspiracy or reciprocal relationship, harm to competition as a whole as opposed to Plaintiffs individually, as well as a definition of the relevant market, are absent from Plaintiffs' pleadings. Defendant Manhattan further opposes Plaintiffs' motion to further amend the Complaint.

Defendants argue that Plaintiff's claims are conclusory and insufficiently supported to survive a motion to dismiss.

Plaintiff maintains that the Amended Complaint provides ample evidence to support the causes of action at issue.

#### *Law/Analysis*

Defendant Yuengling moves to dismiss this action pursuant to *CPLR § 3211 (a)(1) and (a)(7)*. *CPLR § 3211(a)* states in pertinent part that 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; or...*
- 7. The pleading fails to state a cause of action*

A motion made pursuant to *CPLR § 3211(a)(1)* requires the Court to dismiss a claim where “the documentary evidence utterly refutes the plaintiff’s factual allegations, thereby conclusively establishing a defense as a matter of law.” *Ralex Services, Inc. v. Southwest Marine & General Ins. Co.*, 155 A.D.3d 800, 801 (2d Dept. 2017).

*Subsection (7)* requires this Court to accept as true the allegations of the complaint (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]). A determination of a *CPLR § 3211* motion requires the Court to consider whether the claim(s) as pled by Plaintiff are viable based upon a review of the “four corners” of the Complaint. *Doria v. Masucci*, 230 A.D.2d 764, 765 (2d Dept. 1996). Further, the Court is charged with “accord[ing] plaintiff the benefit of every possible favorable inference (*Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]). Moreover, whether the complaint will later survive a motion for summary judgment, or whether the Plaintiff will ultimately be able to prove his claims, of course, plays no part in the determination of a pre-discovery *CPLR § 3211* motion to dismiss (see *EBCI, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11 [2005]; *Shaya B. Pac., LLC v. Wilson, Elser Moskowitz, Edelman & Dicker, LLP*, 38 A.D.3d 34 [2d Dept. 2006]). That said, Plaintiff is nevertheless obliged to plead sufficient facts to thwart a motion to dismiss.

The statutory authority that underlies this action is ABC § 55-c. The pertinent sections are set forth below.

ABC § 55-c – Agreements between brewers and beer wholesalers

1. Purpose. It is hereby declared to be the policy of this state (New York), that the sale and delivery of beer by brewers to beer wholesalers shall be pursuant to a written agreement.

2. Definitions.

(a) "Agreement" means any contract, agreement, arrangement, course of dealing or commercial relationship between a brewer and a beer wholesaler pursuant to which a beer wholesaler is granted the right to purchase, offer for sale, resell, warehouse or physically deliver beer sold by a brewer.

3. Written agreement required. Except as provided for in subdivision ten of this section, beer offered for sale in this state by a brewer to a beer wholesaler shall be sold and delivered pursuant to a written agreement which conforms to the provisions of this section and which sets forth all essential and material terms, requirements, standards of performance and conditions of the business relationship between a brewer and a beer wholesaler. Such agreement may be cancelled, terminated, materially modified or not renewed for good cause as defined in this section, provided the brewer has acted in good faith.

The facts herein as alleged and reviewed by this Court reveal that Plaintiffs have failed to demonstrate compliance with ABC § 55-c, as set forth above. At the outset, there has been an insufficient showing on Plaintiffs' part of the existence of a written contract.

Additionally, Plaintiffs have failed to show the existence of a written agreement which conforms to the provisions of section (3) above, i.e., which sets forth all essential and material terms, requirements, standards of performance and conditions of the business relationship between a brewer and a beer wholesaler. Moreover, the allegations that comprise Plaintiffs' causes of action as to both Defendants are insufficiently conclusory and lacking in specificity.

Certainly, there is no requirement that any agreement(s) wholly prove the causes of action set forth in Plaintiffs' Complaint; however, it is a fundamental starting point. Consequently, Plaintiffs cannot be shielded from a motion to dismiss by mere conclusory statements which highlight the conspicuous absence of the very documents, terms and obligations upon which the action is premised. Mere references to these items are insufficient, and Plaintiffs' statements alone fall short of Plaintiffs' requisite burden.

Accordingly,

It is

ORDERED, that Defendant D.G. Yuengling & Son, Inc.'s motion for an Order, pursuant to CPLR 3211(a)(1) and (a)(7), dismissing all causes of action against Defendant Yuengling in Plaintiffs' Amended Complaint, specifically causes of action one through six, and eight, in their entirety, is Granted; and

It is

ORDERED, that Defendant D.G. Yuengling & Son, Inc.'s motion for an Order granting Defendant Yuengling costs, fees, and expenses in the making of this motion, is Granted; and

It is

ORDERED, that Defendant Manhattan Beer Distributors LLC's motion for an Order of the Court, dismissing the Seventh (Tortious Interference with Contract) and Eighth (Violation of the Donnelly Act) causes of action against Manhattan in the Amended Complaint, pursuant to CPLR 3211(a)(1) and (a)(7), on the grounds that the claims fail to state a cause of action and/or are barred by documentary evidence, is Granted; and

It is

ORDERED, that Plaintiffs' cross-motion for an Order of the Court granting Plaintiffs leave to file an amended complaint, pursuant to CPLR 3025(b), is Denied as moot; and

It is


ORDERED, that Defendants shall serve a copy of this Order upon Plaintiffs by certified mail, return receipt requested and by regular mail within 10 days of the date of filing of the Order.

All applications not specifically addressed herein are denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York  
May 9, 2022

**ENTERED**  
**May 18 2022**  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

  
Sharon M.J. Granelli  
Justice of the Supreme Court