Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LEONARD LIVOTE IA Part 33
Justice

PREFERRED BEVERAGE DISTRIBUTORS, INC., x
Plaintiff

-against-

KING JUICE COMPANY, INC., . and BIG GEYSER, INC.,
Defendant.
x

Index Number 702766 2021

Motion Date 11/16/21

Motion Seq. No. 1

The following numbered papers read on this motion by defendants to dismiss the complaint pursuant to CPLR 3211(a)(5) and (a)(7).

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	EF 7 - 11
Answering Affidavits - Exhibits	EF 15 - 20
Reply Affidavits	EF 21

Upon the foregoing papers it is ordered that the motion is determined as follows:

That branch of defendants' motion to dismiss the breach of contract cause of action on statute of frauds grounds pursuant to CPLR 3211(a)(5) is denied. General Obligations Law § 5-701(a)(1) provides, as relevant, that an agreement is void unless the agreement or some note or memorandum thereof is in writing and subscribed by the party to be charged, where the agreement "[b]y its terms is not to be performed within one year from the making thereof." "[T]he fact that full performance within one year [is] unlikely or improbable does not make the agreement subject to the statute of frauds, for the statute encompasses only

those agreements which, by their terms, 'have absolutely no possibility in fact and law of full performance within one year'" (*Financial Structures Ltd. v UBS AG*, 77 AD3d 417, 418 [1st Dept 2010], *quoting D & N Boening v Kirsch Beverages*, 63 NY2d 449, 454 [1984]; *see Stillman v Kalikow*, 22 AD3d 660, 661-662[2d Dept 2005]).

Applying these principles to the instant case, the court concludes that the alleged oral agreement is not barred by the statute of frauds. Although the parties may have expected the agreement to last over a long period of time, they contemplated its possible termination by action as the complaint alleged that "[d]efendant KING JUICE promised Plaintiff a long-term commitment and specifically that it would pay Plaintiff a termination fee in the event of a '*no cause*' termination of Plaintiff's services as distributor of the KING JUICE Beverages in New York City and Long Island." As such, the subject oral agreement did not, by its terms, "of necessity extend beyond one year from the time of its making" (*Nat Nal Service Stations, Inc. v Wolf*, 304 NY 332 [1952]; *see Bennett v Atomic Prods. Corp.*, 74 AD3d 1003 [2d Dept 2010]).

Defendants seek dismissal of the remaining causes of action for failure to state a cause of action pursuant to CPLR 3211(a)(7). On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept the facts alleged by the plaintiff as true and liberally construe the complaint, according it the benefit of every possible favorable inference (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 406, 414 [2001]; *Benitez v Bolla Operating LI Corp.*, 189 AD3d 970 [2d Dept 2020]). The role of the court is to determine only whether the facts as alleged fit within any cognizable legal theory (*see Bianco v Law Offices of Yuri Prakhin*, 189 AD3d 1326 [2d Dept 2020]). In general, when deciding a motion made pursuant to CPLR § 3211(a)(7), "[t]he court is limited to 'an examination of the pleadings to determine whether they state a cause of action'" (*Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901, 902 [2d Dept 2014], *quoting Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]; *see Fedele v Qualified Pers. Residence Trust of Doris Rosen Margett*, 137 AD3d 965, 967 [2d Dept 2016]).

That branch of defendants' motion to dismiss the cause of action for fraudulent inducement is denied. To properly plead a cause of action to recover damages for fraud, the plaintiff must allege that "(1) the defendant made a false representation of fact, (2) the defendant had knowledge of the falsity, (3) the misrepresentation was made in order to induce the plaintiff's reliance, (4) there was justifiable reliance on the part of the plaintiff, and (5) the plaintiff was injured by the reliance" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553 [2009]; *see Introna v Huntington Learning Ctrs., Inc.*, 78 AD3d 896 [2d Dept 2010]; *Fromowitz v W. Park Assoc., Inc.*, 106 AD3d 950 [2d Dept 2013]; *Pace v Raisman & Assoc., Esqs., LLP*, 95 AD3d 1185 [2d Dept 2012]). Moreover, a cause of action alleging fraud must be pleaded with the requisite particularity pursuant to CPLR 3016(b).

CPLR 3016(b) provides that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." "[T]he purpose underlying [CPLR 3016(b)] is to inform a defendant of the complained-of incidents" (*Eurycleia Partners*, 12 NY3d at 559). While there is no requirement that there be "unassailable proof at the pleading stage," the basic facts constituting the fraud must be set forth (*id.*). "CPLR 3016(b) is satisfied when the facts suffice to permit a reasonable inference of the alleged misconduct" (*id.*).

Here, the complaint contains sufficient allegations to state a cause of action for fraudulent inducement. Specifically, plaintiff alleged that "in or about 2014, representatives of Defendant KING JUICE approached Plaintiff and attempted to induce Plaintiff into taking on the marketing and distribution of the KING JUICE Beverages in New York City and Long Island." In addition, plaintiff alleged that "Defendant KING JUICE promised Plaintiff that it would have the exclusive rights to distribution of the KING JUICE Beverages in New York City and Long Island . . . .," that "Defendant KING JUICE promised Plaintiff that it would pay an invasion fee of fifty cents per case for every case of the KING JUICE Beverages sold by third parties in Plaintiff's exclusive territory," that "Defendant KING JUICE promised Plaintiff a long-term commitment and specifically that it would pay Plaintiff a termination fee in the event of a '*no cause*' termination of Plaintiff's services as distributor of the KING JUICE Beverages in New York City and Long Island," and that "Defendant KING JUICE promised Plaintiff a written distribution agreement containing the above terms." Plaintiff further alleged that "[i]n reliance upon the promises of Defendant KING JUICE, from in or about May 2014 through in or about 2020, Plaintiff invested substantial time, money and labor in establishing and building up the distribution of the KING JUICE Beverages in New York City and Long Island and grew the sales of the KING JUICE products every year from 2014-2020." It is alleged, however, that "to the contrary of said representations, promises and agreements, Defendant KING JUICE willfully breached its obligations to Plaintiff by, amongst other things, declaring a 'no cause' termination of Plaintiff as distributor of the KING JUICE Beverages and refusing to pay Plaintiff the agreed upon termination fee."

Those branches of defendants' motion to dismiss the causes of action for promissory estoppel and unjust enrichment are denied. In support of the motion, defendants' primary contention is that said claims should be dismissed because they are based upon an oral contract that is barred by the statute of frauds. However, as discussed above, the court found that the statute of frauds is not a bar to enforcement of the alleged oral agreement and, thus, plaintiff's promissory estoppel and unjust enrichment causes of action should not be dismissed for that reason (*see Zuccarini v Ziff-Davis Media, Inc.*, 306 AD2d 404 [2d Dept 2003]).

Defendants assert the additional contention that the factual allegations of the complaint do not adequately state a claim for unjust enrichment. To establish a claim for unjust enrichment, the plaintiff must show that the defendant was enriched at the expense of the plaintiff, and that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (*see Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). Here, the complaint sufficiently states a cause of action for unjust enrichment by alleging that "Defendant KING JUICE has unfairly benefitted from the Plaintiff's efforts in building the sales of the KING JUICE Beverages and making the brand a success in New York City and Long Island without fairly compensating Plaintiff."

That branch of defendants' motion to dismiss the cause of action for tortious interference with contract against them is also denied. "The elements of a cause of action alleging tortious interference with contract are: (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional procurement of a third-party's breach of that contract without justification, and (4) damages" (*Nagan Constr., Inc. v Monsignor McClancy Mem. High Sch.*, 117 AD3d 1005, 1006 [2d Dept 2014]; *see U.S. Bank N.A. v Kahn Prop. Owner, LLC*, ___ AD3d ___, 2022 NY Slip Op 03922 [2d Dept 2022]; *Palmieri v Perry, Van Etten, Rozanski & Primavera, LLP*, 200 AD3d 785 [2d Dept 2021]). Further, the complaint must specifically allege that the contract would not have been breached but for the defendant's conduct (*see Barry's Auto Body of NY, LLC v Allstate Fire & Cas. Ins. Co.*, 190 AD3d 807 [2d Dept 2021]; *Ferrandino & Son, Inc. v Wheaton Bldrs., Inc.*, LLC, 82 AD3d 1035 [2d Dept 2011]). Here, taking the allegations of the complaint as true, plaintiff adequately pleaded a cause of action for tortious interference with contract by alleging that plaintiff and defendant King Juice entered into an agreement whereby plaintiff agreed to become the exclusive distributor of the King Juice Beverages in New York City and Long Island, that defendant Big Geyser had actual knowledge of this contract, that Big Geyser intentionally induced King Juice to breach its agreement with plaintiff rendering it impossible for plaintiff to perform its contract with King Juice, and that plaintiff sustained damages as a result thereof.

Accordingly, the motion is denied.

Dated: 8/8/22

J.S.C.