SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
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PREFERRED BEVERAGE DISTRIBUTORS, INC.,

Index No.: 702766-21

Plaintiff,

-against-

MEMORANDUM OF LAW OF PLAINTIFF IN OPPOSITION TO MOTION TO DISMISS

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

Defendants.
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PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted by Plaintiff PREFERRED BEVERAGE DISTRIBUTORS, INC. ("PREFERRED BEVERAGE" or "Plaintiff") in opposition to the motion of Defendants KING JUICE COMPANY, INC. ("KING JUICE") and BIG GEYSER INC. ("BIG GEYSER") whereby said Defendants seek dismissal of the five (5) causes of action of the Complaint pursuant to CPLR § 3211 (a)(5) and (7).

As can be gleaned from a reading of the Complaint filed by the Plaintiff, it is readily apparent that the Defendant KING JUICE (a wealthy and well-funded corporation) engaged in a carefully calculated scheme, based on promises of exclusivity, equity and a long term contractual relationship, in order to induce Plaintiff (a small family owned business) to invest substantial resources, time, effort, money and sweat into making its KING JUICE beverages a success in the New York metropolitan area., only to pull the rug out from under Plaintiff by terminating the relationship without cause and awarding distribution rights to the KING JUICE beverages to the conglomerate known as BIG GEYSER.

Plaintiff has adequately plead each of the causes of action set forth in the Complaint. On the other hand, the Defendants are dead wrong on the law as the doctrine of partial performance removes an oral agreement from operation of the *statute of frauds* where, as here, Plaintiff's actions are unequivocally referable to the alleged oral agreement.

Likewise, it has already been held by the Appellate Division that under virtually identical facts, a beverage distributor alleging an oral agreement is entitled to invoke the theories of promissory estoppel and unjust enrichment.

For the reasons set forth below, this Court should deny the motion of Defendants in its entirety, or in the alternative, grant Plaintiffs the opportunity to revise their Complaint as to any causes of actions which the Court deems to be deficiently plead.

STATEMENT OF FACTS

The Verified Complaint in this case contains all of the relevant and necessary facts in support of the causes of action set forth therein. The most important facts are reiterated below.

Plaintiff PREFERRED BEVERAGE is a privately owned and operated marketer and distributor of beverage products in the New York metropolitan area and on Long Island.

Defendant KING JUICE is in the business of manufacturing and marketing certain non-alcoholic beverage products, including the Calypso brand of lemonade drinks.

Defendant BIG GEYSER is a beverage distributor which services accounts throughout the five (5) boroughs of New York City with a portfolio that includes some of the largest beverage manufacturers in the world including BodyArmor, Hal's New York Seltzer, Super Coffee, and many other brands.

Since 2011, Plaintiff PREFERRED BEVERAGE has developed a well-established network of customers, both national (i.e., supermarkets, mass merchandisers, etc.) and local (i.e.,

delis, bodegas, gas stations, etc.), whom it was servicing on virtually a daily basis in the New York metropolitan area.

Indeed, over the years, Plaintiff PREFERRED BEVERAGE had developed substantial good-will with its customers and had amassed a large customer list in New York City and Long Island. As such, Plaintiff PREFERRED BEVERAGE was uniquely qualified to assist manufacturers with new and/or little-known products such as Defendant KING JUICE's calypso lemonade ("KING JUICE Beverages") with respect to marketing and distribution of such beverage products in New York City and Long Island.

In order to build a new or little know brand, Plaintiff PREFERRED BEVERAGE was willing to invest substantial resources into the marketing and distribution of beverage products in New York City and Long Island, so long as it received certain consideration, including compensation for cases delivered, exclusivity, termination fee, invasion fee, and other consideration customary in the beverage distribution industry.

In or about 2014, Defendant KING JUICE was desperate to obtain effective distribution of its beverage products, particularly the KING JUICE Beverages in New York City and Long Island. As such, in or about 2014, representatives of Defendant KING JUICE approached Plaintiff and attempted to induce it into taking on the marketing and distribution of the KING JUICE Beverages in New York City and Long Island.

As specifically alleged in the Verified Complaint, in 2014 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 in the following classes of trade: *Convenience stores, gas stations, small grocery stores, drug stores, liquor/package stores, mass merchandisers, concession stands and other recreation and entertainment establishments*.

In addition, 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.

Defendant KING JUICE also 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. The promised and agreed upon termination fee was to be calculated based upon two (2) times the gross margin for each case sold in the preceding twelve (12) month period (the "measuring period"). For example, if Plaintiff's gross margin were $ 4.50 a case during the measuring period, it would be entitled to a "no cause" termination fee of $ 9.00 per case.

Defendant KING JUICE promised Plaintiff a written distribution agreement containing the above terms and forwarded several drafts of agreement to Plaintiff for review, each of which contained provisions as to exclusive rights in New York City and Long Island, payment of invasion fees, and payment of a termination fee in the event of a "*no cause*" termination, (amongst other things).

In or about May 2014, Plaintiff accepted the offer of Defendant KING JUICE and based on the aforesaid essential terms, agreed to become the distributor of the KING JUICE Beverages in New York City and Long Island. Indeed, in reliance upon the aforesaid promises of Defendant KING JUICE, from in or about May 2014 though in or about 2020, Plaintiff invested substantial time, money and labor in establishing and budling 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.

As stated above, Defendant KING JUICE` sent several forms of written agreements to Plaintiff over the years, all containing terms related to the promises that were made to Plaintiff (i.e., long term commitment, exclusivity, invasion fee, termination fee) yet continually delayed final execution of same, all the while accepting the benefit of Plaintiff's performance in growing the KING JUICE BEVERAGES in New York City and Long Island. The promises and representations made to Plaintiff were made by Defendant KING JUICE's officers and principals, including Jeff Outlaw, David Klavsons and Bridgette Lasda.

Based upon those promises, Plaintiff performed its duties and did so in a top notch manner as confirmed by Defendant KING JUICE itself (see accompanying affidavit of Lou Ferraro, President of Plaintiff).

Unquestionably, Plaintiff's efforts and investment from 2014 through 2020 made the KING JUICE Beverages a success in New York City and Long Island. Most critically, however, Plaintiff agreed to become a distributor of the KING JUICE Beverages in reliance upon said Defendant's representations and promises and would not have become and/or continued as a distributor of the KING JUICE BEVERAGES without all the aforesaid representations, promises and agreements by Defendant KING JUICE.

Unfortunately, contrary of said representations, promises and agreements, Defendant KING JUICE willfully breached its obligations to Plaintiff in January 2021 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.

Plaintiff duly demanded that Defendant KING JUICE live up to its aforesaid agreement with respect to payment of the agreed upon (both orally and also as reflected in every draft

agreement received by Plaintiff over the years) termination fee but said Defendant has failed to do so.

Making Defendant's conduct even more shameful is the fact that, prior to its deal with Plaintiff, Defendant KING JUICE did not have a legitimate distribution system for the KING JUICE Beverages in New York City and Long Island.

Clearly, the reasons why Defendant KING JUICE agreed to appoint Plaintiff as the exclusive distributor of its beverages in New York City and Long Island was to gain the experience and expertise of Plaintiff, along with the good will of Plaintiff's customers and the customer list developed by Plaintiff over the years.

Plaintiff invested substantial time, money, and labor in building up the sales of the KING JUICE Beverages in New York City and Long Island from 2014 to 2020. Indeed, based upon the promises of Defendant KING JUICE, Plaintiff gave up other opportunities to build the business and increase distributorship of the KING JUICE Beverages.

Finally, Plaintiff sustained monetary damages on account of the "no cause' termination of its distribution rights declared by Defendant KING JUICE via letters dated January 15, 2021, and January 19, 2021, in that said Defendant has failed, neglected and refused to compensate Plaintiff in the agreed upon sum (i.e., Termination Fee).

ARGUMENT

I
PLAINTIFF MUST BE GIVEN THE BENEFIT OF EVERY POSSIBLE FAVORABLE INFERENCE AND THE COURT MUST DETERMINE ONLY WHETHER THE FACTS AS ALLEGED FIT WITHIN ANY COGNIZABLE LEGAL THEORY.

On a motion to dismiss pursuant to CPLR § 3211, the Plaintiff is to be given the "benefit of every possible favorable inference." Rovello v. Orofino Realty Co., Inc., 40 N.Y.2d 634

(1976). Further, the "pleading is to be afforded a liberal construction," and the court must "accept the facts as alleged in the complaint as true and determine only whether the facts as alleged fit within any cognizable legal theory." Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); see also Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977) (on a § 3211 motion to dismiss "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one"). See also Feldman v Finkelstein & Partners, LLP, 76 A.D.3d 703 (N.Y. App. Div. 2010).

The Appellate Court in Randazzo v Nelson, 128 A.D.3d 935 (N.Y. App. Div. 2015), held that, "Where a party offers evidentiary proof on a motion pursuant to CPLR 3211(a)(7), the criterion is whether the proponent of the pleading has a cause of action, not whether he or she has stated one." See also Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 46 A.D.3d 530 (N.Y. App. Div. 2d Dep't 2007).

It is respectfully submitted that, as a matter of law, the instant a motion to dismiss for failure to state a cause of action must be scrutinized very carefully and, unless it is clear that issues of fact or law do not exist, this Court should make every effort to preserve the Plaintiff's day in Court". Irondequoit Bay Pure Waters Dist. v. Nalews, Inc., 123 Misc. 2d 462, 472 N. Y. S. 2d 842 (Sup. 1984). The Appellate Division best states the rule as follows:

> "*Upon a motion to dismiss a complaint, Plaintiff must be given the benefit of every possible favorable inference and the complaint shall not be dismissed if, upon examination of four corners of the pleading, factual allegations contained therein indicate the existence of a cause of action"* Fleming v. Allstate Ins. Co., 482 N.Y.S. 2d 519, affirmed 498 N.Y.S. 2d 365, 106 A.D. 2d 426 (2nd Dept 1984).

II

IF THE COURT DETERMINES THAT ESSENTIAL FACTS HAVE NOT BEEN PLEAD, PLAINTIFF SHOULD BE PERMITTED TO OBTAIN FURTHER EVIDENCE OF DEFENDANTS' MISCONDUCT

New York Civil Procedure Law and Rules ("CPLR") provides for liberal notice pleading standards and permit a plaintiff to proceed with its case where it can be inferred from the pleadings and affidavits that discovery is required to supplement the complaint with factual evidence solely in the possession of the Defendants or third parties.

Indeed, CPLR § 3211(d) provides, in relevant part: "Should it appear from affidavits submitted in opposition to the motion made under subdivision (a) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just." See also, N.Y. CPLR § 3212(f) (facts unavailable to opposing party on a motion for summary judgment).

The improvidence of granting a motion to dismiss is evident where the Defendants' motivation is material to the Plaintiff's case, and can be inferred from the Defendants' conduct, but not specifically stated. The Appellate Division has recognized that since "evidence of bad faith and improper motivation often is within the exclusive possession of the alleged wrongdoer and Plaintiff has not had the opportunity to conduct discovery in this action," dismissal of a complaint under these circumstances is premature. Wee v. City of Rome, 233 A.D.2d 876, 877 (4th Dept. 1996).

Here, under the liberal pleading requirements in the State of New York, Plaintiff PREFERRED BEVERAGE has alleged sufficient facts to state its causes of action and to infer Defendants' broken promises and improper motivations with respect to the frauds and breaches perpetrated upon it by Defendants. It is alleged in detail that Defendants acted in bad faith in making various promises to Plaintiff in order to secure Plaintiff's expertise and investment in

building up the sales and success of the KING JUICE Beverages, only to perpetrate a fraud upon Plaintiff, breaking each and every promise which Plaintiff reasonably relied upon in agreeing to distribute the KING JUICE Beverages.

In light of the fact that Plaintiff has not been afforded any opportunity to conduct discovery and the Defendants' motivation is material to its claims, it is respectfully submitted that the Court should deny Defendants' motion in its entirety, direct Defendants to answer the Verified Complaint, and allow discovery to proceed.

III

THE CAUSE OF ACTION FOR FRAUD IN THE INDUCEMENT SHOULD NOT BE DISMISSED

To properly plead a cause of action for fraud in the inducement, a Plaintiff must plead a misrepresentation or a material omission of fact which was false and known to be false by Defendant, made for the purpose of inducing the other party to rely upon it, as well as justifiable reliance of the other party on the misrepresentation or material omission and injury caused as a result of that reliance. Orchid Constr. Corp. v. Gottbetter, 89 AD3d 708 [2d Dept. 2011]; Northeast Steel Prods., Inc. v. John Little Designs, Inc., 80 AD3d 585 [2d Dept. 2011]; Hense v. Baxter, 79 AD3d 814 [2d Dept. 2010]).

In the case at bar, Plaintiff has plead the following facts, all of which must be accepted as true for the purposes of this motion :

The Representations as Plead in the Complaint

> That in order to induce Plaintiff to commence work as distributor of the KING JUIICE Beverages, and to invest substantial money and resources and time for the sale of said beverages in New York City and Long Island, Defendant KING JUICE made numerous promises, assurances, and affirmative representations of material facts to Plaintiffs, including (but not limited to) that 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. Complaint at par. 31.

That Defendant KING JUICE also represented to Plaintiff that it would have the exclusive rights to distribution of the KING JUICE Beverages in New York City and Long Island in the following classes of trade: Convenience stores, gas stations, small grocery stores, drug stores, liquor/package stores, mass merchandisers, concession stands and other recreation and entertainment establishments. Complaint at par. 32.

That Defendant KING JUICE also 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. Complaint at par. 33.

That Defendant KING JUICE also represented to Plaintiff that it would have a written distribution agreement containing the above terms. Complaint at par. 34.

The Defendants knew the Representations to be False

After setting forth all of the above material representations, the Complaint states that "*all of these affirmative representations were made with the intent to induce Plaintiff to become and continue as a distributor if the KING JUICE Beverages in New York City and Long Island, and to induce Plaintiff to continue to invest time, money and resources to the sales and promotion of the KING JUICE Beverages*" (Complaint at par. 35) and that these affirmative representations of Defendant KING JUICE were *intentionally indifferent, wanton and willful, malicious and exhibited gross indifference to the legal and equitable rights of Plaintiff* (Complaint at Par. 36),were made with *full knowledge of their false nature* and/or complete disregard for their truth or falsity, along with a complete disregard to the legal and equitable rights of Plaintiff (Complaint at par. 37) and that , at the time of said representations, Defendant KING JUICE never intended to honor same (Complaint at par. 38) .

Defendant KING JUICE Induced Plaintiff to Rely

Finally, the Complaint states that *Defendant KING JUICE knew Plaintiff would rely on said representations* (Complaint at par 39) and that *Plaintiff had no way of verifying the veracity*

of the aforesaid assurances and promises of Defendant KING JUICE and that only said Defendant had knowledge (both actual and superior) of the truthfulness of their affirmative statements of material facts. (Complaint at par. 40).

Justifiable Reliance to its Detriment

The Complaint states explicitly that Plaintiff reasonably relied upon said representations to its detriment (Complaint at par. 41).

The Parties who made the Misrepresentations

Of course, the Complaint also states that the misrepresentations were made from 2014 through 2020 by Defendant KING JUICE's officers and principals, including Jeff Outlaw, David Klavsons and Bridgette Lasda.

Clearly, under the liberal standard of review of the instant motion, along with the liberal pleading requirements of New York State, the Plaintiff has sufficiently please a cause of action sounding in *fraud in the inducement*.

. **IV**

THE CAUSE OF ACTION FOR BREACH OF CONTRACT SHOULD NOT BE DISMISSED

Here, there is no question that Plaintiff has plead the required elements of a breach of contract claim. In New York State, "The elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, [and] (4) resulting damage." 2 *Leon C. Lazer, et al.*, New York Pattern Jury Instructions – Civil § 4.1, at 594 (2d ed. 2006*);* see JP Morgan Chase v. J.H. Elec. of N.Y., Inc., 69 A.D.3d 802, 803, 893 N.Y.S.2d 237 *(*2d Dep't 2010*);* Furia v. Furia, *116 A.D.2d* 694, 498 N.Y.S.2d 12, 13 (2d Dep't 1986*).*

In the case at bar, Defendants do not claim that the required elements of a breach of contract claim have not been plead properly. Instead, they claim that the *statute of frauds* bars enforcement of the oral agreement sought to be enforced by the Plaintiff.

However, the Defendants' argument is not supported by applicable case law. To the contrary, in a case exactly on point, two groups of experienced distributors of beverage products filed suit to recover damages for breach of contract, promissory estoppel and unjust enrichment.

One of the groups of Plaintiffs (referred to as the "J.C. Tea plaintiffs") were never issued a written distribution agreement. Instead, the J.C. Tea plaintiffs relied on the oral promises made by the Defendants' representatives that they would receive contracts that would guarantee exclusive rights in their geographical territories, equity in their distributorships, long-term franchise relationships, etc. Based on those promises, the J.C. Tea plaintiffs (like the herein Plaintiff) invested a substantial amount of time, money, and labor to increase the equity in their distribution routes.

In that case, Last Time Beverage Corp. v F & V Distrib. Co., LLC 2010 NY Slip Op 30480(U), the Defendants contended that the statute of frauds prevents the J.C. Tea plaintiffs from asserting breach of contract causes of action based on those oral promises. In support of that contention, just like the herein Defendants, they relied on General Obligations Law §§ 5-701 and 15-301 (1).

However, Hon. Timothy Driscoll held that the Statute of Frauds affects only executory and not executed contracts. Schenley Distilers Corp. v. C. Wiliams & Co. 64 N. S.2d 561 (Supreme Cour, New York County 1946); Green v. Le Beau 281 A.D. 836 (2d Dept. 1953) (statute of frauds did not vitiate oral partnership agreement that had been wholly or partially executed). As such the Court refused to dismiss the breach of contract claims based upon an oral agreement.

On appeal, in Last Time Beverage Corp. v F & V Distrib. Co, (98 AD3d 947), the Appellate division agreed, holding :

> *The J.C. Tea plaintiffs never executed distribution agreements. Instead, they relied on the oral and written promises made by the defendants' representatives that these plaintiffs would receive contracts that would guarantee exclusive rights in their geographical territories, equity in their distributorships, long-term franchise relationship…Based on those promises, the J.C. Tea plaintiffs invested a substantial amount of time, money, and labor to increase the equity in their distribution routes…..The Defendants contend that the statute of frauds prevents the J.C. Tea plaintiffs from asserting breach of contract causes of action based on those oral promises. In support of that contention, they rely on General Obligations Law §§ 5-701 and 15-301 (1)…. However,* ***the doctrine of partial performance removes an oral agreement from the operation of the statute of frauds where, as here, the plaintiffs' actions are "unequivocally referable" to the alleged oral agreement*** (Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group, 93 NY2d 229, 237 [1999]; Anostario v Vicinanzo, 59 NY2d 662, 664 [1983]; see Klein v Jamor Purveyors, 108 AD2d 344, 348 [1985]).

The facts of the instant action are identical to the case law cited above in that Plaintiff PREFERRED BEVERAGE actually partially performed (from 2014 through 2020), with all of its actions unequivocally referable to the oral agreement with Plaintiff (see accompanying affidavit of Lou Ferraro, President of Plaintiff).

Based upon the above, giving the Plaintiff the "benefit of every possible favorable inference" Rovello v. Orofino Realty Co., Inc., 40 N.Y.2d 634 (1976), and "accepting the facts as alleged in the complaint as true", it is respectfully suggested that the Plaintiff's cause of action for breach of a partially performed oral contract must be sustained as a matter of law. Last Time Beverage Corp. v F & V Distrib. Co. ,98 AD3d 947, 2012 NY Slip Op 06127 (2012).

V

THE CAUSES OF ACTION FOR PROMISSORY ESTOPPEL AND UNJUST ENRICHMENT MUST BE SUSTAINED

Once again, even a cursory review of the complaint leaves no doubt that all essential elements of the causes of action sounding in promissory estoppel and unjust enrichment have been plead and, once again, the Defendants are dead wrong on the law in seeking dismissal of these claims.

In the aforesaid governing case, Last Time Beverage Corp. v F & V Distrib. Co., LLC 2010 NY Slip Op 30480(U), the lower Court (Judge Timothy Driscoll) held that "*Promissory estoppel presents an additional ground which vitiates the effect of the Statute of Frauds. The doctrine of promissory estoppel is properly reserved for that limited class of cases where the circumstances are such as to render it unconscionable to deny the promise upon which the plaintiff has relied*. Buddman Distributors v. Labatt Importers 91 A.D.2d 838 839 (4th Dept. 1982).

This precisely relevant to the facts presented herein as Plaintiff PREFERRED BEVERAGE has plead a series of broken promises which would be unconscionable to deny on account of Plaintiff's reliance thereon.

On appeal, in Last Time Beverage Corp. v F & V Distrib. Co, (98 AD3d 947), the Appellate Division agreed, sustaining both the causes of action for promissory estoppel and unjust enrichment :

> *The Supreme Court properly confirmed the referee's conclusion that these oral agreements should be removed from the ambit of the statute of frauds. Moreover, we agree with the referee and the Supreme Court that* ***the J.C. Tea plaintiffs were entitled to invoke the theories of promissory estoppel*** *(see* Rogers v Town of Islip, 230 AD2d 727 [1996]; Ripple's of Clearview v Le Havre Assoc., 88 AD2d 120, 122 [1982]) ***and unjust enrichment*** (Cruz v McAneney, 31 AD3d 54, 59 [2006]).

Based upon the above, giving the Plaintiff the "benefit of every possible favorable inference" Rovello v. Orofino Realty Co., Inc., 40 N.Y.2d 634 (1976), and "accepting the facts as alleged in the complaint as true", it is respectfully suggested that the Plaintiff's causes of action for promissory estoppel and unjust enrichment must be sustained as a matter of law. Last Time Beverage Corp. v F & V Distrib. Co. ,98 AD3d 947, 2012 NY Slip Op 06127 (2012).

VI

THE CAUSE OF ACTION FOR TORTIOUS INTERFERENCE MUST BE SUSTAINED

Here again, the Defendants fail miserably in providing any basis at this early juncture in support of dismissal of the "tortious interference" cause of action. The fact of the matter is that the cause of action has been properly plead and the court must "accept the facts as alleged in the complaint as true and determine only whether the facts as alleged fit within any cognizable legal theory." Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994).

In New York State, the elements of the tort of interference with contract are "[1] the existence of a valid contract with a third party, [2] defendant's knowledge of that contract, [3] defendant's intentional and improper procuring of a breach, and [4] damages." White Plains Coat & Apron Co. v. Cintas Corp., 8 N.Y.3d 422, 426, 867 N.E.2d 381, 835 N.Y.S.2d 530 (N.Y. 2007); accord Rose v. Different Twist Pretzel, Inc., 123 A.D.3d 897, 898, 999 N.Y.S.2d 438 (N.Y. App. Div. 2nd Dept 2014).

The Existence of a Valid Contract with a Third Party

The complaint at par. 63 asserts that Plaintiff and Defendant KING JUICE entered into an agreement containing all essential terms whereby Plaintiff, for valuable consideration and in

consideration of the terms set forth above, agreed to become the exclusive distributor of the KING JUICE Beverages in New York City and Long Island.

Defendant's Knowledge of that Contract

The complaint at par. 64. States that Defendant BIG GEYSER had actual knowledge of the contract between Plaintiff and Defendant KING JUICE.

Defendant's Intentional and Improper Procuring of a Breach

The complaint at par. 65 provides that Defendant BIG GEYSER intentionally induced Defendant KING JUICE to breach its agreement with Plaintiff and the complaint at par. 66 provides that Defendant BIG GEYSER rendered performance by Plaintiff of its contract with Defendant KING JUICE to be impossible.

Damages

The Complaint at par. 68 states that Plaintiff has been damaged on account of the conduct of Defendant BIG GEYSER and the Complaint at par. 69 states that the contract between Plaintiff and Defendant KING JUICE would not have been breached but for the conduct of Defendant BIG GEYSER.

Unquestionably, each and every one of the required elements for this cause of action has been plead. White Plains Coat & Apron Co. v. Cintas Corp., 8 N.Y.3d 422, 426, 867 N.E.2d 381, 835 N.Y.S.2d 530 (N.Y. 2007); accord Rose v. Different Twist Pretzel, Inc., 123 A.D.3d 897, 898, 999 N.Y.S.2d 438 (N.Y. App. Div. 2nd Dept 2014).

Here again, under the liberal standard of review of the instant motion, along with the liberal pleading requirements of New York State, the Plaintiff has sufficiently please a cause of action sounding in *tortious interference*.

CONCLUSION

Upon a motion to dismiss a complaint, Plaintiff must be given the benefit of every possible favorable inference and the complaint shall not be dismissed if, upon examination of four corners of the pleading, factual allegations contained therein indicate the existence of a cause of action" Fleming v. Allstate Ins. Co., 482 N.Y.S. 2d 519, affirmed 498 N.Y.S. 2d 365, 106 A.D. 2d 426 (2nd Dept 1984).

The causes of action sounding in fraud in the inducement, promissory estoppel, unjust enrichment and tortious interference have each been properly plead with a detailed statement of facts set forth in support of same.

As for the breach of contract claim, the doctrine of partial performance removes an oral agreement from the operation of the *statute of frauds* where, as here, the Plaintiffs' actions are "unequivocally referable" to the alleged oral agreement (Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group, 93 NY2d 229, 237 [1999]; Anostario v Vicinanzo, 59 NY2d 662, 664 [1983]; see Klein v Jamor Purveyors, 108 AD2d 344, 348 [1985]). Last Time Beverage Corp. v F & V Distrib. Co, (98 AD3d 947).

The motion should be denied in its entirety and Plaintiff's day in Court should be preserved. Irondequoit Bay Pure Waters Dist. v. Nalews, Inc., 123 Misc. 2d 462, 472 N. Y. S. 2d 842.

Dated : October 29, 2021

Respectfully submitted,
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