SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

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ELEMENT E, LLC,

Plaintiff,

-against-

ALLYSON ENTERPRISES, INC., ALLYSON CHEMICAL IMPORTERS, INC., and ALLYSON FRISCHER,

Defendants.

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PART 6

INDEX NO. 15310/10

MOTION DATE: 03/22/12
SEQUENCE NO: 001, 002

Notice of Motion, Affirmation & Exhibits..... 1
Notice of Cross-Motion, Affs & Exs..... 2
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Upon the foregoing papers, plaintiff's motion to compel the defendants to respond to its Notice for Discovery and Inspection, pursuant to CPLR §3124, is granted to the extent directed below. Defendants' cross-motion for partial summary judgment, pursuant to CPLR §3212, is granted in part and denied in part, as directed below.

This is an action for damages for breach of contract work, labor and services rendered by the plaintiff.

To begin, plaintiff seeks an order compelling the defendants to provide complete responses to plaintiff's discovery demands. Plaintiff contends that on June 10, 2011, defendants served a supplemental response to its Notice of Discovery and Inspection, dated October 21, 2010, which was "inadequate."

The Court has reviewed the plaintiff's Notice for Discovery and Inspection, dated October 21, 2010, plaintiff's complaint, the agreement between the parties dated July 12, 2005, and the list of outstanding demands in plaintiff's motion, numbered therein as 1 through 5, which are identical to numbers 3 through 7 of its Notice for Discovery and Inspection. Given the nature of the business that the parties were involved in and the fact that the agreement noted the accounts for which plaintiff was responsible and the commissions for which it would be paid, as well as the additional commissions which would be due to plaintiff for the sale of Allyson Enterprise products based upon plaintiff's Ellen Berger's request that samples of those products to be sent to customers, plaintiff's demands are not overbroad.

CPLR §3101 requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The scope of disclosure is very broad. (*Kavanagh v. Ogden Allied Maintenance Corp.*, 92 N.Y.2d 952, 705 N.E.2d 1197(1998); *See also, Montalvo v. CVS Pharmacy, Inc.*, 81 A.D.3d 611, 915 N.Y.S.2d 865 (2d Dept. 2011)). Discovery is not limited to information that is material and necessary to the prosecution or defense of an action, but also testimony or documents "that may lead to the disclosure of admissible proof." (*Montalvo v. CVS Pharmacy, Inc.*, 81 A.D.3d 611, 915 N.Y.S.2d 865 (2d Dept. 2011); *Bigman v. Dime Savings Bank of New York*, 153 A.D.2d 912, 545 N.Y.S.2d 721 (2d Dept. 1989); *Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 235 N.E.2d 430 (1968)). The burden of demonstrating that particular subject matter is exempt from disclosure is on the party opposing discovery. (*Bigman v. Dime Savings Bank of New York*, 153 A.D.2d 912, 545 N.Y.S.2d 721 (2d Dept. 1989)).

Accordingly, defendants are ordered to provide complete responses to items numbered 3 through 7 of plaintiff's Notice for Discovery and Inspection, dated October 21, 2010, within forty-five (45) days of the date of this Order. Defendants shall not, however, be required to produce any bank records for deposits made relating to any of the companies named in the plaintiff's demand.

As the defendants do not object to that portion of the plaintiff's motion which seeks an order compelling the defendants to designate the documents already produced as being responsive to plaintiff's particular demands, and to categorize same, the Court orders that same

be completed within forty-five (45) days of the date of this Order.

Defendants cross-move for partial summary judgment, pursuant to CPLR §3212, contending that (1) summary judgment should be granted to defendants Allyson Chemical Importers, Inc. (hereinafter "Allyson Chemical") and Allyson Frischer, as no basis exists for any liability against said defendants, and that (2) summary judgment should be granted to defendant Allyson Enterprises, Inc. (hereinafter "AEI"), dismissing plaintiff's cause of action for breach of contract, as the letter agreement, dated July 15, 2005, is not an enforceable contract.

It is well settled that a dissolved corporation has no existence either de jure or de facto, except for a limited de jure existence for the sole purpose of winding up its affairs. (*Lodato v. Greyhawk North America, LLC*, 39 A.D.3d 496, 834 N.Y.S.2d 237 (2d Dept. 2007)). Generally a person who purports to act on behalf of a corporation which has neither a de jure nor a de facto existence is personally responsible for the obligations which she incurs. (*Id., citing Brandes Meat Corp. v. Cromer*, 146 A.D.2d 666, 537 N.Y.S.2d 177 (2d Dept. 1989)). An individual who as no active knowledge of the dissolution, and thus has not fraudulently represented the corporate status of the dissolved entity, however, will not be held personally liable for the obligations undertaken by the entity while it was dissolved. (*Id., citing Bedford Hills Supply v. Hubert*, 251 A.D.2d 438, 674 N.Y.S.2d 404 (2d Dept. 1998)). Further, when a dissolution is annulled, the entity's corporate status is reinstated *nunc pro tunc*, and contracts entered into during the period of dissolution are retroactively validated. (*Id., Flushing Plaza Associates #2 v. Albert*, 31 A.D.3d 494, 818 N.Y.S.2d 252 (2d Dept. 2006)). Tax Law §203-a permits retroactive nullification of a corporate dissolution upon payment of accrued taxes and arrears, and once AEI paid its back taxes it was restored to its former corporate status. (*Flushing Plaza Associates #2 v. Albert*, 31 A.D.3d 494, 818 N.Y.S.2d 252 (2d Dept. 2006); *Lorisa v. Capital Corp. v. Gallo*, 119 A.D.2d 99, 506 N.Y.S.2d 62 (2d Dept. 1986)).

Defendants Allyson Frischer and Allyson Chemical have made a prima facie showing of entitlement to summary judgment herein. As defendant Allyson Frischer has submitted an affidavit stating that when she became aware of AEI's dissolution, all back taxes were paid and AEI's corporate status was reinstated *nunc pro tunc* to the date of dissolution, as there is no evidence that Allyson Frischer fraudulently represented the corporate status of the dissolved

entity, and as there is no evidence that Allyson Frischer had any dealings with plaintiff outside of her dealings as a corporate officer of AEI, she cannot be found personally liable herein. Additionally, as there is no evidence that Allyson Chemical has any connection to AEI, is a successor in interest to AEI, entered into any agreements with plaintiff, or was provided services by plaintiff, there are no grounds upon which Allyson Chemical can be found liable to the plaintiff herein.

In opposition, plaintiff fails to submit any evidence which raises a triable issue of fact sufficient to defeat the prima facie showing of entitlement to summary judgment made by defendants Allyson Chemical and Allyson Frischer. As such, summary judgment is granted to said defendants and plaintiff's action is hereby dismissed as against defendants Allyson Chemical and Allyson Frischer only.

Defendants lastly contend that defendant AEI is entitled to summary judgment on plaintiff's cause of action for breach of contract as the letter agreement entered into between the principal of plaintiff, Ellen Berger, and the principals of defendant AEI, Allyson Frischer and Josh Wolfman, dated July 12, 2005, does not constitute a binding contract between the parties. While defendant Allyson Frischer does not deny signing the letter, she contends that the letter was not a binding contract but was an "agreement to agree," as the price terms were indefinite and left to future negotiations. As such, defendants argue that the agreement is unenforceable.

The agreement specifically states, however, that plaintiff "will receive commission, to be determined beforehand on a per product basis and will generally average between 5% and 10%, based on invoiced price to customers." As such, there was an objective method for supplying the price according to the terms of the contract. The agreement further states that "[i]f the parties should terminate their sales agency agreement for any reason, Ellen Berger (doing business as Element E), shall be entitled to commissions for three (3) years after termination on sales resulting from Ellen Berger's sales efforts, and the business sustained." Plaintiff contends that there is nothing vague about the agreement and that it was entitled to be paid on all sales to the named companies, Coty and Estee Lauder, and their subsidiaries and companies manufacturing for them, or for ingredients being sold to named companies through third parties.

In order to grant summary judgment, a court must find that no genuine issue of material

fact exists and that the moving party has made a prima facie showing of entitlement to judgment as a matter of law. (*Cox v. Kingsboro Med. Group,* 88 N.Y.2d 904, 646 N.Y.S.2d 659 (1996); *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985)). Based upon the evidence before this Court, the defendants have failed to sustain their burden as there are questions of fact regarding the existence of an enforceable agreement between the parties. To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms. (*Matter of Express Indus. & Term. Corp. v. New York State Dept. of Transp.*, 93 N.Y.2d 584, 715 N.E.2d 1050 (1999)). The Court of Appeals has held, however, that :

> "While there must be a manifestation of mutual assent to essential terms, parties also should be held to their promises and courts should not be 'pedantic or meticulous' in interpreting contract expressions. Before rejecting an agreement as indefinite, a court must be satisfied that the agreement cannot be rendered reasonably certain by reference to an extrinsic standard that makes its meaning clear. The conclusion that a party's promise should be ignored as meaningless 'is at best a last resort'....[A] price term is not necessarily indefinite because the agreement fails to specify a dollar figure, or leaves fixing the amount for the future, or contains no computational formula. Where at the time of agreement the parties have manifested their intent to be bound, a price term may be sufficiently definite if the amount can be determined objectively without the need for new expressions by the parties; a method for reducing uncertainty to certainty might, for example, be found within the agreement, or ascertained by reference to an extrinsic event, commercial practice or trade usage."

(*Cobble Hill Nursing Home, Inc. v. Henry and Warren Corp.*, 74 N.Y.2d 475, 548 N.E.2d 203 (1989), *internal citations omitted*). In the instant matter, the defendants have not sufficiently demonstrated that the parties' agreement was an "agreement to agree in the future" or that the contract is incomplete as to an essential term. The defendants have failed to show that the agreement cannot be rendered reasonably certain by reference to an extrinsic standard that makes its meaning clear or that the price terms within the contract were so indefinite as to make the contract unenforceable.

Accordingly, as there are questions of fact regarding the enforceability of the parties' agreement, defendant AEI's motion for summary judgment on plaintiff's cause of action for breach of contract is denied in its entirety.

The compliance conference scheduled before the undersigned, in this Part, on June 11, 2012 is hereby adjourned to September 27, 2012 at 9:30 A.M. The Court will not countenance any discovery disputes at this conference. The parties are also forewarned that no further discovery motions may be brought before this Court without prior permission of the Court.

This constitutes the decision and Order of this Court.

Dated: May 17, 2012

Anthony L. Parga, J.S.C.

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