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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON.** JOAN A. MADDEN **PART** 11
Justice

GS Plasticos Limitada,

Plaintiff,

- v -

Bureau Veritas Consumer Products Services, Inc.,

Defendant.

INDEX NO. 650242/09

MOTION SEQ. NO.: 018

MOTION CAL. NO.:

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ____	
Answering Affidavits — Exhibits ____	
Replying Affidavits ____	

Cross-Motion: [ ] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion is decided in accordance ~~with~~ with the annexed memorandum decision and order.

Dated: November 8, 2012

J.S.C.

Check one: [ ] **FINAL DISPOSITION** [X] **NON-FINAL DISPOSITION**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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GS PLASTICOS LIMITADA,
Plaintiff,

Decision and Order

Index No. 650242/09

-against-

BUREAU VERITAS AND BUREAU VERITAS CONSUMER PRODUCTS SERVICES,

Defendants

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JOAN A. MADDEN, J.:

Defendant Bureau Veritas Consumer Products Services ("BVCPS") moves, by order to show cause, pursuant to CPLR 3025(b), to file an amended answer to replead certain affirmative defenses. Plaintiff GS Plasticos Limitada ("GS") opposes the motion, which is granted in part and denied in part.

GS is a Brazilian manufacturer of toy "premiums" for the promotional market, which are small plastic toys like those found McDonald's Happy Meals. BVCPS is a provider of testing and inspection services for consumer products. This action arises out of allegations that, *inter alia*, between August 2006 and October 2006, BVCPS issued various reports to Kellogg Brazil, a subsidiary of the Kellogg Company ("Kellogg"), that incorrectly found that GS's stamps which were to be used in promotional inserts in Kellogg's products contained dangerously high levels of arsenic. It is alleged that as a result of these reports, which were subsequently determined to be false, Kellogg cancelled its contract with GS to manufacture the stamps and GS lost future business opportunities with Kellogg, and others.

The original complaint asserted causes of action for negligence, res ipsa loquitor, tortious

interference with existing contractual relations, and tortious interference with prospective business relations. BVCPS moved to dismiss the complaint on various grounds. In its decision and order dated April 7, 2010, the court granted the motion to the extent of dismissing all of GS's claims except for the claim seeking to recover for tortious interference with existing contractual relations.

GS previously moved to dismiss BVCPS's first, second and third counterclaims for failure to state a claim; its first, second, third, fifth, seventh and eighth affirmative defenses for failure to state a defense; and its fourth, sixth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth affirmative defenses as vague and ambiguous. BVCPS partially opposed the motion.

By decision and order dated March 15, 2012, this court granted GS's motion to the extent of (1) dismissing BVCPS's first, second and third counterclaims, (2) dismissing BVCPS's first (failure to state a cause of action), second (statute of limitations), fifth (no duty) and seventh (conformity to applicable standards) affirmative defenses for failure to state a defense, (3) dismissing BVCPS's third (BVCPS's action are not the proximate cause of its alleged injuries and damages), fourth (failure to mitigate), sixth (GS cannot prove that BVCPS's conduct was the cause of its alleged injuries and damages), eighth (GS's damages are barred in whole or in part as they are a result of BS's own conduct), ninth (GS did not perform the contract it alleges that Kellogg breached), tenth (Kellogg did not breach the contract), eleventh (no enforceable contract with Kellogg), twelfth (actions by BVCPS are not a substantial factor in causing GS's alleged damages and injuries), thirteenth (BVCPS did not engage in malicious or intentional conduct), fourteenth (GS cannot prove damages with reasonable certainty) and fifteenth (barring GS from recovery based on its alleged receipt of replacement order and payment which offset its losses)

affirmative defenses as vague and conclusory. The court stated that the dismissal of BVCPS's defenses was without prejudice to BVCPS moving, by order to show cause, within 15 days of the date of the decision and order to amend its answer to replead any legally viable defenses.

Before BVCPS made this motion, GS moved for leave to file a second amended complaint adding claims for negligence and violations of the Donnelly Act, and certain allegations relating to damages in connection with its existing claim for tortious interference with contract. By decision and order dated October , 2012, the court denied the motion to the extent it sought to add claims for negligence and violation of Donnelly Act finding that GS failed to establish the prima facie merit of these claims. However, the court granted that part of the motion seeking to add the allegations regarding the tortious interference claim.

By this motion, BVCPS seeks to amend its answer to replead the affirmative defenses of (1) statute of limitations, (2) lack of proximate cause, (3) failure to mitigate, (4) lack of breach of contract by Kellogg, (5) lack of enforceable contract, (6) speculative damages that cannot be reasonably estimated, and (7) mitigation and offset damages. GS opposes the motion.

With respect to the statute of limitations defense, BVCPS argues that the tortious interference claim may be potentially barred by the one-year statute of limitations for defamation actions. Notably, this court held in its decision and order dated April 7, 2010, that the statute of limitations for a tortious interference claim is three years, and not one year, as argued by BVCPS. Specifically, the court wrote, citing Amaranth LLC v. J.P. Morgan Chase & Co., , 71 AD3d 40 (1st Dept), lv denied in part and dismissed in part, 14 NY3d 736 (2010), that:

> ...in this case, the one-year statute of limitations is not applicable since the "gravamen of the complaint is economic injury, rather than merely reputational harm." Amaranth LLC v. J.P. Morgan Chase & Co., , 71 AD3d at 48. As recently explained by the Appellate Division, First Department the law distinguishes

between cases in which the alleged harm to plaintiff's business reputation "has an indirect effect on the [plaintiff's] ability to form business relationships" in which case the complaint sounds in defamation and those claims in which the harm impacts on "a specific business relationship." Id. ; Mannix Industries, Inc. v. Antonicci, 191 AD2d 482 (2d Dept), lv dismissed, 82 NY2d 846 (1993).

Here, as the complaint alleges harm to specific business relationships, and in particular, GS's relationship with Kellogg and Kraft, GS's claims are not governed by the one-year limitations period applicable defamation claims. Instead, the claims are governed by the three-year limitations period applicable to claims for injury to property. See CPLR 214(4); Amaranth LLC v. J.P. Morgan Chase & Co., , 71 AD3d at 48 (claim for tortious interference with a specific business relationship arising out of purported misrepresentations made by defendant concerning prospective business deal between plaintiff and a third-party is governed by the three-year limitations period governing actions for injury to property) Classic Appraisals Corp v. DeSantis, 159 AD2d 537 (2d Dept 1990)(where the complaint alleged harm to economic interests, it is governed by the three-year statute of limitations).

BVCPS again moved to dismiss complaint on statute of limitations grounds after GS alleged consequential damages and damages to its reputation in connection with the tortious interference claim, on the grounds that GS's request for this type of damages transformed the claim to one for defamation. By decision and order dated March 15, 2012, the court rejected this argument based on New York precedent holding that consequential damages and damages to reputation can be recovered from a party found liable for tortious interference with contract. See Guard Life Corp. v. Parker Hardware Mfg. Corp., 50 NY2d 183, 197 (1980).[1] Intern. Minerals &

[1]In Guard Life Corp, supra, the Court of Appeals held that a plaintiff seeking to recover for tortious interference with contract is not entitled "not simply to lost profits...but to the full pecuniary benefits of the contract with which [defendant] interfered." In a footnote, the Court of Appeals noted that "[i]n an action against the third party for tortious interference... the elements of damages, including consequential damages, would be those recognized under the more liberal

Resources, S.A. v. Pappas, 96 F3d 586, 597 (2d Cir 1996); Haig 4 NY Prac. Comm. New York Courts § 46:42.

BVCPS now argues that the court's decisions denying its motions to dismiss on statute of limitations grounds do not preclude it from asserting the statute of limitations defense as it intends to provide on summary judgment and at trial evidence that there were no direct damages in connection with GS's contract with Kellogg for the triangular stamps. BVCPS asserts that in the absence of such direct damages, the only remaining basis for recovery would be consequential damages based on the alleged damage to GS's business reputation. Under these circumstances, argues BVCPS, the gravamen of the claim would be for harm to GS's reputation and thus the one-year statute of limitations for defamation would apply.

This argument is without merit. It is well settled that "[i]n applying a Statute of Limitations . . . [the court] look[s] for the reality, and the essence of the action and not its mere name. " Amaranth LLC v. J.P. Morgan Chase & Co.,., 71 AD3d at 47-48. In this connection, as noted above, the First Department has held that when a complaint alleges economic injury to specific business relationships, as opposed to general harm to reputation that has damaged the plaintiff's ability to form business relationships, the claim is for tortious interference with contract and not for defamation. Id.

Under this analysis, GS's claim is for tortious interference with contract as it alleges that GS suffered economic injury as a result the false test reports which caused harm to its business relationship with Kellogg, another customer Kraft, as well as other customers. Moreover, even if

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rules applicable to tort actions (Restatement, Torts 2d, § 774A, Comment c)." The court also cited with approval, Restatement, Torts 2d, § 774A(1), which provides that a party found liable to another for interference with a contract (or prospective business relation) is liable for damages for "pecuniary loss of benefits of the contract... consequential losses for which the interference is a legal cause; and emotional distress

BVCPS were able to establish that GS did not suffer any direct damages in connection with GS's loss of its contract with Kellogg for the triangular stamps the gravamen of GS's claim would not change. Furthermore, that GS seeks consequential damages resulting from harm to its reputation-- as permitted in connection with a claim for tortious interference with contract (Guard Life Corp. v. Parker Hardware Mfg. Corp., 50 NY2d 183, 197 [1980)-- is insufficient to transform GS's tortious interference claim into a defamation claim. Accordingly, the request to add the first affirmative defense is denied.

In support of the proposed second, fourth and fifth affirmative defenses (lack of proximate cause, lack of breach of contract, and lack of enforceable contract respectively), BVCPS points to various evidence which it argues is sufficient to show that Kellogg cancelled its contract with GS not based on BVCPS's findings of arsenic but as the stamps failed certain mechanical hazards testing; that Kellogg had the right to cancel the contract and was therefore not in breach; and that the purchase order for the stamps was not an enforceable contract. In support its defense that there was no enforceable contract, BVCPS relies on deposition testimony of Enrico Sessarego, a partner in GS, that he did not cancel the contract with Kellogg "because we did not have a purchasing contract, we just had a purchase order..." (Sessarego, at 341).

In opposition, GS submits an affidavit from its Director of Operations, Francesco Sansone, in which he attaches evidence which he asserts shows that Kellogg canceled the stamp promotion before any mechanical hazards were found and that Kellogg breached the stamp contract as the finding of arsenic by BVCPS made it unrealistic for GS to meet Kellogg's time table for the Kellogg "Back to School" promotion. GS also submits documentary evidence including emails and purchase orders stamps establishing a contract between GS and Kellogg

The court finds that leave should be granted permitting the addition of the proposed

second, fourth affirmative defenses, but not the fifth affirmative defense. Leave to amend a pleading should be 'freely given' (CPLR 3025[b]) as a matter of discretion in the absence of prejudice or surprise." Zaid Theatre Corp. v. Sona Realty Co., 18 AD3d 352, 355-356 (1st Dept 2005)(internal citations and quotations omitted). Moreover, while the court will examine the underlying merits of a proposed amendment, leave to amend will be granted as long as the proponent submits sufficient support to show that proposed amendment is not "palpably insufficient or clearly devoid of merit." MBIA Ins Corp. v. Greystone & Co., Inc., 74 AD3d 499 (1st Dept 2010)(citation omitted).

Here, BVCPS submits evidence sufficient to establish the prima facie merit of the second and fourth affirmative defenses. Furthermore, while GS submits evidence to contradict this proof, such evidence does not provide a basis for denying BVCPS's motion to amend, particularly as, at this juncture, different inferences can be drawn from the record before the court. See Pier 59 Studios, L.P. v. Chelsea Piers, L.P., 40 AD3d 363, 365 (1st Dept 2007)(holding that "[o]nce a prima facie basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide a subsequent basis for a motion for summary judgment").

However, the court reaches a different conclusion with respect to the fifth affirmative defense, as the testimony of a lay person regarding the whether a contract is enforceable is insufficient to establish the prima facie merit of the defense. See generally, In re Sara B., 41 AD3d 170, 171 (1st Dept 2007)(holding that lay witnesses may only testify to facts and not their opinions and conclusions drawn from those facts). Moreover, the documentary evidence submitted by GS is adequate to demonstrate the existence of an enforceable contract. See Caride v. Alonso, 78 AD3d 466 (1st Dept 2010), appeal dismissed in part denied in part, 16 NY3d 806

(2011); Four Seasons Hotel v. Vinnik, 127 AD2d 310, 316 (1st Dept 1987). Accordingly, leave to amend to add the proposed fifth affirmative defense must be denied.

As for BVCPS's proposed third affirmative defense of failure to mitigate, it is based on evidence that GS rejected Kellogg's offer to purchase an additional 1.3 million stamps. GS argues that GS did not reject Kellogg's offer but responded with a counter-proposal to secure an increased payout from Kellogg. It cannot said that this defense is completely without merit, and thus the court will permit it to be added.

With respect to its proposed sixth affirmative defense, which asserts that GS's alleged damages from future purchase orders from Kellogg, Kraft and other customers are speculative, BVCPS points to, *inter alia,* GS's failure in discovery responses to identify other customers from whom it claims it would have obtained business but for BVCPS's action. BVCPS also argues that GS's calculation of damages in its amended complaint is insufficient to support its damage claims in that the calculations are not limited to the lost benefit of future contracts but, rather, show the gross value of the purported loss of aggregate business.

GS responds, *inter alia*, that Sansone's affidavit dated December 28, 2011 provides adequate documentation supporting GS's damage calculations, including calculations of damages over GS's 20-year operating history.

BVCPS has adequately demonstrated the prima facie merit of its defense based on evidence that at least some of damages sought by GS for lost profits may not be directly traceable to BVCPS' allegedly tortious conduct.

The proposed seventh affirmative defense seeks an offset against damages in the complaint which seeks recovery for the 4.7 million stamps in GS's purchase order with Kellogg based on evidence that Kellogg accepted and purchased 300,000 stamps and re-ordered three

million of additional stamps in 2007 after they were reconfigured to meet Kellogg's mechanical hazard requirements.

GS counters that the documentary evidence shows that three million order was for different stamps than the original order, noting that the price is different than in the original order and that the record shows that the stamps were part of a new promotion. GS also denies that Kellogg accepted the 300,000 stamps, and that while Kellogg paid GS $155,000 in connection with the cancellation of the purchase order, the payment was a settlement so that GS would not sue Kellogg[2]. Despite GS's position, the court finds that BVCPS has made a prima facie showing sufficient to permit it to add the seventh affirmative defense.

In view of the above, it is

ORDERED that BVCPS's motion is granted to the extent of permitting it to amend its answer to replead its proposed second, third, fourth, sixth and seventh affirmative defenses and it otherwise denied; and it is further

ORDERED that within twenty days of GS's service of a second amended complaint as permitted by the court's decision and order dated November 8, 2012, BVCPS's shall file an amended answer to the second amended complaint which is consistent with this decision and order.

DATED: November 8, 2012

J.S.C.

[2]In this connection, GS argues that BVCPS is not entitled to a collateral source offset under CPLR 4545. However, BVCPS does not appear to be seeking this type of an offset and thus this argument is unavailing.