Schieffelin & Co., LLC v Piaggio Group Am., Inc.
2013 NY Slip Op 33071(U)
December 4, 2013
Sup Ct, New York County
Docket Number: 654592/2012
Judge: O. Peter Sherwood
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: O. PETER SHERWOOD
Justice

PART 49

SCHIEFFELIN & COMPANY, LLC
D/B/A VESPA SOHO,

Plaintiff,

-against-

PIAGGIO GROUP AMERICAS, INC.,

Defendant.

INDEX NO. 654592/2012
MOTION DATE Nov. 21, 2013
MOTION SEQ. NO. 001
MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this application to dismiss action.

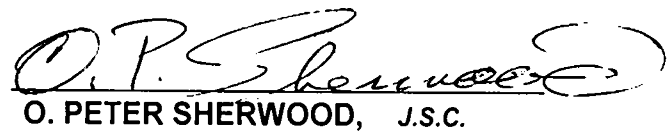
	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [✓] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion to dismiss action is decided in accordance with the accompanying decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: December 4, 2013



O. PETER SHERWOOD, J.S.C.

Check one: [✓] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION
Check if appropriate: [ ] DO NOT POST [ ] REFERENCE
[ ] SUBMIT ORDER/ JUDG. [ ] SETTLE ORDER/ JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

---X

SCHIEFFELIN & COMPANY, LLC, D/B/A VESPA SOHO,

Plaintiff,

-against-

PIAGGIO GROUP AMERICAS, INC.

Defendant.

---X

DECISION AND ORDER

Index No.: 654592/2012
Mot. Seq. Nos. 001

O. PETER SHERWOOD, J.:

I. BACKGROUND

Because this is a motion to dismiss the complaint pursuant to CPLR 3211(a)(1), (3), (5) and (7), the facts are drawn from the complaint and are taken as true with all reasonable inferences drawn in plaintiff's favor for purposes of this motion. *MBIA Ins., Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 290, n. 2 [1st Dept 2011]). Said facts are supplemented by documentary evidence not reasonably in dispute. CPLR 3211(a)(1). Additional background facts are set forth in the Decision and Order issued this date in the related action titled, *Schieffelin & Co. LLC v Piaggio Group Americas, Inc.,* Index No. 601778/2009 ("Action No. 1").

This ("Action No. 2") action arises from a notice to terminate the Authorized Dealer Sales and Service Agreement (the "Dealer Agreement"), dated August 15, 2006, between plaintiff, Schieffelin & Co., LLC ("Schieffelin" or "plaintiff") and Piaggio Group Americas, Inc. ("Piaggio" or "defendant") under which Scheffelin operated a Vespa motor scooter dealership located in Manhattan called Vespa Soho. A Notice Breach of the Dealer Agreement with Notice to Cure ("Notice") authored by Piaggio's counsel and sent to Schieffelin's principal, dated August 3, 2012, states that a "failure to cure [within 30 days] may result in immediate termination without further notice"(Defendant's Exhibit "3"). The Notice states as material breaches of the Dealer Agreement (1) Schieffelin's unauthorized use of the Vespa Soho website, www.vespasoho.com, to promote Carbon Negative, a separate motor scooter sales and service entity owned and controlled by Schieffelin that is not authorized to sell Vespa products; unauthorized creation of hyperlinks within the Vespa Soho website to direct customers to www.carbonnegative.com and unauthorized use of

[* 3]

Vespa trademarks on www.carbonnegative.com to create the impression that Carbon Negative was a Vespa dealership. Pursuant to Section 13.1 of the Dealer Agreement, Schieffelin was advised that it had thirty days to cure the breaches or the Dealer Agreement might be terminated.

In response to the Notice, plaintiff commenced Action No. 1 in this court and obtained a temporary stay of the cure period and threatened termination. The court vacated the stay on September 13, 2013. Schieffelin did not cure the breaches. By letter dated September 17, 2012, Piaggio's counsel advised Schieffelin that termination of the Dealer Agreement would be fully effective on November 1, 2012 (Defendant's Exhibit "8").

On this motion to dismiss the complaint pursuant to CPLR 3211(a)(1)(3), (5) and (7), Piaggio argues that the documentary evidence establishes that Schieffelin's franchise was terminated for cause based on its breach of the Dealer Agreement; that Schieffelin's application to stay termination of the Dealer Agreement, pursuant to Section 463 (2)(e) of the New York State Franchised Motor Vehicle Dealer Act ("Dealer Act"), is untimely; that the Dealer Act contains no provision allowing a dealer to sue a franchisor for granting a franchise to another franchisee who allegedly gave false or inaccurate information to the franchisor; that Schieffelin has no statutory right of action under General Business Law § 687 or common law to damages stemming from Piaggio's alleged failure to scrutinize another dealer's franchise application.[1]

Schieffelin does not dispute the facts on which Piaggio based its decision to terminate the franchise. Instead it argues that there was no proper notice of termination because the August 3, 2012 Notice is only a notice to cure; that it does not specify a date certain for the termination of the Dealer Agreement; and that contrary to section 17 of the Dealer Agreement, the Notice was sent by an attorney, not the president or a specifically designated representative of Piaggio who, according to Schieffelin is only person authorized to issue the Notice. Schieffelin also argues that if there was a notice of termination, it was the September 17, 2012 letter from Piaggio's counsel, and that the effective date of termination of November 1, 2012, triggered the four-month time period within which it could bring the instant action, *i.e.,* by January 17, 2013. Thus, this action alleging improper termination, filed on December 31, 2012, is timely. In any event, Schieffelin contends that there is

[1]At oral argument Schieffelin's counsel withdrew the Fourth Cause of Action against Piaggio. That cause of Action alleges discriminatory treatment in financing by non-party GE Commercial Distribution Corp.

an issue of fact as to the date of termination of the Dealer Agreement. Schieffelin also asserts that the alleged unauthorized uses do not constitute material breaches of the Dealer Agreement because Schieffelin has used the Carbon Negative name as a brand at its Vespa Soho dealership and on the Vespa Soho website since in or around January 2008 without complaint by Piaggio.

Schieffelin cross moves for leave to amend the complaint. It seeks (1) to delete the cause of action predicated upon General Business Law § 687, (2) to add three causes of action seeking declarations that: (a) the August 3, 2012 and the September 17, 2012 letters are without force or effect under the Dealer Agreement as they did not contain the requisite signature of an authorized Piaggio representative (Second Cause of Action); (b) if the August 3, 2012 and September 17, 2012 letters are held by the court to be proper under the Dealer Agreement, that commencement of this action was within the time allowed by section 463 (2)(e) of the Dealer Act (Fourth Cause of Action); and (c) termination of the Dealer Agreement was null and void (Fifth Cause of Action); and (3) to add another cause of action to allege that Piaggio engaged in fraudulent conduct by allowing Andrew Hadjiminas to open a Vespa dealership using financial documentation of Helen Hadjininas in which Helen Hadjiminas stated falsely that she was the sole owner of the Hadjiminas dealership (Eighth Cause of Action).

In reply, Piaggio contends that the causes of action in the proposed Amended Complaint are equally flawed and should be dismissed. Piaggio repeats that the stay of termination sought by Schieffelin under section 463 (2) (e) applies only to a threatened termination and that Schieffelin's Dealer Agreement was terminated on November 1, 2012, well before the commencement of this action. Piaggio also asserts that the Sixth Cause of Action by which Schieffelin asserts claim under section 460 of the Dealer Act fails to state a claim as that provision does not grant a franchisee a private right of action.

Piaggio also contends that Schieffelin executed the Dealer Agreement as Schieffelin & Co., LLC d/b/a Vespa Soho. The Dealer Agreement specifically provided that Vespa trademarks may not be used for another business owned by a dealer without Piaggio's prior written consent. Thus, Schieffelin's admitted use of Vespa trademarks in connection with Carbon Negative, its separate dealership that sells competing brands of motor scooters, constituted a material breach of the Dealer Agreement. In addition, Piaggio notes that Schieffelin took no action during the thirty (30) day cure

period to make changes to its Vespa Soho website or Carbon Negative website, but rather continued to use the Vespa Soho website to direct customers to Carbon Negative even after the November 1, 2012 termination date.

With respect to the date of termination, Piaggio asserts that the August 3, 2012 Notice advised that Schieffelin had thirty (30) days to cure and that a failure to do so might result in immediate termination without further notice. Piaggio also notes that the Dealer Agreement provided a ninety (90) day period prior to termination following a notice of termination. (Defendant's Ex.2, §13.1A[5]). Thus, November 1, 2012 was the proper date of termination of the Dealer Agreement. The September 17, 2012 letter simply memorialized Schieffelin's failure to cure and advised that the effective date of termination would be November 1, 2012.

On the basis of these contentions, Piaggio argues that Schieffelin's cross motion for leave to amend the complaint should be denied as the proposed amended complaint fails to cure the defects in the original complaint.

II. DISCUSSION

A. Standard CPLR § 3211 (a) (1)

To succeed on a motion to dismiss, pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law [citation omitted]" (*McCully v. Jersey Partners, Inc.,* 60 AD3d 562, 562 [1st Dept. 2009]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1,* 73 AD3d 78, 84 [2d Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means judicial records such as judgments and orders, as well as documents reflecting out-of-court transactions such as contracts,

releases, deeds, wills, mortgages and any other papers, "the contents of which are 'essentially undeniable'" (*id.* at 84-85).

B. Standard CPLR § 3211 (a) (7)

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.,* 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.,* 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see, Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]).

While affidavits may be considered on a motion to dismiss for failure to state a cause of action, unless the motion is converted to a 3212 motion for summary judgment the court will not consider them for the purpose of determining whether there is evidentiary support for properly pleaded claims, but, instead, will accept such submissions from a plaintiff for the limited purpose of remedying pleading defects in the complaint (*see Nonnon v City of New York,* 9 NY3d 825, 827 [2007]; *Rovello v Orofino Realty Co.,* 40 NY2d 633, 635-636 [1976]). Affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 "*unless* they 'establish conclusively that [plaintiff] has no * * * cause of action" (*Lawrence v Miller,* 11 NY3d 588, 595 [2008], citing *Rovello v Orofino Realty Co.,* 40 NY2d *supra* at 636). In this posture, the lack of an affidavit by someone with knowledge of the facts will not necessarily serve as a basis for denial of a motion to dismiss.

C. Wrongful Termination of Dealer Agreement (First Cause of Action)

In its First Cause of Action, plaintiff contends that Piaggio wrongfully terminated the Dealer Agreement and that the reasons cited for termination were pretextural and violate section 463 (2)(d)(1) of the Dealer Act. That section requires a franchisor seeking to terminate a dealer

agreement for due cause (1) to provide ninety days notice of the proposed termination, and (2) to state the specific grounds for the termination. Section 13.1 (A)(5) of the Dealer Agreement also provides for a ninety day notice period. It provides, in relevant part that:

> TERMINATION FOR CAUSE. At any time either party may terminate this agreement for cause, as follows, it being understood that the periods of time indicated below shall be deemed extended if and to the extent required under applicable state law:
>
> A. The non-breaching party may cancel or terminate this Agreement upon ninety (90) days' written notice if any of the following events occurs:
>
> * * *
>
> (5) the other party breaches any other material provision contained in this Agreement;
>
> provided that the breaching party has not (i) cured the breach during the thirty (30) day period following the dispatch of the termination notice, or (ii) taken substantial steps, during the thirty (30) day period, to cure a non-monetary breach, which in good faith could not be totally cured within such thirty (30) day period.

(Defendant's Exhibit 2).

The August 3, 2012 letter sets forth the basis for the Notice. Specifically, it states that Schieffelin's website violated sections 5.19 and 8.2 of the Dealer Agreement as it used the authorized Vespa Soho website to promote and re-direct customers to an unauthorized site, *i.e.*, Carbon Negative and that Schieffelin was misused Vespa trademarks to promote the unauthorized Carbon Negative business in violation of section 5.19 of the Dealer Agreement. The Notice included computer monitor screen shots of the Vespa Soho website taken on August 1, 2012. The Notice also states in bold type that "Schieffelin has thirty (30) days from the date of this letter to cure . . . Failure to cure in a timely manner *may* result in immediate termination without further notice *(emphasis added)*. On September 17, 2012, Piaggio sent Schieffelin a second notice stating that Schieffelin had not cured the breaches and that "termination . . . will be fully effective on November 1, 2012" (Defendant's Exhibit 8). The September 17, 2012 notice included screen shots taken on September

3, 2012 showing that plaintiff had failed to remove the Vespa trademarks from the Carbon Negative website. Schieffelin has presented no evidence to dispute this documentary proof.

Plaintiff responds in the first instance that its concession in Action No. 1 regarding the advertising of Carbon Negative on the Vespa Soho website should not be seen as a withdrawal of its contentions against Piaggio regarding the website. Rather, Plaintiff contends that there remain questions of fact as to whether Piaggio implicitly approved use of the Carbon Negative name on the Vespa Soho website as Piaggio did not object for the previous five years and whether any website violation is a material violation of the Dealer Agreement.

Schieffelin's First Cause of Action must be dismissed. The documentary evidence shows that Schieffelin violated the Dealer Agreement in the manner cited by Piaggio in its August 3, 2012 letter and that it took no action to cure its breaches. Schieffelin's contention that the violations were not material because other Vespa Dealers engaged in the same misuse was presented to the court in Action No. 1 and was rejected. Assuming that Piaggio delayed voicing objection to the breaches, such delay is not a bar to suit because section 19 of the Dealer Agreement provides that the "failure . . . to require performance . . . shall not affect . . . the right to require such performance at any later time" (Defendant's Exhibit 2).

D. Stay of Termination of Dealer Agreement (Second Cause of Action)

In its Second Cause of Action, Schieffelin seeks a preliminary injunction under section 463 (2)(e) of the Dealer Act, staying the notice of termination pending final judgment in this action. Such action must be commenced within four months of the receipt of the notice of a proposed termination. Piaggio contends that this cause of action must be dismissed as untimely as the Notice was served on August 3, 2012 and the action was not commenced until December 31, 2012, twenty-eight (28) days after the December 3rd expiration of the four-month period.

While acknowledging that Schieffelin filed an order to show cause in Action No. 1 to stay enforcement of the August 3, 2012 letter, Piaggio contends that neither the time to cure nor the Notice was tolled or extended by the Court. Rather, the court struck the provisions of plaintiff's order to show cause seeking a toll of the time to cure and issued a limited temporary restraining order enjoining Piaggio from discontinuing the supply of replacement parts to Schieffelin's service department until the return date of the order to show cause for a preliminary injunction. Piaggio also notes that on September 12, 2012, the return date of the order to show cause in Action No. 1, the

[* 9]

court denied Schieffelin's application to enjoin Piaggio from taking any action to terminate or cancel the Dealer Agreement. Lastly, Piaggio states that the stay provision of section 463 (2)(e) of the Dealer Act applies only where termination of the dealership has not yet occurred. Here, the termination date was November 1, 2012, and plaintiff did not file this action until December 31, 2012, at a time when the Dealer Agreement had already been terminated.

Plaintiff responds that there is an issue of fact as to whether proper notice of the termination was given. Schieffelin states that under paragraph 17 of the Dealer Agreement only Piaggio's president or another officer designated by Piaggio's president was permitted to send notices to cure or notices of termination. It does not provide for such notices to be sent by Piaggio's attorney. In any event, Plaintiff argues that the August 3rd letter is a notice to cure since Piaggio's attorney referred to it as such and the letter itself merely states that plaintiff "may" terminate the Dealer Agreement in the future if Schieffelin failed to cure. Plaintiff maintains that if there was any notice of termination, it was by means of the September 17, 2012 letter. Plaintiff asserts that this action was commenced within four months of the September 17, 2012 notice or within four months of the end of the alleged cure period and therefore was timely.

Although Schieffelin makes much of the fact that both the August 3, 2012 Notice and the second notice of September 17, 2012 were sent by Piaggio's counsel, section 17 of the Dealer Agreement does not apply to a notice of termination. Even if it does, it does not exclude counsel from acting as Piaggio's representative in the service of such notice. Schieffelin did not assert this defense when it presented its arguments to the court in Action No. 1. Regarding the alleged violation of section 463 (2)(e) of the Dealer Act, it is undisputed that the termination date of the Dealer Agreement was November 1, 2012, that such date of termination was not extended or tolled, and, therefore, when this action was commenced there was no longer a threatened termination to which the automatic stay provision of section 463 (2)(e) of the Dealer Act could apply (*see J.P.T. Automotive, Inc. v Toyota Motor Sales, U.S.A., Inc.*, 659 F.Supp.2d 350, 354 [E.D.N.Y. 2009]; *cf. Smith Cairns Suburu, Inc. v Suburu Distributor Corp.*, 41 Misc3d 1222 [A] *9). Accordingly, the Second Cause of Action shall be dismissed.

E. Violation of Section 460 of the Dealer Act (Third Cause of Action)

In the Third Cause of Action, Schieffelin seeks compensatory and punitive damages on the grounds that Piaggio permitted Andrew Hadjiminas to open a Vespa franchise by according him

preferential treatment and without requiring that he comply with the same policies, procedures and mandates of other Vespa dealers, all in violation of section 460 of the Dealer Act.

Piaggio contends that there is no language in section 460 permitting a private right of action for damages by an existing franchisee arising from an alleged improper grant of a franchise to another franchisee. Piaggio states that section 460 is simply of legislative findings that underlies the enactment of the Dealer Act.

The court agrees that section 460 which is entitled "Legislative Findings," merely recites legislative findings concerning enactment of Article 17-A (the Dealer Act) "in order to promote the public interest and the public welfare" by regulating the distribution and sale of motor vehicles and dealers of motor vehicles within the state to prevent "frauds, impositions and other abuses." Section 460 itself does not create a cause of action. The specific rights accorded franchisees under Article 17-A are set forth in sections 462 through 473 of the law. Where, as here, the statute "does not explicitly provide for a private right of action, recovery may be had under the statute only if a legislative intent to create such a right of action is 'fairly implied' in the statutory provisions and their legislative history" (*Brian Hoxie's Painting Co. v Cato-Meridian Cent. Sch. Dist.,* 76 NY2d 207, 211 [1990], quoting *Sheehy v Big Flats Community Day, Inc.,* 73 NY2d 629, 633 [1989]). The Court of Appeals has set forth a three-prong test to determine whether a private right of action exists under a statute: "(1) whether the plaintiff is one of the class of people for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme." (*Sheehy,* 73 NY2d at 633).

Section 460 and the other sections of Article 17-A are designed to protect the citizens of the state from fraud and other abuses and to preserve their investments and property. It is not intended to impede competition or to protect one franchisee from the acts of a franchisor concerning another franchisee. In this sense, Schieffelin is not within the class of persons which the Dealer Act are intended to protect. In any event, the rights plaintiff seeks to create under section 460 are not within the legislative intent to create a private right of action. As noted above, the causes of action the legislature intended to create are set forth elsewhere in Article 19-A. Accordingly, the Third Cause of Action shall be dismissed.

F. Failure to Scrutinize Hadjiminas & Co.'s Dealer Application (Fifth Cause of Action)

Plaintiff alleges in its Fifth Cause of Action that it sustained damages as a result of Piaggio's failure to adequately review the franchise application of Hadjiminas & Co. to ensure compliance with applicable law and Piaggio's own policies and procedures. Plaintiff further alleges that Helen Hadjimina and/or Andrew Hadjiminas engaged in improper collusion to the detriment of plaintiff.

This cause of action which is predicated upon conclusory statements without factual support will be dismissed. Even accepting plaintiff's allegations as true, plaintiff was not damaged by Piaggio's alleged failures. Indeed, plaintiff does not assert as a predicate for its claim that Piaggio owed a duty to plaintiff to scrutinize the application of potential franchisees. Moreover, any damages accruing due to the alleged inaccurate information in Hadjiminas's application would be sustained by Piaggio, not plaintiff.

G. Violation of New York General Business Law §687 (Sixth Cause of Action)

Schieffelin having failed to respond to that portion of the motion that seeks dismissal of the Sixth Cause of Action, this claim is deemed abandoned. In any event, the complaint fails to state a cause of action on which relief may be granted and must be dismissed.

As Piaggio first observes, it does not sell franchises to prospective dealers. Further, Schieffelin has no private right of action under General Business law §687. General Business Law §691, which is part of the New York Franchise Act (General Business Law §§680 *et seq.*), limits the causes of action under section 687 to "the person purchasing the franchise." No other private right of action exists. Accordingly, Schieffelin is not within the class of persons covered by section 691 and cannot maintain a cause of action under section 687 for alleged fraudulent conduct of Andrew Hadjiminas in obtaining a Vespa franchise.

H. Schieffelin's Cross Motion for Leave to Amend Complaint

Leave to amend a pleading pursuant to CPLR § 3025 "shall be freely given", in the absence of prejudice or surprise (*see e.g. Thompson v Cooper,* 24 AD3d 203, 205 [1st Dept 2005]; *Zaid Theatre Corp. v Sona Realty Co.,* 18 AD3d 352, 354 [1st Dept 2005]). Mere lateness in seeking such relief is not in itself a barrier to obtaining judicial leave to amend (*see, Ciarelli v Lynch,* 46 AD3d 1039 [3d Dept. 2007]). Rather, when unexcused lateness is coupled with significant prejudice to the other side, denial of the motion for leave to amend is justified (*see, Edenwald Contracting Co. v City*

of New York, 60 NY2d 957, 958 [1983]).Prejudice in this context is shown where the nonmoving party is "hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (*Loomis v Civetta Corinno Const. Co.,* 54 NY2d 18, 23 [1981]).

In order to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated (*Thompson, supra* at 205; *Zaid, supra* at 355). Leave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law (*see Aerolineas Galapagos, S.A. v Sundowner Alexandria,* 74 AD3d 652 [1st Dept 2010]; *Thompson, supra* at 205). Thus, a motion for leave to amend a pleading must be supported by an affidavit of merit and evidentiary proof that could be considered upon a motion for summary judgment (*Zaid, supra* at 355).

As the party seeking the amendment, plaintiff has the burden in the first instance to demonstrate its proposed claims' merits, but defendant, as the party opposing the motion, "must overcome a presumption of validity in the moving party's favor, and demonstrate that the facts alleged in the moving papers are obviously unreliable or insufficient to support the amendment" (*Peach Parking Corp. v 346 W. 40th St. LLC,* 42 AD3d 82, 86 [1st Dept 2007]). Where there has been extended delay in seeking leave to amend, the party seeking to amend a pleading must establish a reasonable excuse for the delay (*see Heller v Louis Provenzano, Inc.,* 303 AD2d 20, 24 [1st Dept 2003]).

Review of the proposed amended verified complaint, reveals that such the proposed amended complaint essentially recasts the same causes of action that were alleged in the original complaint. Accordingly, the proposed amended verified complaint fares no better than the original complaint. The following causes of action are alleged in the proposed amended verified complaint:

First Cause of Action: This cause of action is identical to First Cause of Action pleaded in the original complaint, namely, Piaggio's wrongful and bad faith conduct in terminating the Dealer Agreement in violation of section 463 (2)(d)(1) of the Dealer Act;

Second Cause of Action: Like the Second Cause of Action in the original complaint, this claim for declaratory judgment that the August 3, 2012 and September 17, 2012 letters are without force or effect under the Dealer Agreement as no authorization is provided pursuant to section 17 thereof for Piaggio's counsel to send notices to Schieffelin is base on a reading of section 17 which the court has rejected;

Third Cause of Action: The assertion of bad faith termination of the Dealer Agreement in violation of Section 463 (d)(2)(e) of the Dealer Act as Schieffelin did cure or undertake to cure any acts Piaggio claimed violated the Dealer Agreement is not viable because the documentary evidence that accompanied the September 17, 2012 letters shows otherwise;

Fourth Cause of Action: This cause of action for declaratory judgment that commencement of the action was within the time provided under section 463 (2)(e) of the Dealer Act as the August 3, 2012 letter failed to state unequivoccally that it was a Notice of Termination thereby rendering it ineffective to commence running of the statutory fourth-month period for commencing an action to stay the termination has already been rejected;

Fifth Cause of Action: This claim for declaratory judgment that the claim of material breach of the Dealer Agreement contained in the September 17, 2012 letter was false and therefore the termination of the Dealer Agreement was null and void and without effect is belied by documentary proof;

Sixth Cause of Action: The alleged violation of section 460 of the Dealer Act by according preferential treatment to Hadjiminas & Co. as compared to other dealers has already been rejected;

Seventh Cause of Action: The alleged breach of implied covenant of good faith and fair dealing by according plaintiff disparate treatment and permitting Andrew Hadjiminas to enter into a franchise agreement on behalf of Hadjiminas & Co. without executing any of the finance documents required by GE to obtain inventory financing required by Piaggio to enter into a franchise agreement fails to state a cause of action against Piaggio;

Eighth Cause of Action: The alleged fraudulent conduct by Piaggio in permitting Andrew Hadjiminas to open a Vespa dealership using financial documentation of Helen Hadjimina who stated she was the sole owner of Hadjiminas & Company fails to satisfy the requirements of a cause of action for fraud.

In sum, these causes of action are essentially the same as the causes of action alleged in the original complaint and, for the same reasons, are palpably insufficient as a matter of law. In this regard, plaintiff has failed to meet its burden of demonstrating the merit of the claims in the proposed amended verified complaint. Moreover, in support of the cross motion, plaintiff submits only an affirmation of counsel rather than an affidavit of merit from an individual with personal knowledge

of the facts or by submitting evidentiary proof sufficient to rebut the documentary evidence submitted by Piaggio. Accordingly, the cross motion for leave to amend shall be denied.

Accordingly, it is hereby

ORDERED that Piaggio's motion to dismiss the original complaint is GRANTED and the complaint is DISMISSED with costs and disbursements to defendant as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that Schieffelin's cross-motion for leave to amend the complaint is DENIED; and it is further

ORDERED the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: December 4, 2013

E N T E R,

O. PETER SHERWOOD
J.S.C.