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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES PART 17

Justice

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ELMHURST DAIRY, INC.,

Plaintiff,

-against-

Index No. 12116/11
Motion Date: 7/27/11
Motion Cal. No. 18

BARTLETT DAIRY, INC., STARBUCKS CORPORATION, DEAN FOODS COMPANY, TUSCAN/LEHIGH DAIRIES, INC.,

Defendants.

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The following papers numbered 1 to 18 read on this motion by defendant **BARTLETT DAIRY, INC**("Bartlett") for an order pursuant to CPLR 3211 to dismiss the complaint as against Bartlett.

	PAPERS NUMBERED
Notice of Motion.....	1-4
Memorandum of Law.....	5-6
Affirmation in Opposition-Exhibits.....	7-9
Affidavit of Jay Valentine-Exhibits.....	10-12
Memorandum of Law.....	13-14
Affidavit of Thomas Malave.....	15-16
Memorandum of Law.....	17-18

Upon the foregoing papers this motion by defendant Bartlett for an order pursuant to CPLR 3211 to dismiss and the complaint as against Bartlett is granted for the following reasons:

According to the complaint, on or about February 28, 2003, Elmhurst and Bartlett entered into the Contract under which Bartlett agreed to have all of its milk requirements processed and packaged exclusively by Elmhurst for a period of 10 years, beginning on December 1, 2003 and continuing through November 10, 2013. Specifically, under Section 2.1 of the Contract, Bartlett agreed as follows: "[Elmhurst] shall process and package F.O.B. [Bartlett's] trucks at [Elmhurst's] Plant, all of [Bartlett's] Requirements and [Bartlett] agrees to have all [Bartlett's] Requirements processed and packaged exclusively by [Elmhurst]" (emphasis added). The second WHEREAS clause of the Contract, states that: "[Bartlett] is desirous of having all of its requirements of milk and milk products that [Bartlett] sells as a Dealer described on Schedule A hereto . . . . processed and packaged at [Elmhurst's] Plant." The Contract at 8.1(f) identifies as an Event of Default by Bartlett: "The transfer by [the Bartlett] of any portion of [the Bartlett's] routes or business without compliance with the provision of Paragraph 18 hereof[,]" and Paragraph 18 of the Contract

provides that Bartlett may not "assign any of its rights or obligations under this Agreement without [Elmhurst]'s written consent thereto, which shall not be unreasonably withheld …," such that during the ten year term of the Contract, unless terminated earlier pursuant to the terms of 12 of the Contract, Bartlett must use Elmhurst exclusively for its milk processing needs in support of its milk distribution business. The Contract at 12.2 provides: "[Bartlett] may cancel this Agreement on twelve (12) months prior written notice if [Bartlett] intends to and does in fact permanently discontinue its milk distribution business.

The complaint further states that, "[u]pon information and belief, at all times relevant herein, Bartlett has had, presently has, and shall continue to have through November 2013, a contract with Starbucks ("Bartlett/Starbucks Contract") to deliver, among other things, milk products to Starbucks locations in the New York City metropolitan area and other areas in the Northeast United States. Bartlett has not delivered any milk other than Elmhurst milk to these locations of Starbucks (except as expressly permitted, by written waiver, by Elmhurst, as for example, in the upstate New York metropolitan regions of Buffalo, Rochester and Syracuse. Under Section 11 of the Contract, Elmhurst agreed to construct for Bartlett and provide to Bartlett certain facilities at Elmhurst's processing plant and parking spaces for Bartlett's delivery vehicles. Elmhurst agreed to build and provide these facilities to Bartlett because of the amount of business that Bartlett received and would receive from Starbucks and the cost efficiencies created by the large volume of milk distributed by Bartlett to Starbucks.

On or about May 12, 2011, the President of Bartlett, informed Jim Rosa, plant manager for Elmhurst, that beginning on May 23, 2011 Bartlett would be delivering milk processed by Dean to all the Starbucks stores currently provided with Elmhurst milk by Bartlett. By Order to Show Cause application dated May 19, 2011, Elmhurst sought a temporary restraining order and preliminary injunction enjoining Bartlett from delivering milk processed by Dean to Starbucks as of May 23, 2011. This Court denied Elmhurst's request for a temporary restraining order. On May 26, 2011, Starbucks' managing corporate counsel, Kevin Stock, Esq., expressly confirmed to Elmhurst's General Counsel, Frank V. Balon, Esq., during a telephone conference between the two of them that Bartlett would begin delivering milk processed by Dean on June 17, 18 or 19, 2011. Elmhurst claims that the Contract between it and Bartlett does not permit Bartlett to engage in the milk distribution business with Starbucks using the milk of a rival milk processor to fulfill the contractual obligations of Bartlett to Starbucks (or any other client of Bartlett's milk distribution business), and any such a scheme will put Bartlett in violation of the Contract. Elmhurst claims that Bartlett's arrangement with Starbucks and Dean is part of a bad faith scheme to circumvent the intent of the Contract, which was and is for Elmhurst to be the exclusive supplier of all of Bartlett's requirements for milk and milk products, in support of Bartlett's milk distribution business.

Elmhurst also alleges that both Starbucks and Dean Foods have been made aware of the Contract and of its exclusivity provisions. Also, Bartlett and Starbucks have repeatedly made clear that despite the exclusivity provisions contained in the Contract, Starbucks would prefer to have Bartlett supply it with milk processed by a company other than Elmhurst since Starbucks is unhappy with the pricing of the milk supplied by Elmhurst. Elmhurst also claims that it has a

route business through which it directly supplies grocers with fluid milk products. Dean, competes with Elmhurst for the retention of new grocer accounts. A representative of Dean has indicated to Elmhurst that Dean is very unhappy with the pricing that Elmhurst is using to compete in the streets to gain accounts and that it would prefer that Elmhurst not compete with it in this manner. Elmhurst claims that Dean's participation in the bad faith scheme described above is part of an overall plan by Dean to put Elmhurst out of business so that it can anti-competitively gain greater market share and assert more control over milk pricing in New York City and the greater New York metropolitan area. Elmhurst also alleges that Bartlett's action in withdrawing its Starbucks' requirements from Elmhurst will cause an immediate and irreversible loss of business to Elmhurst. Loss of the Starbucks business presents an imminent and severe threat to the viability of Elmhurst as a going concern.

Elmhurst brought this action and its first cause of action seeks a declaratory judgment for the following: the Contract to be in full force and effect; the Second Whereas clause is not incorporated into the Contract; the intention by Bartlett to discontinue its purchases under the Contract for the distribution of milk products to Starbucks to be a violation of the Contract and an Event of Default under the provisions of the Contract; the intention by Bartlett to distribute to Starbucks milk processed by Dean and sold by Dean directly to Starbucks, constitutes an assignment of Bartlett's obligations under the Contract, without Elmhurst's consent, which consent is reasonably withheld by Elmhurst, and thus constitutes a violation of the Contract by Bartlett; the alleged intention by Bartlett to distribute milk to Starbucks that is sold by Dean to Starbucks constitutes an assignment under the contract, which must inure to the benefit of Elmhurst, as such assignment is subject to the Contract, such that Dean must procure the milk from Elmhurst for Bartlett to distribute to Starbucks. Elmhurst has also brought causes of action for a permanent injunction, breach of contract against Bartlett, for anticipatory breach and repudiation against Bartlett, for breach of the duty of good faith and fair dealing against Bartlett, for tortious interference with contract against Starbucks, and for tortious interference with Business relations and economic advantage against Starbucks and Dean.

Bartlett now moves to dismiss Elmhurst's Amended Complaint as against Bartlett because the unambiguous documentary evidences makes it clear that Bartlett’s delivery of milk processed by an entity other than Elmhurst does not constitute a breach of the Supply Agreement. Bartlett claims that the Supply Agreement merely requires Bartlett to purchase from Elmhurst all milk it sells as a dealer and does not preclude Bartlett from delivering milk which a client purchases directly from another processors. Elmhurst has opposed this motion, claiming the Supply Agreement or Contract between the parties prohibits such activity. This issue is determinative of all issues raised in this motion.

CPLR 3211 (a) (1) provides that "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded on documentary evidence . . . " In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim . . . " Berger v Temple Beth-El of Great Neck, 303 AD2d 346, 347 (2d Dept 2003), *quoting*

Trade Source v Westchester Wood Works, 290 AD2d 437 (2d Dept 2002).

In support of its motion, Bartlett has submitted, inter alia, the agreement between Elmhurst and Bartlett, dated February 28, 2003, correspondence between Malave and Valentine regarding Bartlett's delivery of Dean products to Starbucks, and a copy of the amended verified complaint. Bartlett claims this evidence supports its interpretation of the Contract with Elmhurst and Elmhurst claims this evidence supports its interpretation.

In New York, interpretation of an unambiguous contract is a question of law for the court, and a dispute on such an issue may properly be resolved by a dismissal motion. *See*, Omni Quartz v. CVS Corp., 287 F.3d 61, 64 (2d Cir. 2002) It is well settled that "[w]hether a contract is ambiguous is a question of law for the court and is to be determined by looking within the four corners of the document" (*see* Geothermal Energy Corp. v Caithness Corp., 34 AD3d 420, 423 [2d Dept 2006] *quoting* Kass v Kass, 91NY2d 554, 566 [1998][internal quotation marks omitted]). In determining whether an ambiguity exists, the court must "read [the document] as a whole to determine the parties' purpose and intent, giving a practical interpretation to the language employed so that the parties' reasonable expectations are realized" (Queens Best v Brazal S Holdings, 35 AD3d 695, 697 [2d Dept 2006][internal quotation marks omitted]). "[A] contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations," whereas "[a] contract is unambiguous if on its face it is reasonably susceptible of only one meaning"(Geothermal Energy Corp. v Caithness Corp. *supra*. at 422. When a contract or clause is found to be ambiguous, extrinsic evidence is admissible and "the resolution of the ambiguity is for the trier of fact" (*id.* at 423)

New York law holds that a "whereas" clause can be used to clarify the meaning of an ambiguous contract, but cannot be used to modify or create substantive rights not found in the contract's operative clauses. *See, e.g.*, Grand Manor Health Related Facility, Inc. v. Hamilton Equities Inc., 65 A.D.3d 445 (1st Dep't 2009) ("Although a statement in a "whereas" clause may be useful in interpreting an ambiguous operative clause in a contract, it cannot create any right beyond those arising from the operative terms of the document."); Ross v. Ross, 233 A.D. 626 (1st Dep't 1931) ("The recitals in a contract form no part thereof, and at most indicate but the purposes and motives of the parties.") *See also*, RSL Communs., PLC v. Bildirici, 2010 U.S. Dist. LEXIS 22368 (S.D.N.Y. Mar. 5, 2010) *See also*, Haig, Commercial Litigation in New York State Courts, Second Edition, 2005, pp 581 to 584. (These clauses are " the best avenue for clearly setting forth the factual circumstances giving rise to the agreement, the procedural history. . . and ultimately the intent of the parties.. . . In doing so, they help to define the issues covered by the agreement.")

Here, the Whereas Clause identifies Bartlett as a seller of milk and Elmhurst as a milk processor:

"WHEREAS, Dealer is duly licensed to, and does, engage in the business of selling milk and milk products at wholesale within the New York Metropolitan area and Processor is duly licensed to, and does, engage in the business of pasteurizing, processing and packaging milk and milk products at its plant located at 154-21 South Road, Jamaica New York.

There is also a specific and limiting definition to the term "Dealer's Requirements" as

follows:

"WHEREAS, Dealer is desirous of having all of its requirements of milk and milk products that Dealer sells as a dealer described on Schedule A hereto ("Dealer's Requirements"), processed and packaged at Processor's plant.

Section 2.1 of the Supply Agreement states that "Dealer agrees to have all of the Dealer's Requirements processed and packaged exclusively by Processor".

Bartlett claims that the Contract only applies to fluid milk sold by Bartlett and since it is the only exclusivity provision in the Supply Agreement, it is clear that the Supply Agreement does not prohibit Bartlett from acting as a trucking company to deliver milk which Starbucks purchases directly from a supplier other then Elmhurst. Elmhurst argues that the language in the "WHEREAS" clauses are unincorporated and therefore are non-binding terms of the Supply Agreement.

The Court cannot accept Elmhurst's contention that the definitions found in the "WHEREAS" clause for the terms "Plant" and "Dealer Requirements" must be ignored in interpreting the Contract. These terms appear frequently throughout the Supply Agreement and to understand the agreement, it is necessary to understand these terms. Such understanding cannot be discerned without reference to the definitions in the "WHEREAS" clauses. Moreover, these clauses do not create any substantive rights beyond those provided in the Agreement. In fact, only the failure to utilize the stated definition of "Dealer's Requirements" would make the Supply Agreement ambiguous, because without such definition the exclusivity provision contained in Section 2.1 would be meaningless -- the exclusivity provision requires that Elmhurst process and package all of "Dealer's Requirements". Without utilizing the definition of Dealer's Requirements, there would be no way to ascertain what these requirements are and to limit the exclusivity provision. Grand Manor Health Related Facility, Inc. v. Hamilton Equities Inc., *supra*. As such, by utilizing the definitions, the contract becomes unambiguous and the parol evidence that Elmhurst has submitted that seeks to contradict the express terms of the Contract is inadmissible. Charter Realty & Development Corp. v Rotter am MallAssociates, LP, 242 AD2d 656 (2 Dept. 1997). Consequently, the Court shall utilize the definitions set forth in the "WHEREAS" clauses.

The Court finds that it is clear that a proper reading of the Contract between Bartlett and Elmhurst provides that in order for Bartlett to breach the Supply Agreement it would have to be selling milk it purchased from a processor other than Elmhurst. Since the Amended Complaint merely alleges that Bartlett will be delivering milk that Starbucks purchases from Dean, that does not and cannot constitute a breach of the Supply Agreement. The delivering of milk is not a Dealers' Requirement as set forth in the Contract between the parties.

Moreover, Elmhurst's claim that the Agreement prohibits Bartlett from distributing milk does not prohibit Bartlett's acts as set forth in the complaint. According to Black's Law, 8th Edition, a distributor is a "wholesaler, jobber or other manufacturer or supplier that sells chiefly to retailers and commercial users." Thus, based on this definition, Elmhurst is correct that the contract prohibits Bartlett from distributing milk products not purchased from Elmhurst. However, as stated above, Bartlett's arrangement with Dean and Starbucks is to deliver milk

products purchased by Starbucks from Dean. This does not entail Bartlett distributing Dean's products and as such the contract does not prohibit Bartlett from delivering Dean's products to Starbucks. Finally, the Court notes that Elmhurst's claim that discovery is needed prior to the determination of this motion is misplaced. The evidence it seeks is parol evidence and, as stated above, would not be considered by this Court in interpreting an unambiguous contract.

Based on the above finding regarding the terms of the Contract, Bartlett has presented documentary evidence that disposes of plaintiff's claims against Bartlett. Accordingly, the motion is granted and the causes of action against Bartlett are dismissed.

Dated: August 3, 2011 .....

ORIN R. KITZES, J.S.C.