Obsessive Compulsive Cosmetics, Inc. v Sephora USA, Inc.
2015 NY Slip Op 31812(U)
September 14, 2015
Supreme Court, New York County
Docket Number: 652074/15
Judge: Charles E. Ramos

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

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OBSESSIVE COMPULSIVE COSMETICS, INC.,

Plaintiff, Index No. 652074/15

- against -

SEPHORA USA, INC.

Defendant.

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Hon. Charles E, Ramos, J.S.C.

Plaintiff Obsessive Compulsive Cosmetics, Inc. (OCC) moves by way of order to show cause for a preliminary injunction enjoining defendant Sephora USA, Inc. (Sephora) from 1) marking down the retail price of the remaining inventory (remaining inventory) purchased by Sephora from OCC through and including September 30, 2015; and 2) discontinuing the sell down of the remaining inventory in accordance with the process described in Sephora's April 15, 2015 letter terminating the parties' vendor agreement.

Background

The facts set forth herein are taken from the pleadings and affidavits, where noted.

OCC, a manufacturer and distributor of cosmetics, sold products to Sephora, a retailer of cosmetics, pursuant to a vendor agreement. The term of the vendor agreement was July 24, 2012 through May 8, 2015.

OCC alleges that on numerous occasions, Sephora purported to

orally modify the terms of the vendor agreement including agreeing to share fixture costs to entice OCC into expensive projects, and requesting "brick and mortar exclusivity" in consideration for Sephora's promise to substantially increase its purchases of OCC's products to allay projected losses that would be incurred by reason of OCC's refusal to accept purchase orders from Sephora's competitors (Klasfeld Aff., ¶ 3).

According to OCC, it accommodated Sephora's many requests, but Sephora reneged on its promises and the relationship between the parties ultimately deteriorated. By letter dated April 15, 2015, Sephora purported to terminate the vendor agreement. In the letter (termination letter), Sephora stated:

> "Sephora hereby exercises its right to under the Agreement to terminate the Agreement ... Sephora will continue to sell down existing OCC inventory in any Sephora stores and on www.sephora.com with the goal of liquidating that inventory by 30 September 2015, and, as required by the Agreement, will expect OCC to accept return of all unsold product in Sephora's possession, and to reimburse Sephora for such product at full cost value. If OCC refuses or is unable to take delivery of such unsold product, and to reimburse Sephora as required by the Agreement, Sephora will immediately liquidate such product at whatever price and using whatever promotional materials Sephora determines, in its sole discretion to be necessary" (Exhibit C, annexed to the Klasfeld Aff.).

The termination letter also references two purchase orders (outstanding purchase orders), which Sephora indicates "should be shipped by OCC at its earliest convenience" (Exhibit C, annexed to the Klasfeld Aff.).

On May 8, 2015, Sephora sent OCC a letter in which it noted

that OCC had failed to ship goods under the outstanding purchase orders within a commercially reasonable time and thus, Sephora was exercising its right to cancel the outstanding purchase orders (Exhibit D, annexed to the Klasfeld Aff.).

By followup letter dated June 3, 2015, Sephora stated that "the suggestion in our letter of April 15 (termination letter) that Sephora would 'continue to sell down existing OCC inventory in any Sephora stores ... with the goal of liquidating that inventory by 30 September 2015'" was predicated entirely on OCC shipping the remaining product under the Outstanding Orders" (Exhibit E, annexed to the Klasfeld Aff.).

As OCC did not ship products under the outstanding purchase orders, Sephora indicated that it was experiencing shortages of OCC product in its stores and on its website, and thus, Sephora was unable to sell down its existing inventory in the ordinary course as it had originally intended in the termination letter (*Id.*). Sephora reiterated that, upon termination of the vendor agreement, OCC is responsible for accepting return of all remaining product inventory in Sephora's possession and reimbursing Sephora at full cost value for the remaining inventory. To this, Sephora demanded that OCC accept return of all remaining inventory and deposit $832,700 in a third party escrow account or through the posting of an irrevocable letter of credit pending receipt of the inventory from Sephora, or else

Sephora would liquidate OCC's products at whatever price, as Sephora determined in its sole discretion, to be necessary (*Id.*).

In June 2015, OCC commenced this action seeking damages and lost profits for breach of oral agreements, and shortly thereafter, moved for a preliminary injunction.

According to OCC, Sephora is purposefully seeking to mark down its products before they are sold in order to drive OCC out of business. OCC maintains that Sephora should be ordered to continue to use reasonable efforts to sell down the remaining inventory with the goal of a complete sell down, as it stated it would do in the termination letter.

Discussion

A party seeking preliminary injunctive relief pursuant to CPLR 6301 must demonstrate (1) a likelihood of success on the merits, (2) irreparable injury if provisional relief is not granted, and (3) that the equities are in her favor (*City of New York v Untitled LLC*, 51 AD3d 509, 511 [1st Dept 2008]). The drastic remedy of temporary injunction is not to be granted unless a clear right to the relief demanded is established upon the moving papers (*DeLury v City of New York*, 48 AD2d 405, 407 [1st Dept 1975]).

A. Likelihood of Success on the Merits

OCC argues that it is likely to succeed on the merits of its claim to prevent Sephora from selling the remaining

inventory at the price Sephora determines is commercially reasonable because the termination letter actually constituted a modification of the vendor agreement.

Conversely, Sephora argues that the parties' vendor agreement explicitly permits Sephora, in its discretion, to mark down the remaining inventory upon termination of the agreement. Moreover, Sephora argues that the vendor agreement does not require an orderly sell down of the remaining inventory.

When the terms of a written agreement are clear and unambiguous, the court should make a practical determination of the intent of the parties based on the plain language found within the four corners of the document (*W.W.W. Associates, Inc. v Giancontieri,* 77 NY2d 157, 162 [1990]).

The vendor agreement plainly and unambiguously permits Sephora to sell OCC's product at "whatever price" it determines in its "sole discretion" in the event that OCC fails to accept the return of outstanding product (Agreement, at 4). Upon termination, OCC is "responsible for accepting return of all remaining product in Sephora's possession and reimbursing Sephora at full value[1]" (*Id.*).

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[1] The vendor agreement specifically states that upon termination, Obsessive Compulsive Cosmetics is responsible for accepting return of all remaining product in Sephora's posssion and reimbursing Sephora at full cost value ... If for any reason Obsessive Compulsive Cosmetics refuses or is unable to take delivery of such unsold ... product, Sephora reserves the right to begin immediately selling such product at whatever price, and

Here, Sephora purported to terminate the agreement, and requested that OCC accept return of the remaining product inventory in Sephora's possession and reimbursement at full cost value for the remaining inventory. OCC did not respond to the termination letter and it appears that it declined to accept return of the outstanding product, which permitted Sephora to sell OCC's product at "whatever price" it determined in its "sole discretion.

OCC's contention that the termination letter constituted a binding modification of the agreement requiring Sephora to engage in an orderly sell down of the remaining inventory is baseless. The agreement plainly states that it cannot be modified except in a writing signed by both parties (Agreement, at 1), which did not occur. OCC alleges only in conclusory fashion that it altered its position in reliance on Sephora's purported modification.

Finally, the termination letter explicitly states that Sephora is electing to "terminate" the agreement, rather than "modify" the agreement. OCC fails to point to any language in that letter which implies that Sephora intended to modify, as opposed to terminate, the agreement.

For these reasons, OCC has failed to demonstrate a likelihood of success on the merits.

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using whatever promotional materials, Sephora determines, in its sole discretion, to be necessary to liquidate the product.

B. Irreparable Harm

OCC argues that if provisional relief is not granted it will suffer irreparable harm because an immediate mark down of the outstanding inventory would have financially devastating effects and moot any award of damages. However, OCC's alleged damages, including lost profits, are calculable and clearly compensable with money damages, and thus, are not irreparable (*SportsChannel America Assocs. v National Hockey League,* 186 AD2d 417, 417 [1st Dept 1992]).

C. Balance of the Equities

OCC maintains that the balance of the equities weighs heavily in its favor, given the catastrophic result of an accelerated markdown. However, insofar as the vendor agreement explicitly permits Sephora to sell OCC's product at "whatever price" it determines in its "sole discretion," and upon termination, OCC is "responsible for accepting return of all remaining product in Sephora's possession and reimbursing Sephora at full value" (Agreement, at 4), the equities do not appear to weigh in OCC's favor.

Accordingly, it is

ORDERED that the temporary restraining order staying defendant from marking down the remaining inventory is hereby

lifted, and plaintiffs' motion for a preliminary injunction is denied.

DATED: September 14, 2015

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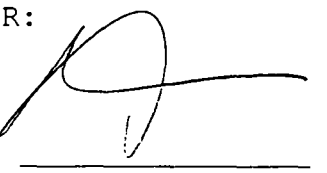

J.S.C.

HON. CHARLES E. RAMOS