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

Brembo, S.P.A.,

Plaintiff,

-against-

T.A.W. Performance LLC,

Defendants.

Index No.: 654931/2017

DECISION/ORDER

Mot. Seq. 002, 003, 004

T.A.W. Performance LLC,

Third-Party Plaintiff,

- against-

Omnia Racing S.r.l. and Carpimoto S.r.l.,

Third-Party Defendants.

PAUL A. GOETZ, J.S.C.:

In this action, plaintiff Brembo S.P.A., an Italian manufacturer of motor vehicle and motorcycle parts, seeks to recover from defendant T.A.W. Performance LLC, Brembo's former distributor in North America, sums allegedly due and owing pursuant to the parties' exclusive distribution agreement dated July 1, 2014. In response, defendant TAW filed counterclaims against Brembo for alleged breach of an oral agreement, breach of the written distribution agreement, fraud/fraud in the inducement, breach of the implied covenant of good faith and fair dealing, declaratory judgment, and tortious interference with contract. Defendant TAW also brought a third-party action against third-party defendants Omnia Racing S.r.l and Carpimoto S.r.l. for tortious interference with contract and tortious interference with business relations based on their alleged sale of Brembo's products in the United States. Plaintiff Brembo and

third-party defendants Omnia and Carpimoto now move to dismiss the complaint pursuant to CPLR 3211. These motions are consolidated for purposes of this decision.

Brembo's Motion to Dismiss

In the first counterclaim, defendant TAW alleges that in or about April 2012, Brembo gave verbal assurances to TAW that it would appoint TAW as the exclusive distributor in the United States and Canada for Brembo's "Moto" products effective January 1, 2013 (Verified Answer and Third-Party Complaint, ¶ 33). TAW alleges that Brembo breached this promise by withdrawing its termination of another non-exclusive distribution agreement with Yoyodyne LLC, thereby failing to fulfill its obligation of appointing TAW as Brembo's exclusive distributer in North America (*Id.* at ¶ 43). In its memorandum of law in opposition to Brembo's motion to dismiss, TAW clarifies that this cause of action is not for breach of an oral distribution agreement but rather for breach of an alleged oral agreement to appoint TAW as exclusive distributor commencing January 2013 (Defendant's Memorandum of Law in Opposition to Plaintiff's Motion to Dismiss Counterclaims, pp. 4-5). However, TAW fails to allege what consideration, if any, it provided to Brembo in exchange for this promise and based on the face of the pleading, it is clear that Brembo's alleged promise was gratuitous (*Startech, Inc. v. VSA Arts*, 126 F.Supp. 2d 234, 236-37 [S.D.N.Y. 2000] ["when it is clear from the face of the pleading and terms of the contract that a promise is gratuitous, the complaint will be dismissed"] [citing *Municipal Grocery Stores v. Eastern Milk & Cream Co.*, 233 A.D. 764 [2d Dep't 1931]]; *see also Maxam v. Kucharczyk*, 138 A.D.3d 1268, 1269 [3d Dep't 2016] [dismissing claim for breach of oral agreement where record disclosed no consideration for such agreement]). Alternatively, TAW's claim fails because the alleged oral agreement was missing a price term and thus is too indefinite to be enforced (*Garcete v. Lazar*, 294 A.D.2d 118, 119 [1st Dep't 2002]

[dismissing breach of contract claim where there was never a meeting of the minds as to the price, an essential term of any contract]). Accordingly, this cause of action must be dismissed.

In the second counterclaim, TAW alleges that Brembo breached the parties' 2014 exclusive distribution agreement by failing to enforce the exclusivity provisions in the contract. Specifically, TAW alleges that Brembo failed to comply with paragraph 5.4 of the agreement, which requires Brembo to cooperate with TAW in notifying E-Bay of Brembo products being sold on E-Bay by distributors in contravention of the exclusivity provisions of the agreement (Verified Answer and Third-Party Complaint, ¶ 64). TAW alleges that Brembo violated this provision by failing to timely respond and approve TAW's VeRO[1] requests to remove certain price offenders, including third-party defendants Omnia and Carpimoto, from the site (Verified Answer and Third-Party Complaint, ¶¶ 66-71).

Brembo argues that TAW fails to allege that it breached the contract and admits in its own allegations that Brembo complied with this provision by sending a letter to E-Bay in January 2015 advising E-Bay of the alleged infringement (Verified Answer and Third-Party Complaint, ¶ 66). However, Brembo's argument ignores TAW's additional allegations regarding Brembo's alleged failure to timely respond to TAW's VeRO requests (Verified Answer and Third-Party Complaint, ¶¶ 67-71). To the extent that Brembo does address these allegations, it argues that it complied with the requirements of the contract, which does not explicitly require Brembo to respond to such requests within a certain time period or to approve the requests (Memorandum of Law in Support of Motion to Dismiss Counterclaims, p. 11; Reply Memorandum of Law in Further Support of Motion to Dismiss Counterclaims, p. 5). However, the nature and extent of Brembo's obligations under paragraph 5.4 of the agreement is a question

[1] According to TAW's pleading, VeRO is a program established by E-Bay to protect the intellectual property rights of E-Bay sellers and consumers (Verified Answer and Third-Party Complaint, ¶ 66).

of fact, which cannot be resolved on a motion to dismiss. TAW has sufficiently alleged that Brembo may have violated its obligations under this provision and thus this cause of action will not be dismissed.

In the third counterclaim, TAW alleges that it was fraudulently induced by Brembo to enter into the 2014 distributorship agreement. TAW alleges that at the time it entered into the agreement, Brembo knew that it would not or could not enforce the exclusivity provisions of the agreement and that third-party defendants Omnia and Carpimoto were selling Brembo's products into the U.S. market. TAW also alleges that it was fraudulently induced by Brembo to purchase Yoyodyne in exchange for an exclusive distributorship agreement which Brembo never intended to perform.

Brembo argues that this cause of action should be dismissed because it is duplicative of the breach of contract claim. To sustain a claim for fraudulently inducing a party to a contract, plaintiff must allege a representation that is collateral to the contract and damages that are not recoverable under the contract claim (*RGH Liquidating Trust v. Deloitte & Touche LLP*, 47 A.D.3d 516 [1st Dep't 2008]). Here, TAW's fraud claim is based upon the same facts as its breach of contract claim—namely, that Brembo would not enforce the exclusivity provisions of the contract. This is insufficient to state an independent cause of action for fraud (*Manas v. VMS Associates, LLC*, 53 A.D.3d 451, 453 [1st Dep't 2008] ["[a] fraud-based cause of action is duplicative of a breach of contract claim when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract."] [internal citations and quotations omitted]; *see also Wyle Inc. v. ITT Corp.*, 130 A.D.3d 438, 448 [1st Dep't 2015] [discussing cases and noting that courts have sustained a fraud claim on a motion to dismiss only when the fraud claim has been based upon facts outside the contract terms]). Further, TAW's allegation

that Brembo knew or should have known at the time it entered the agreement that third-party defendants Omnia and Carpimoto were selling Brembo's products in the U.S. does not support its fraud claim as TAW admits that it was aware of these sales prior to entering the contract (Verified Answer and Third-Party Complaint, ¶ 45). Finally, any damages TAW incurred as a result of Brembo's alleged misrepresentations, including its alleged damages based on the purchase of Yoyodyne, flow from the alleged breach of the agreement's exclusivity provision. Since TAW has failed to allege any misrepresentation which is collateral to its breach of contract claim and has failed to allege any damages which are not recoverable under the contract claim, TAW's cause of action for fraudulent inducement must be dismissed.

With respect to the fourth counterclaim, TAW alleges that Brembo breached the implied covenant of good faith and fair dealing by failing to enforce the exclusivity provision of the agreement and by allowing competitors to sell its products in the territory covered by the exclusivity provisions of the agreement (Verified Answer and Third-Party Complaint, ¶¶ 110-111). This cause of action cannot be maintained because it is premised on the same conduct that underlies the breach of contract cause of action (*MBIA Ins. v. Merrill Lynch*, 81 A.D.3d 419, 420-21 [1st Dep't 2011]). Further, to the extent that TAW argues that Brembo violated its duty of good faith and fair dealing by selling its products to Motorquality, Brembo's Italian distributor, the court rejects this argument because the parties' agreement contained no such restriction and the covenant of good faith and fair dealing may not be used to create new obligations beyond those that reasonably can be deemed implicit in the language of the contract (*D&L Holdings, LLC v. RCG Goldman Co.*, 287 A.D.2d 65, 73 [1st Dep't 2001] [stating that "[t]he covenant of good faith and fair dealing cannot be used to add a new term to a contract,

especially to a commercial contract between two sophisticated commercial parties represented by counsel."]). Accordingly, this cause of action must be dismissed.

With respect to the fifth counterclaim, TAW seeks a declaration from the court that Brembo's breaches of the distribution agreement excuse TAW's performance and payment under said agreement, or, alternatively, that any amounts Brembo claims it is owed should be offset by any damages suffered by TAW. Brembo argues that TAW's declaratory judgment claim should be dismissed because TAW has an adequate remedy at law. TAW fails to oppose this argument. It is well-established that an action for declaratory judgment is "unnecessary where a plaintiff can be accorded complete relief at law" (*Empire 33rd LLC v. Forward Ass'n Inc.*, 87 A.D.3d 447, 448 [1st Dep't 2011]). Here, TAW has an adequate remedy at law in the form of contract damages. Accordingly, this cause of action must be dismissed.

With respect to the sixth counterclaim for tortious interference with contract, TAW concedes in its opposition papers that it did not intend to assert this claim against Brembo. Accordingly, this cause of action is dismissed.

Finally, Brembo seeks to dismiss TAW's request for punitive damages. Punitive damages are recoverable in a breach of contract action "only in those limited circumstances where it is necessary to deter defendant and other like it from engaging in conduct that may be characterized as gross and morally reprehensible and of such wanton dishonesty as to imply a criminal indifference to civil obligations (*New York Univ. v. Continental Ins.*, 87 N.Y.2d 308, 315-16 [1995] [citations and quotations omitted]). In order to state a claim for punitive damages as an additional and exemplary remedy when the claim arises from a breach of contract, (1) plaintiff's conduct must be actionable as an independent tort; (2) the tortious conduct must be of the egregious nature set forth above; (3) the egregious conduct must be directed to defendant and (4)

it must be part of a pattern directed at the public generally (*Id.*). Here, TAW has failed to sufficiently plead any of these elements. Accordingly, its request for punitive damages must be stricken.

Third-Party Defendants Omnia and Carpimoto's Motion to Dismiss

TAW has also filed a third-party complaint against third-party defendants Omnia and Carpimoto for tortious interference with the distribution agreement and tortious interference with business relations based on Omnia and Carpimoto's alleged sales of Brembo's products in the United States. Third-party defendants Omnia and Carpimoto move to dismiss these claims under CPLR 3211(a)(7) and (a)(8) for failure to state a claim and lack of personal jurisdiction.

With respect to the issue of personal jurisdiction, TAW alleges generally that this court has jurisdiction over Omnia and Carpimoto pursuant to CPLR 301 and 302 because both companies operate active commercial websites that sell products covered under the exclusive distribution agreement to persons located in New York (Verified Answer and Third-Party Complaint, ¶¶ 24-25). In support of these allegations, TAW points to the websites operated by Omnia and Carpimoto which contain images of the flag of the United States and offer products for sale in U.S. currency. These websites are interactive and allow consumers to purchase goods directly from third-party defendants. TAW argues that the websites show that Omnia and Carpimoto solicited and sold Brembo's products in the North American market, in contravention of its exclusive distribution agreement with Brembo.

TAW argues that this court has jurisdiction over third-party defendants under the transaction of business prong of CPLR 302. CPLR 302(a)(1) confers jurisdiction over a non-domiciliary corporation that "transacts business within the state," if there is a "direct relationship between the cause of action and the in state conduct" (*Fort Knox Music, Inc. v. Baptiste*, 203

F.3d 193, 196 [2d Cir. 2000]). A single transaction may suffice for personal jurisdiction under CPLR 302(a)(1) provided that it is of the right nature and quality (*Agency Rent A Car Sys., Inc. v. Grand Rent A Car Corp.*, 98 F.3d 25, 20 [2d Cir. 1996]). In the instant case all of the activity allegedly engaged in by third-party defendants occurred via the internet. In such cases, "[t]he guiding principle which has emerged from case law is that whether the exercise of personal jurisdiction is permissible is directly proportionate to the nature and quality of commercial activity that an entity conducts over the internet" (*Citigroup Inc. v. City Holding Co.*, 97 F.Supp.2d 549, 565 [S.D.N.Y. 2000] [internal citations and quotations omitted]). Websites that are of a commercial nature and permit consumers to place orders and email questions, can confer personal jurisdiction pursuant to CPLR 302(a)(1) (*Id.*). However, in such cases, courts are reluctant to find personal jurisdiction unless defendants, in addition to maintaining an interactive website, directly solicited or sold to New York residents via the website or otherwise (*See, e.g., Citigroup*, 97 F.Supp.2d at 565 [finding personal jurisdiction based on interactive website and defendant's direct solicitation of New York clients]; *Hsin Ten Enter. USA v. Clark Enters.*, 138 F.Supp.2d 449, 456 [S.D.N.Y. 2000] [court determined that in addition to an interactive website, defendants had affiliates living in New York, defendant's representatives appeared in New York trade shows and sold several products to New York residents]; *Seldon v. Direct Response Techs. Inc.*, No. 03 Civ. 5381, 2004 WL 691222, at *4 [S.D.N.Y. Mar. 31, 2004] ["Where a cause of action arises from a posting on an internet website, the fact that the posting appears on the website in every state will not give rise to jurisdiction in every state. To the contrary, jurisdiction will lie only if the posting is intended to target or focus on internet users in the state where the cause of action is filed."]).

Here, TAW alleges only that third-party defendants sell products in the U.S. through an interactive website and does not allege any other connections in New York. For example, TAW does not allege that third-party defendants purposefully solicit New York customers or that their websites are in any way targeted toward New York residents. The mere existence of an interactive and commercial website is insufficient, by itself, to justify the exercise of personal jurisdiction unless there is some evidence or allegation that third-party defendants directed their activities to New York (*Savage Universal Corp. v. Grazier Constr., Inc.*, No. 04 Civ. 1089, 2004 WL 1824102, at *9 [S.D.N.Y. Aug. 13, 2004] ["It stretches the meaning of 'transacting business' to subject defendants to personal jurisdiction in any state merely for operating a website, however commercial in nature, that is capable of reaching customers in that state, without some evidence or allegation that commercial activity in that state actually occurred."]). Moreover, TAW's purchase, through Richard Martin, its managing member, of a product from third-party defendants' websites is insufficient to justify an exercise of personal jurisdiction (*ISI Brands, Inc. v. KCC Intern., Inc.*, 458 F.Supp.2d 81, 88-89 [E.D.N.Y. 2006] [two orders placed by plaintiff were "nothing more than an attempt by plaintiff to manufacture a contact with this forum"] [citing *Mattel, Inc. v. Anderson*, No. 04 Civ. 5275, 2005 WL 1690528, at *2 [S.D.N.Y. July 18, 2005]). It is beyond dispute that jurisdiction cannot be manufactured by the plaintiff (*Id.*, citing *Edberg v. Neogen Corp.*, 17 F.Supp.2d 104, 112 [D. Conn. 1998]; *Stewart v. Vista Point Verlag.*, No. 99 Civ. 4225, 2000 WL 1459839, at *4 [S.D.N.Y. Sept. 29, 2000] [holding that the plaintiff's allegation that the defendant accepted its direct order and indicated that it would be shipped directly to the plaintiff does not confer jurisdiction over the defendant because the contact was initiated by plaintiff]). Therefore, TAW fails to demonstrate that the court should

exercise personal jurisdiction over third-party defendants as a result of their websites or TAW's own purchase of products from these websites.

Alternatively, TAW argues that the court has jurisdiction over third-party defendants pursuant to CPLR 302(a)(3)(ii), which confers jurisdiction when a defendant commits a tortious act outside New York that causes injury to a person or property within the state and the defendant "expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate and international commerce" (CPLR 302[a][3][ii]). Under this section, the situs of the injury is where the events giving rise to the injury occurred, not the location where economic damage is felt (*McBride v. KPMG Intern.*, 135 A.D.3d 576 [1st Dep't 2016]; *Marie v. Altshuler*, 30 A.D.3d 271, 272-73 [1st Dep't 2006]). Here, those events occurred in Italy, where third-party defendants are located, and not in New York. In any event, even if the court finds that the situs of injury is in New York, TAW has failed to sufficiently allege that third-party defendants made any sales in New York (other than those manufactured by TAW) and that it suffered any injury to its New York sales as a result of the actions of the third-party defendants.

TAW also argues that the court may exercise personal jurisdiction over defendants under CPLR 301 based on a theory of "solicitation plus" which may confer jurisdiction over a defendant who engages in "substantial and continuous solicitation of New York business" and "other activities in the state" (*Citigroup Inc. v. City Holding Co.*, 97 F.Supp.2d 549 [S.D.N.Y. 2002]). As discussed above, TAW has failed to show that third-party defendants engaged in any solicitation of New York residents, much less the "substantial and continuous solicitation" required to confer jurisdiction under the solicitation plus standard. Hosting a website, even if it is commercial in nature, is simply insufficient to confer jurisdiction under this standard, as the

cases cited by TAW itself make clear (*Chestnut Ridge Air Ltd. V. 1260269 Ontario Inc.*, 13 Misc.3d 807 [Sup. Ct. N.Y. Cty. 2006] [holding that company's interactive website, coupled with the fact that company obtained 4% of its revenue from New York customers and that company spent 14 week per year servicing these customers, was sufficient to confer jurisdiction under CPLR 301]).

Finally, TAW argues that even if it has failed to demonstrate jurisdiction, it should be permitted to conduct jurisdiction discovery concerning the third-party defendants' sales in New York pursuant to CPLR 3211(d). However, a party's mere invocation of CPLR 3211(d) is not enough. Rather, "[a] party must come forward with some tangible evidence which would constitute a 'sufficient start' in showing that jurisdiction could exist, thereby demonstrating that its assertion that a jurisdictional predicate exists is not frivolous" (*Mandel v. Busch Entertainment Corp.*, 215 A.D.2d 455, 455 [2d Dep't 1995] [citing *Peterson v. Spartan Indus.*, 33 N.Y.2d 463, 467 [1974]]). TAW's tangible evidence, which consists of third-party defendants' interactive websites and TAW's own purchase of products, is insufficient without more to constitute a "sufficient start" necessary to support jurisdictional discovery under CPLR 3211(d) (*See e.g., UMS Solutions, Inc. v. Biosound Esaote, Inc.*, 2010 N.Y. Slip Op. 34039(U), 2010 WL 11489113 [Sup. Ct. Westchester Cty. 2010] [cited by TAW; holding that an interactive Facebook page together with evidence of direct sales to New York was sufficient for jurisdictional discovery]).

Accordingly, it is

ORDERED that plaintiff Brembo's motion to dismiss is granted in part and defendant TAW's first, third, fourth, fifth and sixth counterclaims against Brembo, as well as its request for punitive damages, are dismissed; and it is further

ORDERED that plaintiff Brembo's motion to dismiss the second counterclaim is denied; and it is further

ORDERED that the third-party defendants' motion to dismiss the third-party complaint is granted; and it is further

ORDERED that the caption in this action shall be amended to reflect the dismissal of the third-party complaint and that movants shall file a "Notice to County Clerk Form" (Form EF-22 available on NYSCEF) together with a copy of this order with notice of entry to notify the County Clerk of the change in caption and the Clerk shall conform its records accordingly.

Dated: July 2, 2018

HON. PAUL A. GOETZ