

**Manhattan Beer Distribs. LLC v Biagio Cru and  
Estate Wines , LLC**

2019 NY Slip Op 33863(U)

December 10, 2019

Supreme Court, Bronx County

Docket Number: 33818/2018E

Judge: Jr., Kenneth L. Thompson

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This opinion is uncorrected and not selected for official publication.

Original decision denying a motion to dismiss is adhered to.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX IA 20 \_\_\_\_\_ X

MANHATTAN BEER DISTRIBUTIONS LLC

Index No: 33818/2018E

Plaintiff,

-against-

**DECISION AND ORDER**

BIAGIO CRU and ESTATE WINES, LLC,

**Present:**

Defendants

**HON. KENNETH L. THOMPSON, JR.**

\_\_\_\_\_ X

The following papers numbered 1 to 4 read on this motion to reargue

No	On Calendar of August 30, 2019	PAPERS NUMBER
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	1
	Answering Affidavit and Exhibits-----	3
	Replying Affidavit and Exhibits-----	4
	Affidavit-----	
	Pleadings -- Exhibit-----	
	Memorandum of Law-----	2
	Stipulation -- Referee's Report --Minutes-----	
	Filed papers-----	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant, Biagio Cru and Estate Wines, LLC, (Biagio), moves pursuant to CPLR 2221(d) to reargue a motion to dismiss pursuant to CPLR 3211 that resulted in a decision and order of this Court dated June 21, 2019. Biaggio correctly argues that the decision and order overlooked the third cause of action for tortious interference with contract for damages in the amount of \$1,800.

“On a motion to dismiss, the court is not called upon to determine the truth of the allegations (*see, 19 Broadway Corp. v. Alexander's, Inc.*, 46 N.Y.2d 506, 509, 414 N.Y.S.2d 889, 387 N.E.2d 1205). Rather, the complaint should be liberally construed in favor of the plaintiff (*see, Foley v. D'Agostino*, 21 A.D.2d 60, 65-66, 248 N.Y.S.2d 121) solely to determine whether the pleading states a cause of action cognizable at law (*see, Guggenheimer v. Ginzburg*, 43 N.Y.2d 268,



275, 401 N.Y.S.2d 182, 372 N.E.2d 17).” (*Eastern Consolidated Properties, Inc. v Lucas*, 285 AD2d 421-422 [1<sup>st</sup> Dept 2001]).

The subject contract is an amended and restated distribution agreement, (ADA), between Biagio and non-party, Windmill Distributing Company, L.P., (Windmill). The ADA governed the exclusive wine distribution within defined territory in New York State. Paragraph 16 of the ADA provided for the assignment of the contract to the successors of a party to the ADA. At issue in this litigation is whether plaintiff, Manhattan Beer Distributors LLC, (Manhattan Beer), was an assignee of the ADA. Manhattan Beer has plead that it has acquired substantially all of Windmill’s assets and is the successor to Windmill pursuant to section 16(a) of the ADA.<sup>1</sup>

Plaintiff alleges that the “successorship was ratified and consented to by Biagio Cru in writing on May 21, 2015,” and further alleges that “Biagio Cru has conducted itself consistent with Manhattan Beer’s successorship to Windmill, dealing with Manhattan Beer as its exclusive distributor in the territory under the ADA..”<sup>2</sup> Manhattan Beer cites to section 8(a) of the ADA that provides for termination compensation in the event Biagio terminates the ADA,<sup>3</sup> resulting in damages as elaborated in the first cause of action. Manhattan Beer alleges that Biagio failed to provide sufficient notice of termination under the section 8(a) or the ADA,<sup>4</sup> resulting in damages as elaborated in the second cause of action. The

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<sup>1</sup> Complaint, paragraph 11.

<sup>2</sup> Complaint, paragraph 12.

<sup>3</sup> Complaint, paragraph 14.

<sup>4</sup> Complaint, paragraph 13.



linchpin of defendant's motion to dismiss the first two causes of action is the assertion that no assignment of the ADA occurred. However, plaintiff has plead such an assignment, and a breach of contract action for a failure to pay termination compensation and a failure to give timely notice of termination.

Biagio argues that the precise actions contemplated by the ADA with respect to the alleged assignment of the ADA were not followed and therefore Manhattan Beer does not have standing to bring this action. However, under *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957], even a "prohibition against assignment...may be waived." *Id.* at 402. "It is essentially a matter of intention. \* \* \* Commonly, it is sought to be proved by various species of proofs and evidence, by declarations, by acts and by non-feasance, permitting differing inferences and which do not directly, unmistakably or unequivocally establish it." *Id.* at 402.

Biagio cited to *White Plains Coat & Apron Co. v. Cintas Corp.*, 8 N.Y.3d 422, 426 [2007]), regarding a motion for summary judgment that carries evidentiary burdens that are not required to oppose a motion to dismiss. However, that case is instructive for the elaboration of the elements of a tortious interference with contract claim. "In a contract interference case--as here--the plaintiff must show the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages. *Id.* at 426.



Plaintiff has alleged the elements of a tortious interference with contract case. The pertinent alleged facts are that plaintiff, Manhattan Beer Distributors LLC, (Manhattan Beer), had a contract with nonparty BJ's Wholesale Club, Inc. (BJ's), for the provision of Biagio wine products in September and October 2018 for the total purchase price of \$9,564.80.<sup>5</sup> Manhattan Beer alleged that "Biagio Cru had knowledge of those contracts between BJ's and Manhattan Beer, and intentionally interfered with those contracts by persuading BJ's to cancel the Orders."<sup>6</sup> With respect to damages, Manhattan Beer alleged that "Manhattan Beer has suffered \$9,564.80 in lost revenue, and approximately \$1,800 in lost profits, as a proximate result of Biagio Cru's wrongful interference with Manhattan Beer's contractual relations with BJ's."<sup>7</sup> Thus plaintiff has alleged the elements of tortious interference with contract.

Accordingly, the motion to reargue is granted, and upon reargument, the Court adheres to the underlying decision and order of this Court denying defendant's motion to dismiss. The branch of Biagio's motion seeking a stay of discovery is denied as moot.

The foregoing constitutes the decision and order of the Court.

Dated: 12/10/2019

  
KENNETH L. THOMPSON JR. J.S.C.

<sup>5</sup> Complaint, paragraph 28.

<sup>6</sup> Complaint, paragraph 29.

<sup>7</sup> Complaint, paragraph 32.