SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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FEW SPIRITS, LLC,

Plaintiff,

- v -

UB DISTRIBUTORS, LLC,

Defendant.

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INDEX NO. 653212/2019

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4-8, 13-19, 27 were read on this motion to dismiss.

Defendant moves pursuant to CPLR 3211(a)(1) and (7) for an order dismissing the complaint. Plaintiff opposes.

I. VERIFIED COMPLAINT (NYSCEF 5)

Plaintiff alleges the following:

On March 19, 2012, defendant, a beer and malt beverage distributor, obtained a license to sell liquor wholesale in New York. On August 13, 2012, plaintiff, an alcoholic-beverage distiller and seller, executed an agreement with defendant granting it the exclusive right to sell all of plaintiff's branded liquor products throughout New York.

As pertinent here, the agreement provides:

> 2.1 Term. This Agreement will become effective upon signature by the last of the parties, and will remain in effect until terminated as provided herein. Termination other than as specifically set forth herein shall be deemed a breach of this Agreement and the parties shall have all applicable rights and remedies, including without limitation, any applicable equitable remedies.
>
> 2.2 Termination by Mutual Consent. This Agreement may be terminated at any time by mutual consent of the parties in writing effective as provided therein.

2.3 Termination upon Default. This Agreement may be terminated by the non-defaulting party upon a default upon Section 5.1 hereof.

...

5.1 Default Defined. The following will be considered a default and good cause to terminate this Agreement:

5.1.1 A material breach of this Agreement continuing for a period of 120 days after receipt of written notice from the other party, unless the notice specifies a longer period;

5.1.2 An assignment for the benefit of creditors; the institution of involuntary or voluntary proceedings under the United States Bankruptcy Code or state insolvency laws that is not dismissed within 90 days; or the appointment of a receiver or trustee, unless vacated within 90 days;

5.1.3 Discontinuation of normal service to customers for a period of 60 consecutive days;

5.1.4 Determination by a court of competent jurisdiction that a party made a material misrepresentation, or false statement, or materially misled the other, in order to procure a benefit or advantage.

5.2 Remedies. If the Distributor defaults, as described in Section 5.1, the Company shall have as its only recourse to terminate this Agreement in accordance with the law of the State of New York, with no other claim for damages.

If the Company defaults, as described in Section 5.1, the Distributor may at its option:

5.2.3 terminate this Agreement in accordance with the law of the State of New York;

5.2.3 (sic) exercise any other available remedies.

As plaintiff had no understanding or intention that defendant would have the right to distribute its products in perpetuity, it alleges that the agreement lacks mutuality and consideration absent a right to damages or a remedy beyond terminating the agreement. As the agreement appears to be indefinite in duration, plaintiff seeks a declaration that it is terminable after a reasonable amount of time.

Referencing Alcoholic Beverage Control (ABC) Law § 101-b, plaintiff alleges that industry custom and practice for reasonable notice of termination of a liquor distribution agreement is approximately 35 days, and, as the agreement in issue has been in effect for seven years, such reasonable time has elapsed and the agreement is now terminable by either party on reasonable notice. Alternatively, plaintiff seeks a declaration that the agreement be deemed terminable at will.

II. CONTENTIONS

A. Defendant (NYSCEF 4-6)

Defendant denies that the agreement gives it a right to distribute plaintiff's product in perpetuity, maintaining that while the agreement duration is not measured in terms of time, it is measured in terms of events. Such terms are clear in its expression that the agreement cannot be terminated unilaterally absent a default, and here, there is no such default. Defendant maintains that because plaintiff may cease business operations without liability, the duration of the agreement is not indefinite, nor is the agreement not terminable at will.

Distribution agreements in the alcoholic beverage industry, defendant argues, are required by ABC Law § 55-c(4)(a) to continue without a term defined by time but are terminated by agreement or default. It observes that pursuant to ABC Law § 55-c(4)(c), small brewers may terminate distribution agreements by paying the fair-market value of the distribution rights to the distributor, whereas the legislature enacted no such provision for spirits distribution agreements.

B. Plaintiff (NYSCEF 13-18)

Plaintiff asks that defendant's motion be treated as one seeking summary judgment, and it submits the supporting affidavit of its founder who states that he signed the agreement on behalf of plaintiff and that it was plaintiff's understanding that it could terminate the agreement after a

reasonable amount of time and on reasonable notice if it was unhappy with defendant's performance. (NYSCEF 17).

Plaintiff contends that defendant's motion under CPLR 3211(a)(7) must be denied as it seeks to terminate the agreement and defendant denies that it had the right to so. Thus, a justiciable controversy exists regarding whether the agreement may be terminated at will or on reasonable notice.

Plaintiff argues that the motion pursuant to CPLR 3211(a)(1) must be denied because the agreement does not conclusively establish a defense to its claim for a declaratory judgment as a matter of law. It maintains that absent an express provision that the agreement is perpetual in duration, perpetuity may not be inferred. Under defendant's logic, plaintiff argues, any agreement could be construed as one measured by events, yet in New York, an agreement lacking clear and unequivocal language that it is to continue perpetually is deemed to continue for a reasonable time or on reasonable notice of termination of either party.

By affirmation dated October 7, 2019, plaintiff's counsel states, based on his experience, industry custom and practice dictates that distribution agreements for spirits are either terminable at will or after a specified period of time and that he has never seen nor heard of an agreement that continues in perpetuity. Rather, while "franchise" laws in New York require written agreements and limit the grounds for termination or refusal to renew, they do not apply to wine or spirits. (NYSCEF 16).

C. Reply (NYSCEF 19)

In addition to reiterating its earlier arguments, defendant contends that plaintiff inappropriately relies upon parol evidence in arguing that it did not intend for the agreement to continue in perpetuity. Moreover, the affidavit of plaintiff's founder should be disregarded, as

affidavits are not to be considered on motions pursuant to CPLR 3211(a)(1) and (7).

III. ANALYSIS

A. Standard and parol evidence

Pursuant to CPLR 3211(a)(1), a party may move for an order dismissing a pleading on the ground that it has a defense based on documentary evidence. Such a motion may be granted where factual allegations in the complaint are flatly contradicted by documentary evidence. (*Kaisman v Hernandez*, 61 AD3d 565, 566 [1st Dept 2009]; *Kliebert v McKoan*, 228 AD2d 232, 232 [1st Dept 1996], *lv denied* 89 NY2d 802 [1996]).

A pleading may also be dismissed for failure to state a cause of action. (CPLR 3211[a][7]). In deciding the motion, the court must liberally construe the pleading, "accept the alleged facts as true, accord [the non-moving party] the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable theory." (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). However, "[f]actual allegations presumed to be true on a motion pursuant to CPLR 3211 may be properly negated by affidavits and documentary evidence." (*Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [1st Dept 2005], quoting *Biondi v Beekman Hill House Apt., Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]).

Pursuant to CPLR 3211(c), the court may treat a motion to dismiss as one for summary judgment on adequate notice to the parties. Where parties receive no such notice, as is the case here, the motion may nonetheless be converted if all parties (1) specifically request it, (2) indicate that the case involves purely legal questions, or (3) deliberately chart a course for summary judgment. (*Mihlovan v Grozavu*, 72 NY2d 506, 508 [1988]).

Parol evidence, or evidence extrinsic to a contract, is not admissible where the contract is

not ambiguous. (*Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 [2013]). Moreover, where a contract contains a clause providing, for example, that the contract "represents the entire understanding between the parties," parol evidence is inadmissible. (*Primex Int'l Corp. v Wal-Mart Stores, Inc.*, 89 NY2d 594, 599 [1997]). Here, the agreement contains such a clause. Section 9.10 of the agreement provides:

> This Agreement supersedes all previous and contemporaneous agreements and understandings between the parties and is intended as the complete and exclusive statement of the terms of their understanding and agreement with respect to the subject matter hereof. There are no representations, oral or written, upon which the Company or the Distributor has relied as an inducement to enter into this Agreement, other than those set forth herein.

Likewise, in section 9.12, the parties agreed, as pertinent here, that "[t]he language used in this Agreement is the language chosen by the parties to express their mutual intent, and no rule of strict construction will be applied against either party."

Where a contract is clear and unambiguous, it is to be enforced according to its plain meaning. (*Marin v Constitution Realty, LLC*, 28 NY3d 666, 673 [2017]). Here, the parties clearly and unambiguously agreed that the agreement is to remain in effect until terminated. Plaintiff does not allege otherwise. Thus, parol evidence as to plaintiff's intent, including the affidavit of plaintiff's founder, is inadmissible.

As no extrinsic evidence is permitted and there are no issues of fact, the motion presents a legal issue only. Thus, defendant's motion is converted into one for summary judgment. (*Bronx Islamic Soc'y, Inc. v Ally*, 158 AD3d 581, 582 [1st Dept 2018], *lv dismissed* 32 NY3d 1070 [2018] [converting motion to dismiss into one for summary judgment proper where action involves only legal issues argued by both parties]).

B. Agreement duration

Where a contract contains no definite term of duration, it is considered terminable at will.

(*Bennett v Atomic Prod. Corp.*, 132 AD3d 928, 929 [2d Dept 2015], *lv denied* 26 NY3d 918 [2016]; *Interweb, Inc. v iPayment, Inc.*, 12 AD3d 164, 165 [1st Dept 2004], *lv dismissed* 4 NY3d 776 [2005]). A definite term of duration need not be expressly stated but may be implied. (*Bennett*, 132 AD3d at 929). Where there is no definite term of duration, it will not be implied that the contract is perpetual in duration. (*Better Living Now, Inc. v Image Too, Inc.*, 67 AD3d 940, 941 [2d Dept 2009]).

Contract durations need not be stated in terms of time but may be tied to the occurrence of events. (*United Chem. & Exterminating Co. v Sec. Exterminating Corp.*, 246 AD 258, 259 [1st Dept 1936]; *see e.g.*, *Haines v City of New York*, 41 NY2d 769, 773 [1977] [contract for maintenance of sewage disposal facility, designed to ensure pure water for New York City, remains in effect "until such time as the city no longer needed or desired the water"]; *N. Shore Bottling Co. v C. Schmidt & Sons, Inc.*, 22 NY2d 171, 174 [1968] [sustaining breach of contract claim on contract whereby the plaintiff was exclusive wholesale beer distributor for as long as the defendant sold beer]). Contracts with durations based upon the occurrence of events, rather than an express time period, are not too indefinite, "even though it is impossible to predict exactly when the contingency will occur by which it will be terminated." (*United Chem*, 246 AD at 259; *67 Wall St. Co. v Franklin Nat. Bank*, 38 AD2d 460, 461 [1st Dept 1972] ["It is not unusual for contractual obligations to fall in at some presently unknown time in the future, hinging on an agreed contingency."]).

In *United Chemical*, the plaintiff, an exterminator company, entered into a contract with the defendant, a company that solicited customers seeking an exterminator, whereby the defendant granted the plaintiff the exclusive right to service all of the defendant's accounts in exchange for compensation. The parties agreed that the contract was to continue "until and

unless abrogated, cancelled and annulled by the consent of both the parties thereto." (246 AD at 259). On appeal, the Court rejected the contention that the contract was too indefinite, finding that "the contract can in no event continue beyond the corporate existence of the defendant," and thus, there is "no reason to deny to these corporate parties the right to make and enforce contracts with one another which are intended to continue throughout the corporate life of either or both [...] unless rescinded by mutual consent." (*Id.* at 260).

Here, the agreement provides that it is to remain in effect unless the parties mutually consent or upon default. While there is no express time period for which the agreement is to remain in effect, the events which would result in termination are nearly identical to those in *United Chemical* and are not too indefinite to render the agreement unenforceable.

Contrary to plaintiff's contention, the holding in *Cronk v Vogt's Ice Cream*, 15 NYS2d 649, 653 (Sup Ct, Delaware County 1939), which is not binding here, is not inconsistent with *United Chemical*. In *Cronk*, the parties entered into a contract whereby defendant agreed to purchase ingredients from plaintiff; the contract lacked any provision concerning duration or termination. (*Id.* at 651-652). While the court was skeptical of the holding in *United Chemical*, which was not binding on that court, it acknowledged and adhered to the Appellate Division's general rule that contracts without provisions as to duration are contracts at will, and found that the contract at issue was one at will. (*Id.* at 653). Likewise, in *Compania Embotelladora Del Pacifico, S.A. v Pepsi Cola Co.*, 607 F Supp 2d 600, 603 (SD NY 2009), the contract at issue had "no definite term and provides no end date for its duration," and thus, it was deemed an at will contract. By contrast, here, the agreement expressly provides for a definite term.

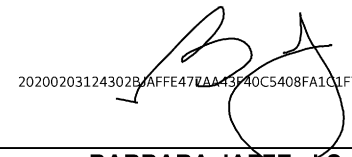
As the agreement is not terminable with reasonable notice, ABC Law § 101-b need not be addressed.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion to dismiss is converted to one for summary judgment, and upon conversion, is granted; and it is further

ORDERED, that the complaint is dismissed, and the Clerk is directed to enter judgment accordingly.



2/3/2020
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE