

Grape Solutions, Inc. v Majestic Wines, Inc.
2015 NY Slip Op 30770(U)
May 11, 2015
Supreme Court, New York County
Docket Number: 651619/2012
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
GRAPE SOLUTIONS, INC.,

Index No.: 651619/2012

Plaintiff,

DECISION & ORDER

-against-

MAJESTIC WINES, INC.,

Defendant.

-----X
SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 005 and 006 are consolidated for disposition.

Plaintiff Grape Solutions, Inc. (Grape Solutions), moves, pursuant to CPLR 3212, for partial summary judgment against defendant Majestic Wines, Inc. (Majestic). Seq. 005.¹ Majestic moves, pursuant to CPLR 3212, for summary judgment against Grape Solutions. Seq. 006. Grape Solutions' motion is granted and Majestic's motion is denied for the reasons that follow.

I. Background

Unless otherwise indicated, the following facts are undisputed.

Grape Solutions is a wine wholesale supplier, with its principal place of business in New Jersey. It is not licensed to sell alcoholic beverages in New York. Majestic is a wine wholesaler, licensed to sell alcoholic beverages to licensed retailers in New York. In October 2009, the parties entered into an oral contract (the Original Contract) for the sale of Grape Solutions' wine products, Riondo Wines, to Majestic. At the time of the Original Contract, Majestic was owned

¹ Grape Solutions also originally moved to hold Majestic in contempt for violating the court's March 18, 2014 order (Dkt. 116), which required Majestic to pay Grape Solutions' attorneys' fees in connection with motion for a default judgment, but has withdrawn the contempt motion. See Dkt. 167.

by non-party Angelo DiBari, and its New York liquor license was issued to him. Under the Original Contract, Majestic placed orders with Grape Solutions, picked up the wine from Bevcon Warehouse, where Grape Solutions stores its Riondo products, transported the wine to Cargo Logistics Warehouse, where Majestic stores its alcoholic beverages, and delivered the wine to its New York retail customers. Grape Solutions charged Majestic a price, and Majestic charged its retail customers a markup price.

In October 2010, the parties orally modified the terms of the Original Contract (the Modified Contract). Grape Solutions provides multiple, conflicting accounts as to which party initiated the modification.² However, the terms of the Modified Contract are not in dispute. Under the Modified Contract, Grape Solutions accepted orders from licensed New York retailers, created invoices, and shipped its wine products directly to the retailers, without the wine coming into Majestic's possession. Angela Massie (Angela), Grape Solutions' bookkeeper, prepared invoices to New York retailers using assigned Majestic invoice numbers that Majestic provided to her, with Majestic's bill heading and the Cargo Logistics Warehouse address. *See* Dkt. 131 at

² According to Grape Solutions, Majestic was unable to keep pace with transactions and requested that Grape Solutions prepare the paperwork, deliver the wine, and bill invoices directly to Majestic's retail customers. Charles Massie, Grape Solutions' Chief Executive Officer, provided conflicting accounts. He stated, "In October 2010, at the request of Mr. DiBari, [Grape Solutions] was asked and agreed to prepare the billing for Majestic for all the wine ordered by Majestic and/or its customers, since Mr. DiBari often instructed his customers to order directly from [Grape Solutions] to expedite the process." *See* Charles Massie Aff., dated November 25, 2014 (Dkt. 130) ¶ 3. Massie also claimed: "[Grape Solutions] went to Majestic, because [Grape Solutions] wanted to expand the sales of our business with another wholesaler. [Grape Solutions] had an existing wholesaler, and we wanted to move in the direction of more than one. So I went to [DiBair], and I asked [him] if he would be willing to take orders that we would do all the logistical work for him on his behalf, and pay him a fee for the – just for the billing and the collecting of money." *See* Massie EBT., dated January 7, 2014 (Dkt. 139 at 6).

30-70 (invoices from 10/13/2010 - 5/31/2011).³ Between October 2010 and May 2011, Grape Solutions wine did not pass through Majestic's Cargo Logistics Warehouse but was delivered directly to licensed New York retailers using a public trucking company hired by Grape Solutions.⁴ Grape Solutions sent DiBari copies of the signed delivery receipts and invoices. DiBari subsequently collected payment from the retailers and paid Grape Solutions the amount invoiced to the retailers, less \$5 for each case sold.

In April 2011, DiBari passed away. At the time, Majestic owed Grape Solutions \$441,589.56 for uncollected payment on the wine sold to licensed New York retailers. *See* Dkt. 131 at 72 (Invoice records). Brenda DiBari (Brenda) temporarily assumed her husband's role at Majestic and provided Grape Solutions with a summary sheet listing customers that owed money to Grape Solutions. *See* Dkt. 131 at 2-4 (Majestic Item Quick Report). By letter dated May 6, 2011, Brenda authorized Grape Solutions to contact Majestic customers "to directly collect payment for all invoices from Majestic Wines Inc. in payment of Riondo products." *Id.* at 6. Grape Solutions recovered \$130,552.60. *Id.* at 72-3 (Payment records). An outstanding balance of \$311,036.95 remained.

On June 14, 2011, Brenda sold Majestic to non-party John Marzano pursuant to Contract (the Majestic Sale Contract). Section 1.2 of the Majestic Sale Contract provides:

[Majestic] is selling and [Marzano] is buying [Majestic], including but not limited to any and all debts or obligations thereof.

Assumption of debts of [Majestic] and Brenda DiBari note owed to Joseph Maria, Esq. in principal amount of \$250,000 (collectively referred to as the "Selling Price").

³ Exhibits should be e-filed as separate documents, as opposed to one pdf that includes all of the exhibits.

⁴ The truck was responsible for any losses or damage to the goods.

See Dkt. 131 at 14-5. Section 1.8 provides:

All debts incurred in connection with the business prior to and after the closing are assumed by and shall be the obligations of [Marzano] and shall be the responsibility of [Majestic]; this paragraph shall survive closing.

See *id.* at 16.

In October 2011, Massie, on behalf of Grape Solutions, met with the new Chief Financial Officer of Majestic, Chris Alveras, to discuss Majestic's outstanding balance of \$311,036.95. By letter dated October 17, 2011, Alveras authorized Grape Solutions "to contact all open accounts and ascertain whether payments have been made to Majestic and obtain copies of payments." *Id.* at 12. Grape Solutions again contacted retailers to collect payment, but was unable to recover the amount owed.

Grape Solutions commenced this action on May 10, 2012, alleging the following causes of action, numbered as they appear in the complaint: (1) contract balance; (2) breach of contract; (3) quantum meruit; (4) account stated; and (5) a claim under CPLR 3016(f).⁵ Grape Solutions seeks \$311,036.95, plus interest from May 31, 2011. Majestic filed an answer on July 16, 2012, asserting six counterclaims: (1) a declaratory judgment that the Modified Contract is illegal and unenforceable; (2) a declaratory judgment that Grape Solutions' conduct is illegal and that no money is due; (3) rescission of the Modified Contract; (4) compensatory damages; (5) punitive damages; and (6) attorneys'

⁵ CPLR 3016(f) provides "[i]n an action involving the sale and delivery of goods, or the performing of labor or services, or the furnishing of materials, the plaintiff may set forth and number in his verified complaint the items of his claim and the reasonable value or agreed price of each. Thereupon the defendant by his verified answer shall indicate specifically those items he disputes and whether in respect of delivery or performance, reasonable value or agreed price." There is no cause of action under CPLR 3016(f) - it is a pleading standard.

fees. Discovery is now complete. Plaintiff filed a note of issue on September 29, 2014.

The instant summary judgment motions followed.

In support of its motion, Grape Solutions submitted evidence and avers that at least 37 New York retailers paid Majestic a total of \$188,485.26 for the Riondo wine, and that Majestic cashed and deposited those checks into its accounts without paying Grape Solutions. *See* Dkt. 131 at 81-263. Further, Grape Solutions stated that on February 14, 2014, it collected \$5,700 from Varmax [*id.* at 79 (Varmax check)] and, over a ten month period, entered into a written agreement with another retailer to recover \$14,000. *See* Dkt. 130 at 3-4.

Grape Solutions filed the instant motion for partial summary judgment, seeking \$188,485.36 plus interest from May 30, 2011, for payment made by retailers to Majestic that was never transferred to Grape Solutions. Majestic also moved for summary judgment.

II. *Legal Standard*

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most

favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

III. Discussion

A. Breach of Contract

“Contracts which violate statutory provisions are, as a general rule, unenforceable on public policy grounds where the statute which is violated is enacted to protect the public health and safety.” *Eber Bros. Wine & Liquor Corp. v Rare Spirits, Inc.*, 21 Misc3d 201, 208 (Sup Ct, Monroe County 2008); *Rosasco Creameries v Cohen*, 276 NY 274, 278 (1937). However, “[i]f the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy ... the right to recover will not be denied.” *Benjamin v Koepfel*, 85 NY2d 549, 553 (1995), quoting *Rosasco Creameries*, 276 NY at 278. Courts generally enforce the contract “where there are [other] regulatory sanctions and statutory penalties in place to redress violations of the law.” *Lloyd Capital Corp. v Pat Henchar, Inc.*, 80 NY2d 124, 127 (1992).

“To constitute a valid defense to an action on a contract, the alleged illegality must be ‘central to or a dominant part of the plaintiff's whole course of conduct in performance of the contract.’” *FCI Grp., Inc. v City of New York*, 54 AD3d 171, 177 (1st Dept 2008), quoting *McConnell v Commonwealth Pictures Corp.*, 7 NY2d 465, 471 (1960). The illegality defense is inapplicable where it would result in a substantial forfeiture to one party while allowing the other party, who has already reaped the benefit of the transaction, to avoid the corresponding

obligation. *Murray Walter, Inc. v Sarkisian Bros.*, 107 AD2d 173, 178 (3d Dept 1985). “This is particularly true where the two parties are equally culpable with respect to the illegal conduct.” *Unger v Leviton*, 5 Misc3d 925, 929 (Sup Ct, Nassau County 2004). Forfeitures by operation of law are disfavored where the party who is alleged to have breached the contract is attempting to improperly use public policy “as a sword for personal gain rather than a shield for the public good.” *Charlebois v J.M. Weller Associates, Inc.*, 72 NY2d 587, 595 (1988). Thus, once the party seeking such enforcement has performed his obligations, “the court should consider the quality of the illegality, the extent of public harm, the relative guilt of the parties, and the cruelty of the forfeiture involved in a denial of remedy.” *Murray Walter, Inc.*, 107 AD2d at 177.

ABCL § 100(1) provides: “no person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter.” Majestic contends that Grape Solutions, who had no New York License, breached the ABCL by shipping wine directly from its warehouse to licensed New York retailers. Majestic argues that the Modified Contract, therefore, is illegal and should not be enforced. According to Majestic, New York’s three-tier system⁶ and the ABCL required Grape Solutions to consign⁷ its wine to Majestic before selling it to licensed New York retailers.

⁶ New York requires all liquor, whether originating in state or out of state, to pass through its three-tier system. Under the three-tier system, alcoholic beverages must pass through a producer, a licensed wholesaler, and licensed retailers. The purpose of the system is to allow New York to collect taxes more efficiently and prevent the sale of alcohol to minors. See *Arnold’s Wines, Inc.*, 571 F3d 185, 188 (2d Cir 2009).

⁷ The parties spend a great portion of their briefs interpreting the statutory language of ABCL § 102(1)(a), and the word “consign.” Consign is not a defined term in the statute. Majestic argues that consign means “possession”, and, thus, Majestic was required to take physical possession of the wine before it was sold to licensed New York retailers. Grape Solutions argues that it did not violate § 102(1)(a) since New York is not an “at-rest” state. An “at-rest” state requires out-of-state shippers to deliver alcoholic beverages to a licensed in-state wholesaler for a resting period (typically lasting 24 to 48 hours) prior to its delivery to retailers. Bill S2473-2011. The court

ABCL § 102(1)(a) provides that “no alcoholic beverages shall be shipped into the state unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages.”

The ABCL does not prevent parties from suing on the contract for violation of the statute. ABCL § 130(3) imposes penalties to redress violations of the statute (“any violation by any person of any provision of this chapter for which no punishment or penalty is otherwise provided shall be a misdemeanor”). Furthermore, the intent of the ABCL is to enable New York to more efficiently collect taxes and prevent the sale of alcohol to minors in accordance with its three-tier system. *See Arnold’s Wines, Inc.*, 571 F3d at 188. Here, there is no concern that Grape Solutions sold its wine to minors. Grape Solutions did not directly sell wine to consumers. Nor is tax collection a concern. Under the Modified Contract, Majestic was required to account for the wine sold and collect payment from the New York retailers; Majestic was responsible for paying the taxes. Accordingly, assuming Grape Solutions violated the ABCL, the alleged illegality would not be the type of harm the statute seeks to prevent.

Majestic claims that Grape Solutions concocted a “clearing fee scam”, using Majestic invoices and license to circumvent the ABCL. Regardless of which party initiated the Modified Contract, Majestic was part of the alleged scheme and benefited from the transaction. It assigned invoice numbers to Grape Solutions, collected payment on the wine sales, and accepted the \$5 per case clearing fee. Majestic was complicit and derived profits from the alleged illegality. Indeed, it subsequently collected a portion of Grape Solutions payments and kept those. After Grape Solutions has fully performed, “the denial of all remedy would disproportionately penalize

will not determine whether Majestic was required to take physical possession of the wine or if Grape Solutions could use Majestic’s license so long as Majestic billed and collected payment from licensed New York retailers and ensured that taxes on the wine were paid to the state of New York.

[Grape Solutions]; and the public welfare is best served by either compelling restitution or enforcing [Majestic's] promise proportionately (6A Corbin, Contracts § 1521, at 759)." *Murray Walter, Inc.*, 107 AD2d at 177.

Moreover, if Majestic acted illegally, its conduct was not so "gravely illegal and immoral" as to bar recovery as a matter of public policy. *See McConnell v Commonwealth Pictures Corp.*, 7 NY2d at 471. Under the circumstances "the real defrauder seems to be [Majestic] who is enriching [itself] at [Grape Solutions'] expense." *See Murray Walter, Inc.*, 107 AD2d at 177.⁸

Simply put, Grape Solutions' wine was sold to licensed New York retailers. Majestic provided Grape Solutions with the use of its license and collected payments for the wine from the retailers on behalf of Grape Solutions. Under the Modified Contract, Majestic was entitled to keep \$5 for each case of wine sold. Pursuant to agreement, the balance of the amounts collected from the retailers should have been remitted to Grape Solutions. Majestic did not do so. Rather, Majestic kept some (or possibly all) of the money for itself. Grape Solutions is granted summary judgment on its entitlement to recover from Majestic the money the retailers paid to Majestic, less \$5 per case.

Summary judgment, however, is denied on damages. The record on this motion, particularly the invoices Grape Solutions submitted, is extremely unclear. For instance, the checks the retailers gave Majestic for the wine (allegedly totaling \$188,765.26) submitted on this motion are difficult to read. *See* Dkt. 131 at 81-263. The court, therefore, refers this case to a Special Referee to conduct an inquest and report on the amount Grape Solutions should collect

⁸ Even if the Modified Contract was not enforceable, Majestic cannot be unjustly benefited from Grape Solutions wine. The actual wine was not illegal or tainted.

from Majestic.⁹ That amount should be computed by determining the amount of money the retailers paid to Majestic and the number of cases sold. Grape Solutions should be awarded the money paid to Majestic less \$5 for each case for which payment was collected. Accordingly, it is

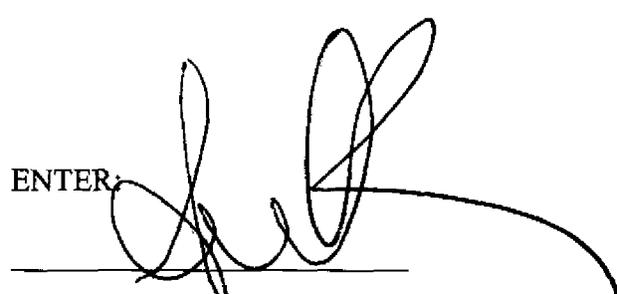
ORDERED that the parties' summary judgment motions are resolved as follows: (1) defendant Majestic Wines, Inc.'s summary judgment motion is denied; (2) summary judgment is granted to plaintiff Grape Solutions, Inc. on liability only; and (3) defendant's counterclaims are dismissed; and it is further

ORDERED that an inquest to compute plaintiff's damages is referred to a Special Referee to hear and report with recommendations, or, if the parties consent, to hear and determine; and it is further

ORDERED that within 7 days, plaintiff shall serve a copy of this order with notice of entry, as well as a completed information sheet,¹⁰ on the Special Referee Clerk at spref-nyef@nycourts.gov, who is directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date.

Dated: May 11, 2015

ENTER:



J.S.C.

⁹ Only Majestic requested a jury on its counterclaim, but such counterclaims are dismissed. Hence, the inquest on Grape Solutions' claims, which would otherwise be tried at a bench trial, may be conducted by a referee.

¹⁰ Copies are available in Rm. 119M at 60 Centre Street, New York, NY, and on the court's website by following the links to "Court Operations", "Courthouse Procedures", and "References".