Obsessive Compulsive Cosmetics, Inc. v. Sephora USA, Inc., 2016 BL 307244 (Sup. Ct. Aug. 18, 2016) [2016 BL 307244]

Pagination
* BL

New York Supreme Court

Obsessive Compulsive Cosmetics, Inc., Plaintiff, against Sephora USA, Inc., Defendants.

652074/2015

August 18, 2016, Decided

THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

For Plaintiff: Norman Klasfeld, Esq.

For Defendant: Daniel P. Waxman, Esq. of Bryan Cave LLP.

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

Charles E. Ramos

Charles E. Ramos, J.

This is an action brought by Obsessive Compulsive Cosmetics (OCC) against Sephora USA, Inc. (Sephora) arising out of an agreement for the purchase of cosmetics.

In motion sequence number 002, Sephora moves to dismiss the first through fifth causes of action in OCC's amended complaint pursuant to **CPLR § 3211 (a) (1)** and **(7).**

Background 1

In May 2012, OCC, a manufacturer and distributer of cosmetics, entered into a written vendor terms agreement (the Written Agreement) with Sephora, a cosmetics retailer. As part of the Written Agreement, OCC was to sell cosmetic products to Sephora, and Sephora would retail the merchandise in Sephora's stores and on its website.

Pursuant to the Written Agreement, OCC is responsible for covering certain costs including the permanently branded fixtures where OCC's products would be on display in Sephora's stores. Furthermore, the Written Agreement contains a no modification clause, whereby the contract cannot be changed except in writing signed by both parties.

On July 26, 2012, the parties, through Averyl Andrews, Associate Merchant on behalf of Sephora, and David Klasfield, President of OCC, allegedly reached a verbal agreement at Sephora's offices that Sephora would be the exclusive non-online purchaser of OCC's products (First Verbal Agreement). In reliance on the First Verbal Agreement, OCC refused requests for purchase orders from stores other than Sephora. OCC alleges that at some point, Sephora failed and refused to provide OCC with purchase orders to offset OCC's damages, totaling $834,111.91 in lost purchase orders, which OCC would have earned from other customers.

In September of 2013, Sephora requested that OCC expand the placement of its products into several new stores. Due to the high costs of this venture, totaling approximately $786,558.40, OCC initially refused Sephora's request for expansion.

On October 11, 2013, in an effort to induce OCC to agree to place its products into twenty-six locations, Sephora, by its Vice President, Alison Hahn, verbally represented to OCC at a meeting, that it would share all fixture costs with OCC by fifty percent (the Second Verbal Agreement). Purportedly, relying on Sephora's representations and purchase orders, OCC produced new products, totaling the sum of $590,558.40. When OCC insisted that Sephora adhere to its representations and agreement to share the fixture costs, Sephora cancelled all purchase orders with respect to the opening inventory and did not pay any of the fixture costs. OCC alleges it has been damaged in the sum of $521,647.20, representing the contract price of the purchase orders less the amounts recovered by OCC from sales of the products to other customers.

Discussion[*2]

A motion to dismiss pursuant to **CPLR § 3211 (a) (1)** , premised on the ground that the action is barred by documentary evidence, may be granted "only where the documentary evidence utterly refutes [a] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of New York*, **98 NY2d 314** , **774 N.E.2d 1190** , **746 N.Y.S.2d 858** [2002]).

On a motion to dismiss pursuant to **CPLR § 3211 (a) (7)** , the court must "accept the facts as alleged in the complaint as true, accord [plaintiff] the benefits of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, **84 NY2d 83** , **87-88** , **638 N.E.2d 511** , **614 N.Y.S.2d 972** [1994]).

The Second Verbal Agreement

Sephora argues that the claims for fraud, breach of contract and promissory estoppel (first through third counts of the amended complaint, respectively) should be dismissed under **CPLR 3211 (a) (1)** because of the parties' binding Written Agreement, which specifically states that OCC is responsible for one hundred percent of any fixture costs and that the agreement cannot be modified unless there is a dually-signed writing.

When a written contract provides that it can only be changed by a signed writing, an oral modification of that agreement is not enforceable (**General Obligations Law § 15-301 [1]** ; *Tierney v Capricorn Invs.*, **189 AD2d 629** , 631, **592 N.Y.S.2d 700** [1st Dept 1993]). However, complete and partial performance are exceptions to the requirement of a written modification:

> "When the oral agreement to modify *has in fact been acted upon to completion*, the same need to protect the integrity of the written agreement from false claims of modification does not arise. In such case, not only may past discussions be relied upon to test the alleged modification, but the actions taken may demonstrate, objectively, the nature and extent of the modification. Moreover, apart from statute, a contract once made can be unmade and a contractual prohibition against oral modification may itself be waived.
>
> Where there is *partial performance* of the oral modification sought to be enforced, the likelihood that false claims would go undetected is similarly diminished. Here, too, the court may consider not only past oral exchanges, but also the conduct of the parties. *But only if the partial performance be unequivocally referable to the oral modification* is the requirement of a writing under (subdivision 1) section 15-301 (of the General Obligations Law) avoided (*Rose v Spa Realty Associates*, **42 NY2d 338** , **366 N.E.2d 1279** , **397 N.Y.S.2d 922** [1977][emphasis added]).

In *Rose* (*id.*), a case involving an oral modification reducing a quantity of land to be conveyed under written contract, the Court of Appeals held that the parties' partial performance of the contract was unequivocally referable to the oral modification and thereby avoided the statutory requirement of a writing.

In contrast, in *Tierney* (189 AD2d at **631**), the plaintiff, pursuant to an oral representation,sought to recover compensation over and above the compensation set forth in a written employment agreement which specifically provided that it can be modified only by a signed writing. The Court found that plaintiff's performance was not "unequivocally **[*3]** referable" to the alleged modification because it would be equally consistent with his desire to continue to earn his compensation under the written employment agreement, as with the alleged oral modification (*id.*).

In the instant case, OCC alleges that it produced products for the new and other existing locations pursuant to purchase orders from Sephora totaling $590,558.40 in reliance on Sephora's vice president's verbal representation that it would share in the fixture costs. OCC has sufficiently plead partial performance unequivocally referable to the alleged oral modification that Sephora would share in the fixture costs in light of allegations that OCC initially refused Sephora's purchase orders and only agreed to produce new products after Sephora's verbal representation was made with respect to sharing fixture costs (*Rose*, **42 NY2d 338** , 343-344, **366 N.E.2d 1279** , **397 N.Y.S.2d 922**). Further buttressing the contention that OCC's performance is unequivocally referable to the oral modification is the fact that the Written Agreement is not a "requirements contract," and thus, OCC had no contractual duty to expand the placement of its products at Sephora's stores.

Sephora also contends that the fraud claim is not plead with requisite specificity. To plead a common law fraud claim, a plaintiff must allege misrepresentation of a material fact, falsity of the misrepresentation, scienter, reasonable reliance, and injury (*Eurycleia Partners, LP v Seward & Kissel, LLP*, **12 NY3d 553** , 559, **910 N.E.2d 976** , **883**

N.Y.S.2d 147 [2009]). Where a cause of action is based upon fraud, the circumstances constituting the wrong shall be stated in detail (**CPLR § 3016 [b]**).

OCC does not sufficiently plead all the elements of a fraud claim in that there is nothing in the alleged facts which suggests that Sephora intended to deceive OCC (*Houbigant, Inc v Deloitte & Touche LLP*, **303 AD2d 92** , **93** , **753 N.Y.S.2d 493** [1st Dept 2003][To state a claim for fraud, a plaintiff must allege some "rational basis for inferring that the alleged misrepresentations were knowingly made."]).

OCC sufficiently plead all the elements of a breach of contract claim in that there was a Second Verbal Agreement between the parties, which, pursuant to, OCC performed under by producing an opening inventory, that Sephora breached this agreement by failing to pay its share of the fixture costs and cancelling the purchase orders for the opening inventory, and OCC was damaged as a result of Sephora's conduct (2 NY PJI 2d 4:1, at 676 [2013]["[t]he elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, (4) resulting damage"]).

The doctrine of promissory estoppel may be invoked only where the aggrieved party can allege the existence of a clear and unambiguous promise upon which he or she reasonably relied, thereby sustaining injury (*Steele v Delverde S.R.L.*, **242 AD2d 414** , **662 N.Y.S.2d 30** [1st Dept 1997]). Sephora, relying on *Curtis Props. Corp. v Greif Cos.*, **236 AD2d 237** , **653 N.Y.S.2d 569** (1st Dept 1997), contends that OCC's promissory estoppel claim should be dismissed because under "the general rule...the existence of a valid and enforceable **[*4]** written contract governing a particular subject matter precludes recovery in quasicontract for events arising out of the same subject matter"(***id*** .). Sephora highlights that the Written Agreement specifically states that OCC is responsible for any fixture costs and thus precludes recovery in quasi-contract for events arising out of the same subject matter (*id.*).

In opposition, OCC relies on *Curtis* (*id.*) for the notion that the promissory estoppel claim is possible "where the contract does not cover the dispute in issue" (*id.*). Because OCC properly alleges a promise by Sephora to cover fifty percent of the fixture costs outside of the Written Agreement and after its execution, and because the Written Agreement was not a "requirements contract" whereby OCC was obliged to process every purchase order, the issue of which party is to cover the costs of fixtures and for how much is an issue which the Written Agreement does not cover, and thus, does not preclude a claim for promissory estoppel.

Thus, OCC's first cause of action for fraud is dismissed, while OCC's second and third causes of action for breach of contract and promissory estoppel are adequately plead and remain.

The First Verbal Agreement

Sephora argues that the fourth and fifth claims for breach of contract and promissory estoppel pertaining to the alleged First Verbal Agreement should be dismissed because the essential term of "quantity" is missing from the parties' alleged agreement, and the promissory estoppel claim is duplicative of the breach of contract claim.

Under the First Verbal Agreement, OCC alleges that the parties agreed that OCC would sell its products to Sephora as its exclusive non-online customer, and in-turn, Sephora would provide sufficient orders to offset OCC's losses from not accepting purchase orders from other vendors. During the period of July 26, 2012 through July 9, 2014, OCC allegedly refused to accept requests for purchase orders, totaling $834,111.91, from four department stores, a chain of cosmetic stores, and a subscription box service and retail store. Sephora then refused OCC's request for purchase orders sufficient to compensate OCC for its rejection of requests for opening purchase orders from other clients.

Like the First Verbal Agreement, the amended complaint has sufficient facts alleging that OCC partially performed under the First Verbal Agreement and that performance was unequivocally referable to the First Verbal Agreement to bypass the parties' Written Agreement prohibiting oral modifications (*Rose*, **42 NY2d 338** , 343-344, **366 N.E.2d 1279** , **397 N.Y.S.2d 922**). The First Verbal Agreement's terms regarding exclusivity are not mentioned in the Written Agreement whereas the First Verbal Agreement addresses OCC's relations with third parties, i.e., Sephora's competitors, a main provision that the Written Agreement does not contemplate.

Sephora argues that the alleged First Verbal Agreement between the parties is "not enforceable because no quantity term appears therein" (*Townsend Oil Corp. v Marini*, **77 AD3d 1416** , **909 N.Y.S.2d 591** [4th Dept 2010][Supply agreement **[*5]** between supplier of petroleum products and dealer did not contain a quantity term, and therefore, was unenforceable, where agreement stated supplier was to sell and dealer was to purchase the products marketed and used by supplier, all as was to be determined by supplier]). However, "a term which measures the quantity by the output of the seller...means such actual output or requirements as may occur in good faith" (*Feld v Henry S. Levy & Sons, Inc.*, **37 NY2d 466** , **335 N.E.2d 320** , **373 N.Y.S.2d 102** [1975], *citing* Section 2-306 of the Uniform Commercial Code,

entitled Output, Requirements and Exclusive Dealings'). The lack of a quantity term does not make the alleged First Verbal Agreement unenforceable since quantity is determined by OCC's receipt of purchase orders from Sephora's competitors and not strictly determined by OCC, the seller and supplier.

Like the promissory estoppel claim under the Second Verbal Agreement, the issue regarding an exclusivity relationship under the promissory estoppel claim in the parties' alleged First Verbal Agreement is not covered by the parties' Written Agreement as that agreement is silent as to whether Sephora is to be the exclusive buyer of OCC's products in sufficient amount to offset OCC's losses from not accepting purchase orders from Sephora's competitors (*Curtis*, **236 AD2d 237** , **653 N.Y.S.2d 569** [promissory estoppel claim upheld where the contract does not cover the dispute in issue]).

Sephora argues that the promissory estoppel claim is duplicative of OCC's breach of contract claim since OCC has not alleged any independent duty to warrant a tort claim and cites to *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, **70 NY2d 382** , **389** , **516 N.E.2d 190** , **521 N.Y.S.2d 653** [1987]). However, the promise, as alleged, is sufficiently separate from the Written Agreement and created a legal duty independent of the Written Agreement.

Thus, OCC's fourth and fifth causes of action for breach of contract and promissory estoppel are sufficiently plead.

Accordingly, it is

ORDERED that defendants' motion to dismiss (Sequence No. 002) is denied as to all causes of action, except as to the first cause of action for fraud, which is hereby severed and dismissed.

ORDERED that defendants shall serve an answer to the complaint within 20 days of notice of entry.

Dated: August 18, 2016

Hon. Charles E. Ramos

J.S.C.

*fn*1
The facts set forth herein are allegations set forth in the parties' pleadings.

General Information

Judge(s)	Charles E. Ramos
Related Docket(s)	652074/2015 (N.Y. Sup.);
Topic(s)	Contracts; Civil Procedure
Industries	Cosmetics
Date Filed	2016-08-18 00:00:00
Court	New York Supreme Court
Parties	Obsessive Compulsive Cosmetics, Inc., Plaintiff, against Sephora USA, Inc., Defendants.

Obsessive Compulsive Cosmetics, Inc. v. Sephora USA, Inc., No. 652074/2015, 2016 BL 307244 (Sup. Ct. Aug. 18, 2016), Court Opinion

Direct History

1 **Obsessive Compulsive Cosmetics, Inc. v. Sephora USA, Inc., No. 652074/2015, 2016 BL 307244 (Sup. Ct. Aug. 18, 2016)**
order entered, motion to dismiss denied (in part), case dismissed (in part)

2 **Obsessive Compulsive Cosmetics, Inc. v. Sephora USA, Inc., No. 652074/15, 2015 BL 323184 (Sup. Ct. Sept. 14, 2015)**
injunction denied, order entered

Case Analysis

No Treatments Found

Table Of Authorities (11 cases)

1 Discussed , Quoted Townsend Oil Corp. v. Marini, 77 A.D.3d 1416, 909 N.Y.S.2d 591 (App Div, 4th Dept 2010)

Sephora argues that the alleged First Verbal Agreement between the parties is "not enforceable because no quantity term appears therein" (*Townsend Oil Corp. v Marini* , **77 AD3d 1416** , **909 N.Y.S.2d 591** [4th Dept 2010] [Supply agreement between supplier of petroleum products and dealer did not contain a quantity term, and therefore, was unenforceable, where agreement stated supplier was to sell and dealer was to purchase the products marketed and used by supplier, all as was to be determined by supplier]). However, "a term which measures the quantity by the output of the seller...means such actual output or requirements as may occur in good faith" (*Feld v Henry S. Levy & Sons, Inc.* , **37 NY2d 466** , **335 N.E.2d 320** , **373 N.Y.S.2d 102** [1975], *citing* Section 2-306 of the Uniform Commercial Code, entitled Output, Requirements and Exclusive Dealings'). The lack of a quantity term does not make the alleged First Verbal Agreement unenforceable since quantity is determined by OCC's receipt of purchase orders from Sephora's competitors and not strictly determined by OCC, the seller and supplier.

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Direct History Summary	
Caution	0
Negative	0
Total	0

Case Analysis Summary	
Positive	0
Distinguished	0
Caution	0
Superseded	0
Negative	0
Total	0

Authorities Summary	
Positive	11
Distinguished	0
Caution	0
Superseded	0
Negative	0
Total	11

Table Of Authorities (11 cases)

2 Cited — Eurycleia Partners, LP v. Seward & Kissel, LLP, 12 N.Y.3d 553, 883 N.Y.S.2d 147, 910 N.E.2d 976 (2009)

Sephora also contends that the fraud claim is not plead with requisite specificity. To plead a common law fraud claim, a plaintiff must allege misrepresentation of a material fact, falsity of the misrepresentation, scienter, reasonable reliance, and injury (*Eurycleia Partners, LP v Seward & Kissel, LLP* , **12 NY3d 553** , 559, **910 N.E.2d 976** , **883 N.Y.S.2d 147** [2009]). Where a cause of action is based upon fraud, the circumstances constituting the wrong shall be stated in detail (**CPLR § 3016 [b]**).

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4 Cited , Quoted — Goshen v. Mut. Life Ins. Co. of New York, 98 N.Y.2d 314, 746 N.Y.S.2d 858, 774 N.E.2d 1190 (2002)

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The doctrine of promissory estoppel may be invoked only where the aggrieved party can allege the existence of a clear and unambiguous promise upon which he or she reasonably relied, thereby sustaining injury (*Steele v Delverde S.R.L.* , **242 AD2d 414** , **662 N.Y.S.2d 30** [1st Dept 1997]). Sephora, relying on *Curtis Props. Corp. v Greif Cos.* , **236 AD2d 237** , **653 N.Y.S.2d 569** (1st Dept 1997), contends that OCC's promissory

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Like the promissory estoppel claim under the Second Verbal Agreement, the issue regarding an exclusivity relationship under the promissory estoppel claim in the parties' alleged First Verbal Agreement is not covered by the parties' Written Agreement as that agreement is silent as to whether Sephora is to be the exclusive buyer of OCC's products in sufficient amount to offset OCC's losses from not accepting purchase orders from Sephora's competitors (*Curtis* , **236 AD2d 237** , **653 N.Y.S.2d 569** [promissory estoppel claim upheld where the contract does not cover the dispute in issue]).

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8 Cited , Quoted — Tierney v. Capricorn Invs., LP, 189 A.D.2d 629, 592 N.Y.S.2d 700 (App Div, 1st Dept 1993)

When a written contract provides that it can only be changed by a signed writing, an oral modification of that agreement is not enforceable (**General Obligations Law § 15-301 [1]** ; *Tierney v Capricorn Invs.* , **189 AD2d 629** , 631, **592 N.Y.S.2d 700** [1st Dept 1993]). However, complete and partial performance are exceptions to the requirement of a written modification: "When the oral agreement to modify *has in fact been acted upon to completion* , the same need to protect the integrity of the written agreement from false claims of modification does not arise. In such case, not only may past discussions be relied upon to test the alleged modification, but the actions taken may demonstrate, objectively, the nature and extent of the modification. Moreover, apart from statute, a contract once made can be unmade and a contractual prohibition against oral modification may itself be waived.

Where there is *partial performance* of the oral modification sought to be enforced, the likelihood that false claims would go undetected is similarly diminished. Here, too, the court may consider not only past oral exchanges, but also the conduct of the parties. *But only if the partial performance be unequivocally referable to the oral modification* is the requirement of a writing under (subdivision 1) section 15-301 (of the General Obligations Law) avoided (*Rose v Spa Realty Associates* , **42 NY2d 338** , **366 N.E.2d 1279** , **397 N.Y.S.2d 922** [1977][emphasis added]).

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In the instant case, OCC alleges that it produced products for the new and other existing locations pursuant to purchase orders from Sephora totaling $590,558.40 in reliance on Sephora's vice president's verbal representation that it would share in the fixture costs. OCC has sufficiently plead partial performance unequivocally referable to the alleged oral modification that Sephora would share in the fixture costs in light of allegations that OCC initially refused Sephora's purchase orders and only agreed to produce new products after Sephora's verbal representation was made with respect to sharing fixture costs (*Rose* , **42 NY2d 338** , 343-344, **366 N.E.2d 1279** , **397 N.Y.S.2d 922**). Further buttressing the contention that OCC's performance is unequivocally referable to the oral modification is the fact that the Written Agreement is not a "requirements contract," and thus, OCC had no contractual duty to expand the placement of its products at Sephora's stores.

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