

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 08-CV-10269-RGS

PSMG INTERNATIONAL, INC.

v.

NODINE'S SMOKEHOUSE, INC.

MEMORANDUM AND ORDER ON
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

November 3, 2009

STEARNS, D.J.

On February 15, 2008, PSMG International, Inc., brought this action against Nodine's Smokehouse, Inc. (Nodine's), for breach of contract, negligence, and violations of Mass Gen. Laws ch. 93A.¹ Presently before the court is defendant's motion for summary judgment.

BACKGROUND

Nodine's is a manufacturer of smoked fishes, meats, and cheeses. Nodine's is based in Torrington, Connecticut. In February of 2006, Paul Giragosian, the Chief Executive Officer and President of PSMG, approached a Nodine's salesman at a trade show with an offer to serve as the exclusive distributor of Nodine's products in China, Hong Kong, Malaysia, and Taiwan. The only written acknowledgment of the joint undertaking was a letter dated April 21, 2006, which stated (insofar as relevant) part that

¹The Complaint additionally asserted claims for violation of various federal regulations and for breach of warranty. These were dismissed by the court on July 31, 2008.

“PSMG is the exclusive supplier of [Nodine’s] products for China, Hong Kong, Malaysia, and Taiwan.”² No contract terms (such as the duration, the parties’ respective obligations, or the amount or nature of any commissions to be paid) were mentioned. At the heart of this litigation is a dispute over whether an oral agreement supplemented this letter of intent. While PSMG contends that Nodine’s bound itself orally to supply “all documentation necessary” to export its products to Asia, Nodine’s argues that such a promise, even if made, is so lacking in content as to be unenforceable.

On August 21, 2007, Todd Hicks, Nodine’s chef, emailed the ingredients for Nodine’s boneless turkey breast and boneless ham to Wen Chiang, PSMG’s marketing research and sales advisor.³ Todd invited Chiang and Giragosian to tour Nodine’s plant. On August 22, 2007, Chiang responded via email, stating in pertinent part: “Thank you for the information, but I need more information if that can be for all your product line that will be the best. . . . [Giragosian] and I will come to visit your company in next Wednesday, and would like to ask you to have all product documents information for the export to Asia use.” On August 29, 2007, Giragosian and Chiang visited Nodine’s and placed an order for frozen poultry, beef, and pork products. PSMG advised Nodine’s that the products would be used as samples at a trade show in Taiwan the following month.

On September 4, 2007, Chiang sent an email to Todd , requesting that Nodine’s forward the following information: “1. Each sample as intent to make the purchase, I will

²Although the Complaint alleges that Nodine’s and PSMG signed a “contract,” only Nodine’s signed the letter of intent.

³Hicks’s email was presumably in response to an inquiry from Chiang, although the record does not say.

need the Nutrition fact information. 2. Spec, 3. The products must have FDA inspection and or by APHIS, or APHASIA for the Sanitary Certificate in order by air cargo company to accept the package as well as by overseas government in clear of custom. I am awaiting for your information's."⁴

According to PSMG, Giragosian spoke with Nodine's personnel and left messages requesting product information nearly every day for ten days beginning in August of 2007.⁵ In September of 2007 (the parties do not provide a specific date), Chiang attempted to bring 170 pounds of Nodine's products into China in a large suitcase. The products were

⁴"FDA" stands for the U.S. Food and Drug Administration. Although PSMG does not define "APHIS," the court presumes that the acronym refers to the Animal Plant and Health Inspection Service, which is a part of the U.S. Department of Agriculture (USDA). See <http://www.aphis.usda.gov> (last visited Nov. 2, 2009). Nor does PSMG explain what "APHASIA" is. Although the court at first assumed that it referred to an Asian counterpart to APHIS, an internet search revealed the existence of no such agency. The only information found in the search is that the word "aphasia" describes a "disorder that results from damage to portions of the brain that are responsible for language." www.nidcd.nih.gov/health/voice/aphasia.htm (last visited Nov. 2, 2009).

⁵At his deposition, Giragosian could not identify any specific document that he requested from Nodine's. When asked if he knew what documents were required by the U.S. government to export Nodine's products, Giragosian stated, "I'm not that familiar. But I know that they have to have some - time of goods has to be approved by USDA, and have to have the stamps, their nutrition stuff. And they have to have some kind of seal or whatever. There are a few things they have to have." When asked if he knew what documents were required by Chinese officials, Giragosian stated, "Same idea." Giragosian Dep., at 37-38. For his part, when asked if he was familiar with USDA requirements for exporting food products, Chiang stated, "Well, I'm not familiar, but I spoke to customs several times, and it is not difficult, it's very fairly easy. They just say as long as manufacturer of their product had been tested and inspected by the customs and the custom checked their records, they've been registered, has been approved by USDA, then they will give a certificate." Chiang Dep., at 118-119. In his affidavit, Chiang stated that he spoke with U.S. officials numerous times, but he does not mention ever discussing Chinese import restrictions.

confiscated by Chinese officials. On October 25, 2007, Nodine's received a letter from Chiang stating,

[W]hen my plane arrived to Shanghai Custom, the X-ray show the products, and the custom ask me to provide Sanitary Certificate and proof of purchase. Since I do not have this certificate, the custom took all meat and my passport to making entry remark that I am trying to smuggle the products Your failure to supply the Sanitary Certificate and Ingredient information to us for samples for the Taiwan International Food Trade show embarrassed the Nodine trade name and result in a fine of improper entry of products into China, all because your actions.⁶

On December 18, 2007, Chiang sent another letter requesting Nodine's to provide any sanitary certificate in its possession, any USDA approval certificates for Nodine's products, and the name of any ingredients that were not listed on the packages. Nodine's did not provide any of the requested information.⁷

DISCUSSION

Summary judgment is appropriate where “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R.

⁶Although the record is not clear on this point, the court assumes that Chiang did not declare the products on his Chinese customs form. When asked why Chiang brought products to China without the proper documentation, Giragosian stated, “I don't know. I didn't do it. I don't know what his thought was. . . . I was the President of the company. I says, You taking a chance; you want to take a chance, go ahead. I said, Maybe by you taking a chance they might not let you. . . . The thing is, before we took some pieces with us, samples, and put in it luggage. And it went through. There was no problem.” Giragosian Dep., at 83.

⁷The parties dispute the nature of their subsequent dealings. PSMG denies Nodine's claim that it did not know what a “sanitary certificate” was and that it asked PSMG provide it with a sample certificate or an official document number that it could use as a reference.

Civ. P. 56(c). “A ‘genuine’ issue is one that could be resolved in favor of either party, and a ‘material fact’ is one that has the potential of affecting the outcome of the case.” Calero-Cerezo v. U.S. Dep’t of Justice, 355 F.3d 6, 19 (1st Cir. 2004), citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-250 (1986).

1. Breach of Contract

PSMG has the burden of proving the existence of a contract. Canney v. New England Tel. & Tel. Co., 353 Mass. 158, 164 (1967). Under Massachusetts law, “[a]ll the essential terms of a contract must be definite and certain so that the intention of the parties may be discovered, the nature and extent of their obligations ascertained, and their rights determined.” Cygan v. Megathlin, 326 Mass. 732, 733-734 (1951). “It is axiomatic that to create an enforceable contract, there must be an agreement between the parties on the material terms of that contract, and the parties must have a present intention to be bound by that agreement.” Situation Mgmt. Sys., Inc. v. Malouf, Inc., 430 Mass. 875, 878 (2000). Although “unspecified terms will not necessarily preclude the formation of a binding contract,” id., “[i]t is essential to the existence of a contract that its nature and the extent of its obligations be certain. This rule has been long established.” Caggiano v. Marchegiano, 327 Mass. 574, 579 (1951). This rule applies to oral as well as written contracts. See Simons v. American Dry Ginger Ale Co., 335 Mass. 521, 525 (1957).

Nodine’s alleged promise to provide “all documentation necessary” to export Nodine’s products to Asia is simply too vague and indefinite to create an enforceable contract. This general statement does not provide any indication of the nature and extent of the parties’ putative obligations. While their respective roles in the contemplated

transaction are reasonably clear – Nodine’s was to manufacture and supply food products and PSMG was to export them – there is no indication as to which party was responsible for identifying the necessary export documents. Nor is there any indication whether Nodine’s was supposed to act proactively or only after a request by PSMG, or of the time-frame in which either party was to act.⁸

The difficulty here is that the [agreement] sued on is silent as to material matters important in its interpretation for the ascertainment of the obligations of the parties Many of the essential terms necessarily involved in the proposed undertaking are not set forth and without them no enforceable contract is shown.

Geo. W. Wilcox, Inc. v. Shell E. Petroleum Prods., Inc., 283 Mass. 383, 390 (1933).

“Construction and enforcement of the agreement without these essential terms would be futile, and [the court] cannot supply these provisions without writing a contract for the parties which they themselves did not make.” Held v. Zamparelli, 13 Mass. App. Ct. 957, 962 (1982) (internal citation omitted). “[I]nchoate language, which both anticipates a final agreement and is imperfect in material respects, fails to bind the parties.” Jones v. Consol. Rail Corp., 33 Mass. App. Ct. 918, 920 (1992). See Buker v. Nat’l Mgmt. Corp., 16 Mass. App. Ct. 36, 42 (1983) (defendant’s oral promise to “work things out” was too vague to form

⁸In fact, it is telling that even at his deposition, Giragosian acknowledged that PSMG was ultimately responsible for providing shipping documentation. There is no indication in Nodine’s alleged promise as to what Nodine’s was required to provide to PSMG.

Q: Do you know who is responsible in the relationship of exporter [PSMG] and manufacturer [Nodine’s] to provide documentation to ship?

A: I think Wen supposed to do that.

Q: But it’s PSMG’s responsibility?

A: Yes.

Giragosian Dep., at 74.

a contract); Brookhaven Hous. Coal. v. Solomon, 583 F.2d 584, 593-594 (2d Cir. 1978) (Town's promise to "provide whatever programs would be necessary" unenforceable for lack of specificity); Cabot Corp. v. AVX Corp., 448 Mass. 629, 640 (2007) (a "contract" to purchase an unspecified amount of goods is "not a contract at all"). In sum, PSMG has failed to carry its burden of proving the existence of a binding contract.

2. Negligence

PSMG's negligence claim is essentially an iteration of its breach of contract claim, as it is premised upon Nodine's alleged duty to provide a complete list of ingredients and a sanitary certificate. The economic loss doctrine precludes recovery under a theory of tort when there is only an economic loss and no personal injury or physical damage to property. See Garweth Corp. v. Boston Edison Co., 415 Mass. 303, 305 (1993). See also Clark v. Rowe, 428 Mass. 339, 342 (1998). Massachusetts courts have recognized a limited exception to the economic loss doctrine based on a theory of negligent breach of contractual duties. See Carter v. Transam. Life Ins. Co., 2000 WL 1299519 (Mass. Super. May 23, 2000) at *3, citing Abrams v. Factory Mut. Liab. Ins. Co., 298 Mass. 141, 144 (1937). However, because Nodine's did not breach any contractual obligation, the exception does not apply.

3. Chapter 93A

Mass. Gen. Laws ch. 93A provides relief for unfair and deceptive acts by a party to a commercial transaction. The remedy is equitable in nature. "Although whether a particular set of acts, in their factual setting, is unfair or deceptive is a question of fact . . . the boundaries of what may qualify for consideration as a G.L. c. 93A violation is a

question of law.” R. W. Granger & Sons, Inc. v. J & S Insulation, Inc., 435 Mass. 66, 73 (2001). A chapter 93A claim “requires a showing of conduct that (1) falls within the penumbra of some common-law, statutory, or other established concept of unfairness; (2) is immoral, unethical, oppressive, or unscrupulous; and (3) causes substantial injury to [consumers or other businesspersons].” Jasty v. Wright Med. Tech., Inc., 528 F.3d 28, 37 (1st Cir. 2008) (citations omitted). Because PSMG’s common-law claims for breach of contract and negligence fail (and because there is no palpable of evidence that Nodine’s engaged in any unethical or unscrupulous business conduct), summary judgment on this claim is also appropriate.⁹ See FAMM Steel, Inc. v. Sovereign Bank, 571 F.3d 93, 108 (1st Cir. 2009).

ORDER

For the foregoing reasons, defendant’s motion for summary judgment will be ALLOWED. The Clerk will enter judgment in favor of Nodine’s on all counts and close the case.

SO ORDERED.

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE

⁹A mere breach of contract does not in any event give rise to liability under Chapter 93A. Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 100-101 (1979). Moreover, disputes that arise between parties to a joint venture or joint business undertaking do not fall within the scope of Chapter 93A. Zimmerman v. Bogoff, 402 Mass. 650, 662 (1988), Szalla v. Locke, 421 Mass. 448, 452 (1995).