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United States District Court, S.D. New York.

E & K SUCCESS IMPORT EXPORT LTD., Plaintiff,
v.
GEHA–WERKE GMBH and Dennison Manufacturing Company, Defendants.

No. 85 Civ. 8426 (RLC).
|
Dec. 18, 1985.

Attorneys and Law Firms

Dweck & Sladkus, New York City, for plaintiff; Jack S. Dweck, of counsel.

White & Case, New York City, for defendants; Rayner M. Hamilton, Alice K. Jump, of counsel.

OPINION

CARTER, District Judge.

***1** Plaintiff E & K Success Import Export Ltd. ("E & K") has filed a complaint seeking to compel defendant, Geha-Werke GMBH ("Geha") to continue to recognize an exclusive distributor contract with plaintiff for the Geha "Mark 2 Text-Marker" line of marking pens. Plaintiff alleges an exclusive distributorship in the importation of these pens which defendant Geha has breached, and also alleges unlawful interference with plaintiff's economic benefits, malicious interference with plaintiff's contractual rights and unfair competition by defendant Dennison Manufacturing Company ("Dennison"). By order to show cause, dated October 24, 1985, plaintiff seeks a temporary restraining order, a preliminary injunction to enjoin Geha from breaching the exclusive distributorship contract and Dennison from distributing the Geha Mark 2 Text-Marker pens.

A hearing was held on October 31, 1985. At that hearing testimony was given by Fred Kooby, President of plaintiff organization, who was scheduled to be outside the United States and would not be available at any subsequent hearing scheduled within the next several weeks. At the conclusion of that hearing, the court ruled that plaintiff's showing was insufficient to warrant the issuance of a temporary restraining order. The matter was set down for further hearing on November 6.

At that hearing plaintiff's controller and one of plaintiff's partners testified as well as the marketing director for the Dennison Carter Division of Dennison.

The requirements for a preliminary injunction in this circuit is irreparable injury and a showing of either the probability of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation with the balance of hardship tipping decidedly toward the party requesting relief. *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.,* 596 F.2d 70 (2d Cir.1979). The absence of a showing of irreparable injury is fatal. *Id.* at 72. ("Irreparable injury means injury for which a monetary award cannot be adequate compensation and ... where money damages is adequate compensation a preliminary injunction will not issue.").

At the hearing, evidence of the plaintiff's exclusive right to distribute the Geha Mark 2 pen was based on two documents: a telex dated March 3, 1981, (Pl. Exh. 1) and a letter dated June 11, 1981, (Pl. Exh. 6), both from Geha. It is conceded that the telex granted to plaintiff exclusivity on a trial basis and only until the end of 1981. The telex negates any other conclusion: "with reference to discussions held in Frankfurt on 22/2/81 we herewith confirm to grant you sole distribution rights for our geha mark–2 for a trial period until the end of 1981...." (Pl. Exh. 1)

The June 11, 1981 letter, therefore, becomes plaintiff's sole basis for its contract claim. After referring to a recent visit to Geha's factory in Hanover by Kooby and James Ezra, the letter continues:

> It was agreed to extend the sole distribution rights for our Mark 2 initially granted to your good selves for a trial period until end of 1981, as per our telex dated 3/3/81, until the end of 1982 as well, provided that your purchases effected with our Geha Mark 2 within the next year will amount to a minimum of 100,000 pieces

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> regardless of the quantities imported by you in 1981. For the years thereafter, you promised yearly increases of approximately 25 per cent. When fixing these figures, we started from minimum quantities which you should be able to realize without difficulties all the more so as we, in fact, expect you to reach a multiple therefrom.

***2** Plaintiff reads the June 11, 1981 letter as a contract granting exclusive distributorship rights through 1982, and thereafter, provided sales increased by 25% per year. (Kooby Tr. at 14). Kooby relies on the sentence in the June 11 letter following the grant through 1982 for this conclusion, and testified that oral representations to that effect were made to him as well. *Id.* at 14–15.

Geha takes the view that the letter provided only for a trial period through 1982 and that thereafter:

> it would either enter into a formal distribution contract, terminate its arrangements with E & K, and/or continue sales on a spot basis. As the letter of June 11, 1981 notes, E & K had promised to increase their purchases by 25% per year. However, because the letter related to a limited trial period, we had advised E & K that if there was to be a long-term relationship, Geha would expect E & K's purchases in subsequent years to increase very substantially and very quickly.
>
> It was and is GEHA's policy to sign a formal contract with any party to whom it grants exclusive distribution rights on a continuing basis. GEHA's standard contract spells out in detail the duration of the contract, the territory which it covers, and the distributor's minimum sales requirements. The contract also contains a provision prohibiting the distributor from selling competing products as well as a provision for termination after notice. Also GEHA's standard contract states that it is governed by German law.

(Affidavit of Angelo Coviello, Export Manager of Geha, ¶¶ 8–9 at 3–4). Coviello and Peter Sturver, in charge of Geha's United States exports, had met with Kooby and Ezra in February, 1981, at the Frankfurt trade fair. Their discussions about the possibility of marketing the Geha products resulted in an agreement to grant E & K exclusive distributor rights through 1981 and the March 3, 1981 telex. In June, 1981, Coviello and Sturver met with Kooby and Ezra in Hanover, which led to the June 11, 1981 letter.

I read the June 11, 1981 letter as only a grant of an exclusive distributorship through 1982, and if I am right, the plaintiff has no basis for relief of any kind. Even if this reading is in error, it would be difficult to base a contract on this communication, since the evidence adduced shows that there was no meeting of the minds. *Gupta v. University of Rochester,* 57 A.D.2d 731, 395 N.Y.S.2d 566, 567 (4th Dep't. 1977) ("Where the offeror, using ambiguous language, reasonably means one thing and the offeree reasonably understands differently, there is no contract."); *Restaurant Associates Industries, Inc. v. Anheuser-Busch, Inc.,* 397 F.Supp. 1213, 1217 (S.D.N.Y.1975) (Pollack, J.), *decided on the merits,* 422 F.Supp. 1105 (S.D.N.Y.1976) ("The fundamental basis of contract is a meeting of minds of the parties."); *Murphy v. Gutfreund,* 583 F.Supp. 957, 962 n. 6 (S.D.N.Y.1984) (Lasker, J.) ("The 'meeting of the minds' doctrine applies only when both parties hold different understandings of an agreement, do not disclose their respective positions to each other, nor have any reason to know of any difference in interpretation between them."); *Mefer S.A.R.L. of Paris, France v. Naviagro Maritime Corp.,* 533 F.Supp. 337, 345 (S.D.N.Y.1982) (Lumbard, C.J.) ("It is well settled that if two parties give different meanings to the words of a purported agreement, the party who sues for enforcement in accordance with his own meaning has the burden of proving that the other party knew what the claimant's meaning was and that the claimant did not and had no reason to know that the other party gave the words a different meaning.")

***3** If there is no meeting of the minds and no contract, there can be no holding that plaintiff is entitled to preliminary relief.

Moreover, even if we assume both that the plaintiff's reading is correct and that a contract between it and Geha exists, the latter's breach does not warrant injunctive relief because plaintiff can be compensated in money damages. *Jack Kahn Music Co. v. Baldwin Piano & Organ Co.,* 604 F.2d 755, 759 (2d Cir.1979). Injunctive relief is unavailable without a showing of "the absence of an adequate remedy at law, which is the sine qua non for the grant of such equitable relief," *Buffalo Forge Co. v. Ampco-Pittsburgh Corp.,* 638 F.2d 568, 569 (2d

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Cir.1981). While the law is settled in this circuit "that a remedy at law may be considered inadequate when the amount of damages would be difficult to prove", *Rockwell International Systems, Inc. v. Citibank N.A.,* 719 F.2d 583, 586 (2d Cir.1983); *see also Gerard v. Almouli,* 746 F.2d 936, 939 (2d Cir.1984); *Triebwasser & Katz v. American Telephone & Telegraph Co.,* 535 F.2d 1356, 1359 (2d Cir.1976); *Danielson v. Local 275, Laborers International Union of North America, AFL–CIO,* 479 F.2d 1033, 1037 (2d Cir.1973), no such problem exists here. Whatever damages the breach of any distributorship contract may have caused plaintiff can be calculated. The defendant, Dennison, is a major American Corporation. It had net sales of $248 million and net earnings of $10.7 million in 1974, and has experienced yearly increases thereafter reaching net sales figures of $648 million and net earning of $34.7 million in 1984. On the basis of these figures Dennison can respond in damages.

Since it is clear that plaintiff has an adequate remedy at law, it cannot show irreparable injury and the motion for preliminary injunction relief must be denied.

IT IS SO ORDERED.

All Citations

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