Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES **PART 17**

Justice

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ELMHURST DAIRY, INC.,

Plaintiff,

-against-

BARTLETT DAIRY, INC., STARBUCKS CORPORATION, DEAN FOODS COMPANY, TUSCAN/LEHIGH DAIRIES, INC.,

Defendants.

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Index No. 12116/11
Motion Date: 10/12/11
Motion Cal. No. 18, 19, & 20

The following papers numbered 1 to 21 read on this motions by defendants **STARBUCKS CORPORATION** ("Starbucks") and **DEAN FOODS COMPANY and TUSCAN/LEHIGH DAIRIES, INC.** (collectively "Dean")for Orders pursuant to CPLR 3211 to dismiss plaintiff's complaint; and cross-motion by **ELMHURST DAIRY, INC.** ("Elmhurst") for an Order pursuant to CPLR 3025 granting it permission to amend its Amended Verified Complaint. The motions under calendar numbers 18, 19, & 20 have been consolidated for purposes of disposition.

	PAPERS NUMBERED
Notice of Motion-Affidavit-Exhibits......................................	1-4
Defendant Starbucks Memorandum of Law..........................	5
Notice of Cross-Motion..	6
Affirmation in Opposition & Support-Exhibits.....................	7-9
Elmhurst's Memorandum of Law..	10
Affidavit of Jay Valentine-Exhibits......................................	11-12
Reply Memorandum-Starbucks...	13-14
Notice of Motion-Memorandum...	15-17
Notice of Motion..	18-19
Reply Memorandum-Dean..	20-21

Upon the foregoing papers these motions by defendants Starbucks and Dean for Orders pursuant to CPLR 3211 to dismiss plaintiff's complaint; and cross-motion by Elmhurst for an Order pursuant to CPLR 3025 granting it permission to amend its Amended Verified Complaint, are decided as follows:

Initially, this Court notes that defendants Starbucks and Dean have previously made a motion seeking the same relief that was denied by this Court with permission to renew, in an Order, dated July 7, 2011. They have adhered to the conditions for renewal and thus these motions are properly before this Court.

According to the complaint, on or about February 28, 2003, Elmhurst and Bartlett

entered into the Contract under which Bartlett agreed to have all of its milk requirements processed and packaged exclusively by Elmhurst for a period of 10 years, beginning on December 1, 2003 and continuing through November 10, 2013. Specifically, under Section 2.1 of the Contract, Bartlett agreed as follows: "[Elmhurst] shall process and package F.O.B. [Bartlett's] trucks at [Elmhurst's] Plant, all of [Bartlett's] Requirements and [Bartlett] agrees to have all [Bartlett's] Requirements processed and packaged exclusively by [Elmhurst]" (emphasis added). The second WHEREAS clause of the Contract. states that: "[Bartlett] is desirous of having all of its requirements of milk and milk products that [Bartlett] sells as a Dealer described on Schedule A hereto . . . , processed and packaged at [Elmhurst's] Plant." The Contract at 8.1(f) identifies as an Event of Default by Bartlett: "The transfer by [the Bartlett] of any portion of [the Bartlett's] routes or business without compliance with the provision of Paragraph 18 hereof[,]" and Paragraph 18 of the Contract provides that Bartlett may not "assign any of its rights or obligations under this Agreement without [Elmhurst]'s written consent thereto, which shall not be unreasonably withheld ...," such that during the ten year term of the Contract, unless terminated earlier pursuant to the terms of 12 of the Contract, Bartlett must use Elmhurst exclusively for its milk processing needs in support of its milk distribution business. The Contract at 12.2 provides: "[Bartlett] may cancel this Agreement on twelve (12) months prior written notice if [Bartlett] intends to and does in fact permanently discontinue its milk distribution business.

The complaint further states that, "[u]pon information and belief, at all times relevant herein, Bartlett has had, presently has, and shall continue to have through November 2013, a contract with Starbucks ("Bartlett/Starbucks Contract") to deliver, among other things, milk products to Starbucks locations in the New York City metropolitan area and other areas in the Northeast United States. Bartlett has not delivered any milk other than Elmhurst milk to these locations of Starbucks (except as expressly permitted, by written waiver, by Elmhurst, as for example, in the upstate New York metropolitan regions of Buffalo, Rochester and Syracuse. Under Section 11 of the Contract, Elmhurst agreed to construct for Bartlett and provide to Bartlett certain facilities at Elmhurst's processing plant and parking spaces for Bartlett's delivery vehicles. Elmhurst agreed to build and provide these facilities to Bartlett because of the amount of business that Bartlett received and would receive from Starbucks and the cost efficiencies created by the large volume of milk distributed by Bartlett to Starbucks.

On or about May 12, 2011, the President of Bartlett, informed Jim Rosa, plant manager for Elmhurst, that beginning on May 23, 2011 Bartlett would be delivering milk processed by Dean to all the Starbucks stores currently provided with Elmhurst milk by Bartlett. By Order to Show Cause application dated May 19, 2011, Elmhurst sought a temporary restraining order and preliminary injunction enjoining Bartlett from delivering milk processed by Dean to Starbucks as of May 23, 2011. This Court denied Elmhurst's request for a temporary restraining order. On May 26, 2011, Starbucks' managing corporate counsel, Kevin Stock, Esq., expressly confirmed to Elmhurst's General Counsel, Frank V. Balon, Esq., during a telephone conference between the two of them that Bartlett would begin delivering milk processed by Dean on June 17, 18 or 19, 2011. Elmhurst claims that the Contract between it

and Bartlett does not permit Bartlett to engage in the milk distribution business with Starbucks using the milk of a rival milk processor to fulfill the contractual obligations of Bartlett to Starbucks (or any other client of Bartlett's milk distribution business), and any such scheme will put Bartlett in violation of the Contract. Elmhurst claims that Bartlett's arrangement with Starbucks and Dean is part of a bad faith scheme to circumvent the intent of the Contract, which was and is for Elmhurst to be the exclusive supplier of all of Bartlett's requirements for milk and milk products, in support of Bartlett's milk distribution business.

Elmhurst also alleges that both Starbucks and Dean Foods have been made aware of the Contract and of its exclusivity provisions. Also, Bartlett and Starbucks have repeatedly made clear that despite the exclusivity provisions contained in the Contract, Starbucks would prefer to have Bartlett supply it with milk processed by a company other than Elmhurst since Starbucks is unhappy with the pricing of the milk supplied by Elmhurst. Elmhurst also claims that it has a route business through which it directly supplies grocers with fluid milk products. Dean, competes with Elmhurst for the retention of new grocer accounts. A representative of Dean has indicated to Elmhurst that Dean is very unhappy with the pricing that Elmhurst is using to compete in the streets to gain accounts and that it would prefer that Elmhurst not compete with it in this manner. Elmhurst claims that Dean's participation in the bad faith scheme described above is part of an overall plan by Dean to put Elmhurst out of business so that it can anti-competitively gain greater market share and assert more control over milk pricing in New York City and the greater New York metropolitan area. Elmhurst also alleges that Bartlett's action in withdrawing its Starbucks' requirements from Elmhurst will cause an immediate and irreversible loss of business to Elmhurst. Loss of the Starbucks business presents an imminent and severe threat to the viability of Elmhurst as a going concern.

Elmhurst brought this action seeking a declaratory judgment for the following: the Contract to be in full force and effect; the Second Whereas clause is not incorporated into the Contract; the intention by Bartlett to discontinue its purchases under the Contract for the distribution of milk products to Starbucks to be a violation of the Contract and an Event of Default under the provisions of the Contract; the intention by Bartlett to distribute to Starbucks milk processed by Dean and sold by Dean directly to Starbucks, constitutes an assignment of Bartlett's obligations under the Contract, without Elmhurst's consent, which consent is reasonably withheld by Elmhurst, and thus constitutes a violation of the Contract by Bartlett; the alleged intention by Bartlett to distribute milk to Starbucks that is sold by Dean to Starbucks constitutes an assignment under the contract, which must inure to the benefit of Elmhurst, as such assignment is subject to the Contract, such that Dean must procure the milk from Elmhurst for Bartlett to distribute to Starbucks. Elmhurst has also brought causes of action for a permanent injunction, breach of contract against Bartlett, for anticipatory breach and repudiation against Bartlett, for breach of the duty of good faith and fair dealing against Bartlett, for tortious interference with contract against Starbucks, and for tortious interference with Business relations and economic advantage against Starbucks and Dean.

Dean and Starbucks now move to dismiss Elmhurst Dairy Inc's sixth and eight causes of action for tortious interference with contract on documentary evidence grounds under CPLR

3211 (a) (1). They also seek to dismiss Elmhurst's seventh and ninth causes of action for tortious interference with economic advantage under CPLR 3211 (a) (7), claiming that Elmhurst has failed to plead facts sufficient to sustain these claims. Elmhurst has opposed the motions. Starbucks and Dean contend that Elmhurst claims it has the right to force Starbucks to buy milk from Elmhurst pursuant to Elmhurst's contract with Bartlett to which Starbucks is not a party. According to them, the contracts between the parties make clear that Elmhurst has no such right and that Starbucks is free to purchase its milk from whomever it chooses and has chosen Bartlett to deliver its milk, since Bartlett already is a general distributor of all its store products. They point out that Bartlett and Starbucks had an Agreement, dated August 10, 2010, under which Starbucks purchased milk from Bartlett as a seller of milk and it was understood that Bartlett would source its milk with Elmhurst. This contract was not exclusive, was terminable upon sixty days notice, and did not obligate Starbucks to buy a particular amount of milk from Bartlett. On May 13, 2011, Starbucks and Dean entered into an agreement wherein Dean's wholly owned subsidiary, Garelick Farms, LLC, would sell its milk to Starbucks.

CPLR 3211 (a) (1) provides that "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded on documentary evidence . . . " In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim . . . " Berger v Temple Beth-El of Great Neck, 303 AD2d 346, 347 (2d Dept 2003), *quoting* Trade Source v Westchester Wood Works, 290 AD2d 437 (2d Dept 2002).

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference. (Jacobs v Macy's East, Inc., 262 AD2d 607, 608; Leon v Martinez, 84 NY2d 83.) The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v State of New York, 42 NY2d 272; Jacobs v Macy's East Inc., supra), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading. (See, Rovello v Orofino Realty Co., Inc., 40 NY2d 633.) The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint. (See, Rovello v Orofino Realty Co., Inc., supra; Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159.) In determining a motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory ." (1455 Washington Ave. Assocs. v Rose & Kiernan, supra, 770-771; Esposito-Hilder v SFX Broadcasting Inc., 236 AD2d 186.)

In an Order of this Court, dated August 3, 2011, this Court granted the motion by Bartlett to dismiss the complaint as against Bartlett. The Court found that a proper reading of the Contract between Bartlett and Elmhurst provided that in order for Bartlett to breach the

Supply Agreement it would have to be selling milk that it purchased from a processor other than Elmhurst. Since the Amended Complaint merely alleges that Bartlett will be delivering milk that Starbucks purchases from Dean, that does not and cannot constitute a breach of the Supply Agreement. The delivering of milk is not a Dealers' Requirement as set forth in the Contract between the parties. The Court also found that the Agreement did not prohibit Bartlett's acts as set forth in the complaint. While Elmhurst was correct that the contract prohibited Bartlett from distributing milk products not purchased from Elmhurst, Bartlett's arrangement with Dean and Starbucks is to deliver milk products purchased by Starbucks from Dean.

The sixth and eighth causes of action brought against Starbucks and Dean are for tortious interference with contract. The elements of tortious interference with contract are 1) the existence of a valid contact between plaintiff and a third party, 2) defendant's knowledge of that contract, 3) the intentional procurement of the breach by defendant without justification, and 4) damages. Lama Holding Co. v Smith Barney, Inc., 88 NY2d 413 [1996].) As set forth above, while there was a contract between Elmhurst and Bartlett, it did not prevent Bartlett from entering into the subject relationship with Starbucks and Dean. Accordingly, the documentary evidence established the lack of the first element, and the sixth and eighth causes of action are dismissed.

The seventh and ninth causes of action are for tortious interference with prospective economic advantages. The pleadings are deficient since they fail to set forth sufficient facts to plead wrongful conduct by defendants Starbucks and Dean to secure a competitive advantage or that the actions taken were for the sole purpose of harming the plaintiff. *See*, Carvel Corp. v Noonan, 3 NY3d 182 (2004); NBT Bancorp v Fleet/Norstar Fin. Grp., 215 AD2d 990 (1995) affd 87 NY2d 614 (1996); North Main St. Bagel Corp. V Duncan, 6 AD3d 590 (2004.)

Based on the above, the motions by defendants Starbucks and Dean are granted and the complaint is dismissed as against them. The Court notes that contrary to Elmhurst's claim, there is no need to deny this motion pending the completion of discovery.

The cross-motion by Elmhurst to amend its Amended Complaint is denied. It is well-settled that leave to amend pleadings is freely given "absent prejudice" or surprise resulting directly from the delay." McCaskey Davies & Associates Inc. v. New York City Health and Hospitals Corp., 59 N.Y.2d 755 (1983). However, an amendment which is plainly lacking in merit will not be permitted. Sunrise Plaza Assocs., LP v International Summit Equities Corp., 288 AD2d 300 (2d Dept 2001.) Here, the proposed amendment entails allegations that Bartlett is distributing Dean's milk and acting as an effective seller of Dean's milk. Elmhurst claims this was discovered in the course of motion practice. This amendment is lacking in merit since this Court has reviewed the documentary evidence and found that Bartlett is not effectively selling Dean's milk. Accordingly, the motion to amend the complaint is denied.

Dated: October 18, 2011

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ORIN R. KITZES, J.S.C.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES PART 17
Justice

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ELMHURST DAIRY, INC.,

Plaintiff,

-against-

BARTLETT DAIRY, INC., STARBUCKS CORPORATION, DEAN FOODS COMPANY, TUSCAN/LEHIGH DAIRIES, INC.,

Defendants.

Index No. 12116/11
Motion Date: 10/12/11
Motion Cal. No. 21

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Thefollowing papers numbered 1 to 7 read on this motion by plaintiff to reargue or renew this court's order dated August 3, 2011, which granted defendant **BARTLETT DAIRY, INC.**'s ("Bartlett") motion to dismiss the complaint as against Bartlett, and upon renewal or reargument seeks the denial of Bartlett's motion; or in the alternative, for an order pursuant to CPLR 3025 granting plaintiff leave to amend its Amended Verified Complaint.

	PAPERS NUMBERED
Notice of Motion	1
Affirmation-Exhibits	2-4
Memo in Support	5
Memo in Opposition	6-7

Upon the foregoing papers it is ordered that the motion by plaintiff to reargue or renew thiscourt's order dated August 3, 2011, which granted defendant Bartlett's motion to dismiss the complaint as against Bartlett, and upon renewal or reargument seeks the denial of Bartlett's motion; or in the alternative, for an order pursuant to CPLR 3025 granting plaintiff leave to amend its Amended Verified Complaint is denied, for the following reasons:

In its August 3, 2011 Order, this Court granted Bartlett's motion on the grounds that, *inter alia*, a proper reading of the Contract between Bartlett and Elmhurst provided that in order for Bartlett to breach the Supply Agreement it would have to be selling milk it purchased from a processor other than Elmhurst. Since the Amended Complaint merely alleges that Bartlett will be delivering milk that Starbucks purchases from Dean, that does not and cannot constitute a breach of the Supply Agreement. The delivering of milk is not a Dealers' Requirement as set forth in the Contract between the parties. The Court also found that the Agreement did not prohibit Bartlett's acts as set forth in the complaint. While Elmhurst was correct that the contract prohibited Bartlett from distributing milk products not purchased from Elmhurst, Bartlett's arrangement with Dean and Starbucks is to deliver milk products purchased by

Starbucks from Dean.

Elmhurst now seeks to reargue and renew Bartlett's motion that resulted in the dismissal of the complaint. Elmhurst claims this Court overlooked or misunderstood the allegations in the complaint. However, this Court clearly set forth its findings that Bartlett's obligations to Elmhurst were not violated by Bartlett's obligations to Starbucks and Deans. As such, Elmhurst has failed to meet its burden of establishing that this court misapprehended either the facts or the law so as to warrant reargument (Foley v Roche, 68 AD2d 558, 567 [1979], lv denied 56 NY2d 507 [1982]). Additionally, a motion to reargue is not a vehicle "to permit the unsuccessful party to argue once again the very questions previously decided" (id. at 567).

Furthermore, defendant has not proffered any new facts or law which would change this court's prior determination (see id.) as to warrant renewal pursuant to CPLR 2221(e)(2); *see*, Hageman v Home Depot U.S.A., Inc., 45 AD3d 732, 734 (2007.) Contrary to its claims, the new evidence of the purchase schedules does not change this Court's determination regarding the lack of a breach of the Agreement between Bartlett and Elmhurst.

Accordingly the branch of the motion seeking reargument and renewal is denied.

The branch of the motion seeking permission to amend the complaint is denied. It is well-settled that leave to amend pleadings is freely given "absent prejudice" or surprise resulting directly from the delay." McCaskey Davies & Associates Inc. v. New York City Health and Hospitals Corp., 59 N.Y.2d 755 (1983). However, an amendment which is plainly lacking in merit will not be permitted. Sunrise Plaza Assocs., LP v International Summit Equities Corp., 288 AD2d 300 (2d Dept 2001.) Here, the proposed amendment entails allegations that Bartlett is distributing Dean's milk and acting as an effective seller of Dean's milk. This amendment is lacking in merit since this Court has reviewed the documentary evidence and found that Bartlett is not effectively selling Dean's milk. Accordingly, the motion to amend the complaint is denied.

Dated: October 18, 2011

ORIN R. KITZES, J.S.C.