

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

TULSTAR PRODUCTS, INC., an)	
Oklahoma corporation,)	
)	
Plaintiff,)	
)	C.A. No. 04C-05-173 MMJ
v.)	
)	
IONSEP CORPORATION,)	
)	
Defendant.)	

MEMORANDUM OPINION

Following October 10, 2006 Bench Trial

Decided: December 7, 2006

Jeffrey P. Wasserman, Esquire, Ciconte, Roseman & Wasserman, Wilmington, DE, Attorney for Plaintiff

George T. Lees, III, Esquire, Rawle & Henderson, LLP, Wilmington, DE, Attorney for Defendant

JOHNSTON, J.

On May 18, 2004, plaintiff Tulstar Products, Inc., (“Tulstar”) filed a complaint against defendant Ionsep Corporation, Inc., (“Ionsep”), demanding judgment in the amount of \$172,567.84, plus interest and costs. Tulstar claims that it sold products to Ionsep and Ionsep failed to pay. Ionsep filed a counterclaim against Tulstar, alleging that Tulstar and Ionsep entered into an exclusive distributorship agreement. Ionsep claims that Tulstar failed to make any payments pursuant to the agreement and, therefore, Ionsep is entitled to an offset (as well as additional recovery) of \$250,000 from any amount due and owing Tulstar.

FINDINGS OF FACT

During the non-jury trial, the parties presented live testimony and documentary evidence. Tulstar is a chemical distributor. Ionsep develops and sells chemical processes. It is not disputed that Tulstar provided Ionsep with \$163,088.06 worth of chemicals, for which Ionsep has not compensated Tulstar.

In May 2003, Ionsep representatives met with Tulstar representatives. The parties discussed Ionsep’s need to increase its purchases of Sodium Hypophosphite for Ionsep’s production of Nickel Hypophosphite. Nickel Hypophosphite is a unique product, developed by Ionsep for sale to the electroless nickel plating industry.

During the May 2003 meeting, the parties also discussed the possibility of an exclusive distributorship agreement. Under such an agreement, Tulstar would become the exclusive distributor of Ionsep Nickel Hypophosphite . The parties' recollections differ as to whether an agreement was reached.

Ionsep's Evidence

On behalf of Ionsep, Daniel J. Vaughan¹ testified that the parties discussed the market potential for Nickel Hypophosphite as \$300,000,000 in the United States. Vaughan testified that he informed Tulstar that he "would consider \$250,000" in exchange for granting to Tulstar an exclusive distributorship contract. By mid-June, Tulstar had expressed interest in going forward with the agreement.

Ionsep set up a new manufacturing facility for Nickel Hypophosphite at a cost of \$60,000. Vaughan traveled to Tulstar's facility in Oklahoma, at Tulstar's request, as a technical consultant. Vaughan testified that he would not have discussed the proprietary technical aspects of Nickel Hypophosphite manufacturing and marketing unless the exclusive distributorship agreement had

¹Vaughn is a reknowned inventor and holder of numerous patents. Among other things, he discovered Tyvek.

been reached. Ionsep's Vice-President testified that Vaughan would not have traveled to Oklahoma without "some sort of an agreement."

Ionsep ordered special bottles to enable Tulstar to provide samples to its customers. As reflected in email correspondence, the parties were in the process of discussing a marketing price for the product. The parties also discussed the amount of product that could be produced during the start-up marketing period.

Ionsep's Vice-President testified that Ionsep purchased approximately \$300,000 worth of Sodium Hypophosphite, in reliance on Tulstar's agreement to distribute Nickel Hypophosphite. Further, Ionsep manufactured between 80,000 and 100,000 pounds of Nickel Hypophosphite solution. At the time of trial, the solution remained in Ionsep's inventory.

In mid-October 2003, Vaughn suffered a broken neck, and relations with Tulstar "essentially shut-off." It is undisputed that there is no written exclusive distributorship agreement. On December 2, 2003, Vaughan emailed Mark Nagle, President of Tulstar, asking: "Are you going to do anything on IONSEP Nickel Hypophosphite?" Nagle responded:

Well, there is a small matter of past due invoices to Tulstar amounting to \$172,567.84. Additionally, Dave imported approximately 250,000 lbs. Of SHPP based upon purchase orders given to us by Ionsep which is languishing in our warehouse due to your failure to pay for what we have already shipped to you.

* * *

If and when Ionsep gets current then if you desire we can look at marketing Nickel Hypo.

* * *

I trust this makes my position crystal clear.

Ionsep's Vice-President testified that it was her understanding that Vaughan had asked for \$250,000 in chemicals be shipped by Tulstar to Ionsep as payment for the exclusive distributorship agreement. The advance delivery of Sodium Hypophosphite only stopped when Vaughan became injured and incapacitated.

Tulstar's Evidence

Tulstar President Mark Nagle testified that during the May 2003 meeting, the parties discussed the unique nature of the manufacturing process and Ionsep's need for Sodium Hypophosphite. Nagle asked Vaughan if Ionsep needed marketing help for Nickel Hypophosphite and whether Vaughan would consider an exclusive arrangement. Nagle testified that Vaughan said that he would consider such an arrangement.

On June 6, 2003, Nagle sent a widely-distributed email stating: "My company, Tulstar Products Inc...is World Wide Distributor of a revolutionary new process to produce ultra high purity Electroless Nickel Hypophosphite solution for

high tech applications including manufacturing of CD's." An August 8, 2003 email from Tulstar to Ionsep sets forth draft sales materials, including the statement: "Tulstar Products Inc. in agreement with Ionsep Corp. now distributes Nickel Hypophosphite solution." Nagle testified that these emails reflect his understanding that Tulstar had entered into a non-exclusive agreement to sell Nickel Hypophosphite. No agreement had been reached concerning compensation.

During Vaughan's July 2003 visit to Oklahoma, Nagle testified that he again asked Vaughan for an exclusive distributorship and "Vaughan declined." Tulstar did not sell any of Ionsep's product. Nagle testified that the parties failed to reach agreement as to the marketing price. Additionally, Nagle stated that Tulstar purchased more than \$400,000 worth of Sodium Hypophosphite for Ionsep's use. Tulstar eventually was obligated to sell the Sodium Hypophosphite at a loss or at no profit to other manufacturers.

ANALYSIS

The crucial issue is whether the parties entered into an enforceable exclusive distributorship agreement whereby Tulstar would market Ionsep Nickel Hypophosphite. The evidence adduced at trial makes clear that the parties had

agreed that Tulstar would distribute Ionsep Nickel Hypophosphite. This agreement was never reduced to writing.

Delaware's Statute of Frauds provides that no breach of contract action may be brought for any agreement that is not to be performed within one year.² However, the Statute does not bar enforcement where there is sufficient part performance. The existence and terms of an oral contract must be established by clear and convincing evidence. The part performance must be such that the actor would have had no other reason to perform, absent contractual obligation.³ The part performance exception applies in Delaware to exclusive distributorship contracts.⁴

The trial evidence demonstrates that Tulstar did not actually sell any Ionsep product. The parties did not establish any minimum amount of product that Tulstar must distribute. There was no meeting of the minds regarding any compensation to be paid by Tulstar to Ionsep in exchange for becoming the exclusive distributor. There is no documentation or other clear and convincing evidence that Tulstar agreed to furnish \$250,000 worth of Sodium Hypophosphite

²6 Del. C. §2714.

³*Durand v. Snedeker*, 177 A.2d 649, 651-52 (Del. Ch. 1962).

⁴See *CPM Industries, Inc. v. Fayda Chemicals & Minerals, Inc.*, 1997 WL 762650, at *8 (Del. Ch.).

as payment for an exclusive distributorship. The parties failed to agree to a market price for Nickel Hypophosphite.

Tulstar's initial forays into the potential Nickel Hypophosphite market are consistent with a non-exclusive distribution agreement. Ionsep's construction of a manufacturing facility and provision of technical information to Tulstar are not sufficient to demonstrate that an exclusive agreement had been reached. The Court finds that there was no meeting of the minds as to a sufficient number of contractual terms to evidence a binding oral agreement for exclusive distribution by Tulstar. The Court also finds that any actions of the parties were not sufficient part performance to permit an exception to the Statute of Frauds. The parties actions are consistent with a non-exclusive distribution agreement.

CONCLUSION

THEREFORE, the judgment of the Court following trial without a jury is for plaintiff Tulstar Products, Inc., in the amount of **\$163,088.06, plus costs**. Defendant/counterclaim plaintiff Ionsep Corporation, Inc.'s counterclaim is hereby **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

/s/ Mary M. Johnston

The Honorable Mary M. Johnston