

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

U.S. HORTICULTURAL SUPPLY, INC.: CIVIL ACTION  
f/k/a E.C. GEIGER, INC., :  
 :  
 Plaintiff :  
 :  
 v. :  
 :  
 THE SCOTTS COMPANY, :  
 :  
 Defendant : NO. 03-773

MEMORANDUM AND ORDER

McLaughlin, J.

July 20, 2005

U.S. Horticultural Supply, Inc., formerly known as E.C. Geiger, Inc. ("Geiger"), a distributor and seller of horticultural products, claims that The Scotts Company ("Scotts"), a manufacturer of horticultural products, breached a contract to supply Geiger with Grocote, a controlled-release fertilizer. The defendant has moved for summary judgment. The Court will grant the motion.

I. The Summary Judgment Record

On December 23, 1996, Geiger and Scotts entered into a Horticultural Products Distributor Agreement ("Distributor Agreement"). This contract appointed Geiger as a non-exclusive distributor of a number of Scotts products within certain

geographical areas. Among the products covered by this agreement was Osmocote, a proprietary fertilizer manufactured by Scotts. The Distributor Agreement had an initial term of four years and was renewable for one-year terms at Scotts' option. The contract was amended on August 28, 2001 and was renewed with an expiration date of September 30, 2002, with any further renewal at Scotts' option. Plaintiff's Mem., Ex. A.

On March 19, 2002, the parties entered into a Distributor Agreement - Horticulture ("Grocode Agreement"). The contract appointed Geiger as an exclusive private label distributor of a private label controlled-release fertilizer called Grocode. The Grocode Agreement required Geiger to purchase at least \$100,000 worth of Grocode in year 1, which was defined as March 9, 2002, to September 30, 2002, and to maintain Osmocote purchases equal to 95% of the dollar volume purchased the prior year. The Grocode Agreement was set to expire on September 30, 2006, and was not assignable by either party without the other party's consent. Plaintiff's Mem., Ex. B at 13.

During the relevant period, Geiger maintained a \$3,000,000 line of credit with Scotts. The first \$1,750,000 of this line was unsecured. The remaining \$1,250,000 was secured by a promissory note from Geiger, and Scotts held a UCC-1 security

interest in Geiger's accounts receivable and inventory. Scotts' security interest would not be implicated unless the amount due from Geiger to Scotts exceeded \$1,750,000. Defendant's Mem., Ex. 12, 15.

Geiger placed three orders for Grocote beginning in April, 2002, two of which were to be delivered on October 1, 2002, and one of which was to be delivered on October 2, 2002. The three orders totaled \$55,480. Defendant's Mem., Ex. 2, 3 at 357-58.

On September 5, 2002, Scotts notified Geiger by fax that it would not renew the Distributor Agreement, which was set to expire on September 30, 2002. The fax also informed Geiger that Geiger's unsecured line of credit would be reduced from \$1,750,000 to \$350,000 effective October 1, 2002, because Geiger would be selling a lower volume of Scotts products. Defendant's Mem., Ex. 4.

Ronald Soldo, Geiger's president and chairman, instructed his accounting staff on September 9, 2002 that it should not make any further payments to Scotts without his instruction, whether toward pending orders or toward Geiger's balance with Scotts. Defendant's Mem., Ex. 5, Ex. 6 at 77.

Scotts learned of the instruction to the Geiger accounting staff in early September. Defendant's Mem., Ex. 5.

Scotts' counsel informed Geiger's counsel in a letter dated September 17, 2002, that it knew of the instruction and had placed all pending Geiger orders on hold in light of Geiger's determination not to pay Scotts. In the same letter, Scotts' counsel stated that, despite the expiration of the Distributor Agreement, Scotts intended to "honor the terms of the existing controlled release fertilizer agreements, which would include the negotiation of reasonable annual volumes going forward." Scotts also urged Geiger in this letter to meet with Scotts regarding settlement. Defendant's Mem., Ex. 5.

Beginning in early June, 2002, Geiger negotiated with a competitor, Griffin Greenhouse Supplies, Inc. ("Griffin") in order to reach an agreement to sell Geiger's assets to Griffin. The negotiations progressed to a letter of intent executed by Griffin on September 24, 2002. The sale of Geiger's assets to Griffin was scheduled for October 31, 2002. Plaintiff's Mem., Ex. D, E.

Prior to the asset sale, Griffin learned that Scotts held a UCC-1 lien on Geiger's accounts receivable. Defendant's Mem., Ex. 11. On October 25, 2002, Geiger's counsel asked Scotts to release its lien so that the sale to Griffin could go forward. Scotts' counsel, Vincent Brockman, responded:

Regarding your request that Scotts terminate the UCC-1's, I agree that if Geiger's exposure to Scotts were limited to some amount under \$1.75 million . . . then Scotts should terminate the UCC-1's. My concern is that the sum of Geiger's account balance and its open orders exceeds \$1.75 million. Therefore, absent your client's agreement to pay down its account balance or cancel the open orders, terminating the security interest will prejudice Scotts. I believe Scotts and Geiger began the process of reconciling their books but it was never completed. Please see if you can get your client to expedite this process.

Defendant's Mem., Ex. 13.

Over the next few days, the accounting departments of Geiger and Scotts jointly determined that Geiger owed Scotts \$1,359,431.62 for orders that Geiger had placed and Scotts had delivered. Defendant's Mem., Ex. 6 at 66-69, Ex. 16. Geiger generated a list of its pending purchase orders with Scotts, which totaled \$905,721.96. Defendant's Mem., Ex. 2.

Mr. Soldo, Geiger's president and chairman, sent the list of pending orders to Scotts by fax on October 30, 2002. Aside the list of pending orders, Soldo wrote a signed, handwritten notation addressed to Mr. Brockman. The notation read, in relevant part:

As discussed, please cancel all pending purchase orders that were place [sic] with The Scotts Company by E.C. Geiger, Inc. Also, our Accounting Department has been in touch with the Scotts people all day on the

account reconciliation. Hopefully, both sides will resolve that issue tomorrow. Please call Gerry Chalpin . . . tomorrow to settle the matter . . . This should be a full listing of all purchase orders now placed by E.C. Geiger with Scotts. If others exist, please cancel them also. Thanks.

Defendant's Mem., Ex. 2. After receiving the fax, Scotts terminated its lien. Defendant's Mem., Ex. 17.

The sale of Geiger's assets to Griffin occurred on October 31, 2002. Geiger did not place any additional Grocote orders after October 31, 2002; it ceased business operations on that date. Defendant's Mem., Ex. 18 at 18-19, Ex. 3 at 359.

## II. The Litigation

On February 7, 2003, Geiger filed a complaint against Scotts, alleging attempted monopolization under Section Two of the Sherman Act, 15 U.S.C. § 2, and promissory estoppel based on Scotts' decision not to renew the Distributor Agreement. On February 28, 2003, Geiger amended its complaint to include another promissory estoppel claim and the claim for alleged breach of the Grocote Agreement.

The Court dismissed the two promissory estoppel claims without prejudice on November 13, 2003, upon agreement of the parties. It also dismissed the antitrust claim without prejudice

on February 28, 2005 upon agreement of the parties. The breach of contract claim is Geiger's only remaining claim in the case.

### III. Discussion

The parties agree that Ohio law applies to the breach of contract claim. In order to prevail on its claim, the plaintiff must show: (1) the existence of a contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4) damage or loss to the plaintiff. Nilavar v. Osborn, 738 N.E.2d 1271, 1281 (Ohio Ct. App. 2000).

The parties do not dispute the existence or validity of the Grocote Agreement. Geiger claims that Scotts breached the Grocote Agreement by failing to fill the three orders for Grocote placed in 2002 that were to be delivered in October 2002, and by anticipatorily repudiating the Grocote Agreement by failing to renew the Distributor Agreement and by reducing Geiger's unsecured line of credit.

Scotts does not dispute that it did not fill the three Grocote orders but argues that it is entitled to summary judgment because Geiger released it from its duty to deliver the Grocote orders when Geiger cancelled the orders. It also contends that it did not anticipatorily repudiate the Grocote Agreement, but that Geiger repudiated the Grocote Agreement when it refused to

pay Scotts. The Court concludes that the summary judgment record demonstrates that Geiger released Scotts from the obligation to fulfill the outstanding three orders and that Scotts did not anticipatorily repudiate the Grocote Agreement. The Court, therefore, does not need to decide whether Geiger repudiated the Grocote Agreement by refusing to pay.<sup>1</sup>

A. Release

Scotts argues that Geiger released Scotts from its duty to deliver the orders when Geiger's president and chairman, Ronald Soldo, cancelled all outstanding orders with Scotts in exchange for Scotts' release of its UCC-1 lien on Geiger's inventory. "A release operates to extinguish a right which is the subject thereof in exchange for some consideration, and it effectively operates as an estoppel or a defense to an action by the releasor." Task v. Nat'l City Bank, No. 65617, 1994 WL 43883, at \*4 (Ohio Ct. App. Feb. 10, 1994).

Geiger does not dispute that Soldo cancelled the pending orders. Geiger argues instead that Scotts forced it to

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<sup>1</sup>Nor does the Court reach the other arguments of the defendant for summary judgment: (1) that Geiger voluntarily discontinued business operations after October 31, 2002; and (2) that Geiger has not shown any damages as a result of Scotts' alleged breach.



cancel the orders through economic duress. Duress ordinarily is presented as an affirmative defense to a breach of contract claim, and, if shown, can void an otherwise valid contract. See 28 Williston on Contracts § 71:8 (4<sup>th</sup> ed.). Under Ohio law, threats against a person constitute duress when they overcome the will of the person threatened and induce him to do an act which he would not otherwise have done and which he was not bound to do. Tallmadge v. Robinson, 109 N.E.2d 496, 500 (Ohio 1952).

The Ohio Supreme Court has distinguished physical duress from economic duress, the kind alleged in this case, and has identified three requirements for economic duress: "(1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party." Blodgett v. Blodgett, 551 N.E.2d 1249, 1251 (Ohio 1990).<sup>2</sup>

"The assertion of duress must be proven to have been the result

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<sup>2</sup>Geiger relies on Lakeside Avenue L.P. v. Cuyahoga County Board of Revision, et al., 664 N.E.2d 913, 917 (Ohio 1996), in arguing that the Ohio Supreme Court rejected the Blodgett test for duress in favor of a more lenient standard when the party asserting duress was not attempting to void a contract. The Court does not read Lakeside in that way. The alleged duress in Lakeside was only relevant as evidence of whether a property purchase was an arm's-length transaction for the purpose of tax assessment. Here the plaintiff is trying to use the principle of duress in an affirmative claim for damages. Blodgett applies.

of the defendant's conduct and not by the plaintiff's necessities." Id.

The Court finds that Geiger has not produced evidence that would allow a reasonable jury to find economic duress under Ohio law. Geiger contends that Scotts' refusal to release the UCC lien was a coercive act that prompted Geiger involuntarily to cancel its pending orders with Scotts. Geiger admits, however, that Scotts did have a security interest in Geiger's accounts receivable. Nor does Geiger dispute that Scotts had a valid and enforceable security interest to the extent that Geiger's indebtedness exceeded \$1.75 million. Geiger has produced no evidence to challenge Scott's evidence that Geiger's indebtedness exceeded \$1.75 million at the time Scotts refused to release its lien. The joint account reconciliation and the list of pending orders support Scotts' position that it believed its security interest applied and thus reasonably refused to release the lien unless Geiger either canceled pending orders or paid down a portion of its balance. Defendant's Mem., Ex. 2, 16.

The record does not support a claim that Geiger's decision to cancel the orders was the result of Scotts' coercive conduct. "It is not enough to show that one assented merely because of difficult circumstances that are not the fault of the other party." Blodgett, 551 N.E.2d at 1251-52.

## B. Anticipatory Repudiation

Geiger's second theory of breach is that Scotts' actions amounted to an anticipatory repudiation of the Grocote Agreement. Geiger argues that when Scotts failed to renew the Distributor Agreement and reduced Geiger's unsecured line of credit, Scotts made it impossible for Geiger to perform the Grocote Agreement.

Anticipatory repudiation is an overt communication of intention, or an action which renders performance impossible or demonstrates a clear determination not to continue performance. Ohio Rev. Code Ann. § 1302.68 cmt. 1 (West 2005). In order to amount to repudiation under Ohio law, an action must be a definite and unequivocal refusal to perform. Am. Bronze Corp. v. Streamway Prods., 456 N.E.2d 1295, 1301 (Ohio Ct. App. 1982). Whether the actions of a party, which are facts to be found by the trial court, constitute repudiation of a contract is a question of law. Nuco Plastics, Inc. v. Universal Plastics, Inc., 601 N.E.2d 152, 155 (Ohio Ct. App. 1991).

The Court finds that the undisputed facts cannot support Geiger's claim that Scotts repudiated the Grocote Agreement or rendered Geiger's performance impossible.

As an initial matter, no one from Scotts told Geiger that Scotts would not perform the Grocote Agreement. Indeed, when Scotts notified Geiger that it was not going to renew the Distribution Agreement, Vincent Brockman of Scotts told Edward Fitzgerald, counsel for Geiger, that "Scotts stands ready to honor the terms of the existing controlled release fertilizer supply agreements [the Grocote Agreement and another contract that is not at issue], which would include the negotiation of reasonable annual volumes going forward." Defendant's Mem., Ex. 5.

Second, Geiger does not present any evidence or argument that Scotts had any obligation to renew the Distribution Agreement that expired by its own terms.

Instead, Geiger argues that (1) Scotts' failure to renew the Distributor Agreement and (2) its reduction of Geiger's unsecured line of credit rendered it impossible to perform the Grocote Agreement. With respect to Scott's failure to renew the Distribution Agreement, Geiger asserts that it could not maintain the minimum purchase levels of Osmocote or comply with the minimum purchases required by the Grocote Agreement once the Distributor Agreement expired. Geiger provides no evidence in support of this assertion to show that it would have been impossible for Geiger to obtain Osmocote. There is nothing in

the language of either the Grocote Contract or the Distributor Agreement that renders it impossible for Geiger to purchase Osmocote and comply with the Grocote Contract. No evidence shows (a) that Geiger had not already complied with this requirement or (b) that it could not satisfy the requirement by purchasing Osmocote from Scotts going forward. Geiger has presented no evidence to show that the expiration of the Distribution Agreement meant that Scotts would refuse to sell any of its products to Geiger.

Nor is there any record support for the assertion that nonrenewal of the Distribution Agreement precluded it from complying with the minimum purchase requirements in Contract Year 1. When Scotts stated its intention on September 5, 2002, to allow the Distributor Agreement to expire, it also informed Geiger that it would be accepting orders for sale or delivery only through the end of November, 2002. Geiger contends that this made performance of the Grocote Agreement impossible, since Grocote orders required a lead time of at least 120 days. The letter informing Geiger of the pending expiration of the Distributor Agreement, however, refers to orders under that Agreement, not under the separate Grocote Agreement. Defendant's Mem., Ex. 4.

Nor does Geiger provide support for its claim that Scotts' reduction of Geiger's unsecured line of credit rendered it impossible to perform the Grocote Agreement. Under Ohio law, "a contracting party will not be excused from performance merely because performance may prove difficult, dangerous or burdensome." A party must also show "performance has been rendered impossible without his fault and when the difficulties could not have reasonably been foreseen." Truetried Serv. Co. v. Hager, 691 N.E.2d 1112, 1118 (Ohio Ct. App. 1997).

The Court concludes that Geiger has not produced evidence by which a jury could reasonably conclude that Scotts repudiated the Grocote Agreement or that it made performance of that Agreement impossible.

An appropriate order follows.

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 Plaintiff :  
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 v. :  
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 THE SCOTTS COMPANY, :  
 :  
 Defendant : NO. 03-773

ORDER

AND NOW, this 20<sup>th</sup> day of July, 2005, upon  
consideration of defendant's motion for summary judgment (Docket  
No. 80), plaintiff's opposition, and defendant's reply thereto,  
IT IS HEREBY ORDERED that said motion is GRANTED.

BY THE COURT:

/s/ Mary A. McLaughlin  
MARY A. McLAUGHLIN, J.