COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

17-P-1633

PAPER CITY BREWERY CO., INC.

vs.

LA RESISTANCE, INC., & another;[1] Jon Hebert & another,[2] third-party defendants.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, Paper City Brewery Co., Inc. (Paper City), appeals from a grant of summary judgment by a Superior Court judge in favor of the defendants, La Resistance, Inc. (La Resistance), and Daniel W. Shelton. This lawsuit arises out of the alleged breach of an oral agreement made between the plaintiff, a microbrewer, and La Resistance, a beer distribution company, providing that La Resistance would pay the plaintiff for the beer it purchased from the plaintiff for distribution. Concluding that the plaintiff raised no genuine issue of material fact to suggest that the distribution agreement falls outside the purview of Article 2 of the Uniform Commercial Code and the applicable four-year statute of limitations, we affirm.

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[1] Daniel W. Shelton.

[2] Jay R. Hebert.

1. Standard of review. "We review a grant of summary judgment de novo." Deutsche Bank Nat'l Trust Co. v. Fitchburg Capital, LLC, 471 Mass. 248, 252-253 (2015). "The standard of review of a grant of summary judgment is whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law." Molina v. State Garden, Inc., 88 Mass. App. Ct. 173, 177 (2015), quoting Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991). Summary judgment is proper where no issue of material fact exists as to whether the statute of limitations has run. See Doe v. Harbor Schs., Inc., 446 Mass. 245, 247 (2006); Castillo v. Massachusetts Gen. Hosp. Chelsea Memorial Health Care Ctr., 38 Mass. App. Ct. 513, 516 (1995) ("On an appropriate record, summary judgment may be granted on the question whether a particular statute of limitations has run").

2. Contract for the sale of goods. The plaintiff, Paper City, is owned by brothers Jay and Jon Hebert. On April 11, 2002, Jon Hebert established La Resistance with defendant Daniel Shelton. Shelton was the sole officer, director, and shareholder of La Resistance, but he took no part in the management or operation of the company. Jon Hebert was the sole manager of La Resistance. In his capacity as manager, Jon Hebert entered into an oral contract with Jay Hebert, president

of Paper City, whereby La Resistance was to distribute Paper City's beer. Shelton was not party to the agreement but understood that La Resistance would distribute Paper City's beer as well as his own. The plaintiff now claims that the oral distribution agreement made between Jon Hebert, in his capacity as manager of La Resistance, and Jay Hebert, in his capacity as president of Paper City, was primarily a contract for services.

Contracts for the sale of goods are subject to a four-year statute of limitations pursuant to G. L. c. 106, § 2-725, a provision that is identical to § 2-725 of the Uniform Commercial Code (UCC). Goods, as defined by G. L. c. 106, § 2-105 (1), are "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action." Article 2 does not apply to contracts for services. See Mattoon v. Pittsfield, 56 Mass. App. Ct. 124, 141 (2002). If a contract is for both sales and services, however, "[w]e would be disinclined to import automatically all the provisions of the sales article into a relationship involving a variety of subjects other than the sale of goods, merely because the contract dealt in part with the sale of goods." Zapatha v. Dairy Mart, Inc., 381 Mass. 284, 290 (1980). See id. (sale of goods was minor aspect of franchise agreement where "Dairy

Mart's profit was intended to come from franchise fee and not from the sale of items to its franchisees"). At the same time, it would be unwieldy to apply the sales article only to aspects of the agreement that concerned goods. See id. Instead, we consider whether "the predominant factor, thrust, or purpose of the contract is . . . 'the rendition of service, with goods incidentally involved.'" Mattoon, supra, quoting Cumberland Farms, Inc. v. Drehmann Paving & Flooring Co., 25 Mass. App. Ct. 530, 534 (1988).

Massachusetts courts have not yet addressed the question whether distribution agreements fall within art. 2. The majority of courts to address this issue in other jurisdictions, however, have concluded that art. 2 governs distribution agreements where the sale of goods is the predominant factor. See Specialty Beverages, L.L.C. v. Pabst Brewing Co., 537 F.3d 1165, 1174-1175 (10th Cir. 2008) (applying "predominant factor" test and determining that art. 2 governs distribution agreements); Watkins & Son Pet Supplies v. Iams Co., 254 F.3d 607, 612 (6th Cir. 2001) (written distribution agreement that primarily entailed sale of pet food by defendant to plaintiff governed by art. 2). See also Corenswet, Inc. v. Amana Refrigeration, Inc., 594 F.2d 129, 134 (5th Cir. 1979) ("Although most distributorship agreements, like franchise agreements, are more than sales contracts, the courts have not

hesitated to apply the Uniform Commercial Code to cases involving such agreements"). We decline to establish a general rule on the facts of this case. Instead, we conclude that there is no genuine issue of material fact as to whether the distribution agreement between the plaintiff and La Resistance was predominantly for the sale of goods.

Although the plaintiff alleges that it contracted with La Resistance to perform services such as managing accounts, representing the brewery at trade shows and festivals, and being the first line of defense in the event that there were issues with the product, there is no indication in the summary judgment record that the agreement was anything but a contract for the sale of beer. From July 4, 2003, until October 18, 2009, the plaintiff sold and delivered beer to La Resistance, which delivered the beer to retail stores. La Resistance wrote checks to the plaintiff for the beer. Although the plaintiff alleges that it was the "industry standard" for a distributor to provide certain services, there was no evidence in the summary judgment record to suggest that La Resistance was contractually required to do so. During the approximately six-year period in which La Resistance was distributing the plaintiff's beer, the plaintiff never paid La Resistance for providing any services. Nor did the plaintiff seek to recover any money for services that La Resistance failed to perform. There is no information in the

summary judgment record that La Resistance ever actually provided services. Contrast Mattoon, 56 Mass. App. Ct. at 141 (city treating and distributing water to its citizens was rendition of services, not sale of goods, where rate charged reflected cost of storage, treatment, and distribution). The plaintiff's claim that the oral contract was primarily a contract for service is unsubstantiated by the summary judgment record. Accordingly, the motion judge properly found that the plaintiff failed to raise a genuine issue of material fact that the contract was primarily for services, rather than for the sale of beer.

Although the statute of limitations for a breach of contract claim is six years from the date of the breach, see G. L. c. 260, § 2, contracts governed by art. 2 of the UCC have a four-year statute of limitations. See G. L. c. 106, § 2-725. Because there was no genuine issue of material fact that the contract was primarily for the sale of goods, the judge properly applied the UCC's four-year statute of limitations. The plaintiff's suit, which was filed on October 17, 2014, almost five years after the alleged breach of contract, is untimely. Accordingly, the motion judge properly granted summary judgment

in favor of the defendants.

Judgments affirmed.[3]

By the Court (Wolohojian, Hanlon & Ditkoff, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: March 15, 2019.

[3] Three separate judgments entered on the docket. Although the defendants filed a cross appeal from the judgment on their counterclaims and from the judgment on their third-party complaint against the Hebert brothers, the defendants disclaim any interest in pursuing the cross appeal where, as here, the judgment for the defendants on the plaintiff's claims is affirmed.

[4] The panelists are listed in order of seniority.