

Box, Tray & Giraffe Inc. v OU Holdings Inc.
2010 NY Slip Op 30070(U)
January 12, 2010
Supreme Court, New York County
Docket Number: 602389/08
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON
Justice

PART 55

Index Number: 602389/2008
BOX TRAY & GIRAFFE, INC.,
vs.
OU HOLDINGS, INC.,
SEQUENCE NUMBER: # 001
DISMISS

INDEX NO. 602389-08
MOTION DATE 6/15/09
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

were read on this motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4-8

9-10

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided together with motion sequence or in accordance with the general memorandum decision and order.

N.B. - preliminary conf. scheduled for 2/8/10, at noon.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
JAN 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/12/10


JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----x
BOX, TRAY & GIRAFFE INC.,

Plaintiff,

Index No.: 602389/08

-against-

DECISION and ORDER

OU HOLDINGS INC., AACHENER PRINTEN-
UND SCHOKOLADENFABRIK HENRY
LAMBERTZ GMBH & CO. KG,
HENRY LAMBERTZ GMBH & CO. KG,
and HENRY LAMBERTZ INC.,

Defendants.

SOLOMON, J.:

Defendants Henry Lambertz, Inc. (NJ Lambertz) and OU
Holdings Ltd. (incorrectly sued as OU Holdings Inc., and
hereinafter referred to as "OU") move to dismiss the complaint.

Plaintiff Box, Tray & Giraffe Inc. (Box Tray) is
incorporated under the laws of the People's Republic of China,
with its principal place of business in that country. It alleges
the following: Box Tray packages goods manufactured by others for
sale in the United States; in or around August 2007, OU was an
agent for each of the other defendants; Box Tray was introduced
to OU's principal, Uri Zohar, at a trade show in Canton, China,
and later met him at a "Lambertz trade show booth" at a trade
show in Cologne, Germany; and Box Tray entered into an oral
contract with OU, in its capacity as agent for each of the other
defendants, whereby the Lambertz defendants would deliver cookies
to Box Tray in China, and Box Tray would pack them according to

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the Lambertz defendants' specifications. The complaint further states that the specifications involved putting the cookies into decorative tins sealed with plastic or foil, with stickers on the outside, and delivering them to the United States in time for the 2007 Christmas holiday season; the cookies were packaged and shipped on time to a customer in Texas, but defendants complained that some of the packaging was defective, and withheld payment; Efforts by Box Tray to resolve the complaint failed, and this lawsuit for breach of contract, breach of covenant of good faith and fair dealing and unjust enrichment ensued.

Box Tray alleges that defendants Aachener Printen-Und Schokoladenfabrik Henry Lambertz GmbH & Co. KG (Aachener HL GmbH) and Henry Lambertz GmbH & Co. KG (HL GmbH) are incorporated in the Federal Republic of Germany, with their principal places of business there, and that NJ Lambertz is a New Jersey corporation with its principal place of business located in Lincoln Park, New Jersey. Box Tray also alleges, erroneously, that OU is a New York corporation, with its principal place of business in New York City. In fact, OU is incorporated in the British Virgin Islands (BVI).

Zohar states that he represented OU as a broker selling HL GmbH products at trade shows. He arranged a deal whereby Lambertz cookies were shipped from Germany, where they are manufactured, to China, where Box Tray packaged them, and OU then

* 4]

shipped the packaged cookies to a retailer, Sam's Club, in Texas. Zohar states that he discussed the transaction with Box Tray representatives in person, in China and at the Cologne trade show.

In motion sequence 01, NJ Lambertz moves to dismiss the complaint on the ground that the court lacks personal jurisdiction over it (CPLR 3211[a][8]) and the complaint fails to state a cause of action (CPLR 3211[a][7]). In motion sequence 02, OU moves to dismiss the complaint on the grounds of lack of personal jurisdiction, forum non conveniens (CPLR 327), and failure to state a cause of action.

NJ Lambertz denies it had any relationship with OU or Box Tray, and refers to copies of invoices issued by OU to the German Lambertz companies, but not NJ Lambertz. Invoices from Box Tray to OU are addressed to OU in the city of Tortola, BVI. The president and CEO of NJ Lambertz submits an affidavit stating that his company was sent an invoice for cookies by Aachener HL GmbH, and paid the invoice in full. He further states that Zohar and OU are well known in the food industry as providers of logistical services for food manufacturers, and Zohar's presence at a Lambertz trade booth overseas does not raise an inference in the industry that he was acting for NJ Lambertz. Indeed, Zohar denies that OU ever held itself out as an agent for NJ Lambertz. NJ Lambertz paid OU for its services, and had no dealings with

Box Tray. Therefore, it contends that the complaint fails to state a legal basis for this lawsuit as against it.

NJ Lambertz also relies on the long-arm statute, CPLR 302, to show that there is no personal jurisdiction against it. Under CPLR 302(a)(1), the court may exercise personal jurisdiction over a non-domiciliary who transacts business in New York State or contracts to supply goods or services in the state where the cause of action arises out of that transaction or contract (see, *Holness v Maritime Overseas Corp.*, 251 AD2d 220, 224 [1st Dept 1998]). Box Tray's claim arises from a transaction involving the shipment of cookies from Germany to China for processing, then to Texas, and does not involve any New York transaction. Although Box Tray alleges that Zohar, the OU principal, has used a personal New York City address and made telephone calls regarding the transaction from New York, this contact with New York is insufficient to confer jurisdiction over NJ Lambertz under CPLR 302(a)(1). Accordingly, NJ Lambertz's motion to dismiss for lack of personal jurisdiction is granted.

OU's claim that there is no personal jurisdiction over it is based on Box Tray's alleged failure to serve the summons and complaint upon it (OU does not deny it has a dispute with Box Tray regarding the cookie deal). Box Tray served the summons and complaint on the New York State Secretary of State, but Box Tray is not a New York corporation. It is incorporated in the British

Virgin Islands, which is where Box Tray sent its invoices. OU paid those invoices through a Cyprus bank account. Zohar claims that he only learned of this lawsuit after he was contacted by NJ Lambertz's attorney.

In opposing the motion, Box Tray shows that Zohar has contacts with New York, but fails to produce an affidavit of service showing that the summons and complaint ever were served upon OU. Even if OU's principal is frequently in New York, that does not excuse Box Tray's failure to effect service of process on OU in any manner authorized by the CPLR.

Service upon a foreign corporation is governed by Business Corporations Law (BCL) section 307 (not BCL 306). Under BCL section 307, the New York Secretary of State may be served papers as an agent for a foreign corporation where it would be subject to personal jurisdiction under CPLR Article 3. Such service is sufficient if notice thereof and the papers served are delivered personally to the foreign corporation outside New York in the manner authorized to serve process in the foreign jurisdiction where service is made, or sent by the plaintiff to the foreign corporation by registered mail return receipt requested at the address on file in the department of state in the foreign jurisdiction, or if no such address is on file, then to the last known address of the defendant foreign corporation (see, BCL sections 37[a] and 37 [b][1]-[2]).

OU alleges that it received no notice of service of the summons and complaint upon the New York Secretary of State, and the papers were not served upon it in BVI or at any other location. The inference that Box Tray did not serve OU as required by BCL 37(b) would be rebuttable with proof of compliance. However, Box Tray offers no proof of compliance. In light of the foregoing, it is unnecessary to address the other branches of OU's motion. Accordingly, it hereby is

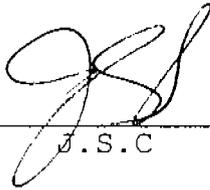
ORDERED that the motions to dismiss the complaint by NJ Lambertz, Inc. and OU Holdings Inc. are granted, and the complaint is severed and dismissed as against these defendants, and the Clerk shall enter judgment accordingly with costs and disbursements to the moving defendants as taxed; and it further is

ORDERED that a preliminary conference for the remaining parties is scheduled for February 8, 2010, at noon in Part 55, 60 Centre Street, Room 432, New York, NY, and plaintiff's counsel is directed to give notice of said conference to all other appearing parties, if any; and it further is

ORDERED that if no defendants but the movants have appeared or are in default, plaintiff shall notify the court forthwith, and the complaint shall be dismissed in its entirety.

Dated: January 12, 2010

ENTER:



J.S.C

JANE S. SOLOMON

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