

Box Tray & Giraffe, Inc. v OU Holdings, Inc.
2010 NY Slip Op 33332(U)
December 1, 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

JANE S. SOLOMON

PRESENT:

PART 55

Index Number : 602389/2008

BOX TRAY & GIRAFFE

vs

OU HOLDINGS

Sequence Number : 003

REARGUMENT/RECONSIDERATION

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

6/28/10

The following papers, numbered 1 to _____ 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

4-6

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

See answered Decision & Order.

FILED

DEC 02 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/1/10

[Signature]
JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

[*2]
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., HENRY
LAMBERTZ GMBH & CO. KG,
AACHENER PRINTEN-UND
SCHOKOLADENFABRIK, HENRY
LAMBERTZ GMBH & CO. KG, and
HENRY LAMBERTZ, INC.,

Defendants.

-----x
SOLOMON, J.:

FILED
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COUNTY CLERK'S OFFICE

Plaintiff Box Tray & Giraffe, Inc. (Box Tray) moves to reargue prior motions (motion sequence 01 and 02) that resulted in its amended complaint having been severed and dismissed as against defendants OU Holdings, Ltd. (OU), sued here erroneously as OU Holding, Inc., and Henry Lambertz, Inc., a company based in New Jersey (NJ Lambertz).

NJ Lambertz had moved to dismiss the amended complaint on the grounds that the court lacks personal jurisdiction over it, and for failure to state a claim. OU's motion to dismiss was made on the grounds of failure to state a claim, lack of personal jurisdiction, and forum non conveniens. Both motions to dismiss were granted based on lack of personal jurisdiction.

Briefly, plaintiff alleges that it had an oral contract with OU whereby Box Tray agreed to accept cookies manufactured in Germany by defendants Henry Lambertz GmbH & Co. KG (HL GmbH) and

Aachener Printen-und Schokoladenfabrik, Henry Lambertz GmbH & Co. KG (Aachener GmbH), which are incorporated, and have their principal places of business, in the Federal Republic of Germany. The cookies were shipped to Box Tray in China, put in decorative packaging, and shipped by Box Tray to a retailer in Texas. The retailer allegedly rejected some of the packaged cookies because they arrived in poor condition, and refused to pay. Box Tray alleges that it packaged the cookies in accordance with the specifications provided by OU, so it should not bear the burden of the retailer's refusal.

NJ Lambertz is a New Jersey corporation with its principal place of business in New Jersey. NJ Lambertz is authorized to do business in New York State. OU is incorporated in the British Virgin Islands. Box Tray sent an invoice for its services to OU at its British Virgin Islands address. OU sent an invoice for its services to NJ Lambertz, which paid OU.

Box Tray commenced this action for breach of contract, breach of the duty the covenant of good faith and fair dealing, and unjust enrichment. Box Tray states that it served the summons and complaint on OU by serving copies thereof upon the New York Secretary of State, and at an address in New York City referred to as OU's "last known address", even though the address Box Tray sent its invoices to was in Tortola, British Virgin Islands. Box Tray contends that serving the papers on OU in this

[* 4].
fashion constitutes adequate and complete service pursuant to Business Corporation Law (BCL) § 306(b)(1) and § 307(2).

A. Reargument Granted With Respect To NJ Lambertz

Box Tray also alleges, on the affirmation of its lawyer, that service was made upon NJ Lambertz. No affidavit of service upon NJ Lambertz is submitted or referred to in the papers. However, a copy of an affidavit of service of the summons and complaint upon NJ Lambertz was submitted in OU's opposition to this motion, apparently because it was an exhibit to OU's earlier motion. Assuming the validity of this document, which is not contested by NJ Lambertz, Box Tray's motion to reargue is granted.

Upon reargument, the motion by NJ Lambertz to dismiss the amended complaint is granted. Box Tray alleges three causes of action: Breach of contract, breach of the covenant of good faith and fair dealing, and unjust enrichment. The allegations of the complaint, and the papers submitted on the prior motions, show that there was no contract between Box Tray and NJ Lambertz. Although, in the amended complaint, Box Tray lumps NJ Lambertz together with OU, HL GmbH and Aachener GmbH as if they were a single entity, the papers submitted on the prior motions, including the affidavit of Box Tray's managing director, Eran Yaron (Yaron), shows that Box Tray had no contact with NJ

Lambertz in the underlying transaction. Yaron states that he transacted business with OU and its principal, Uri Zohar.¹ Yaron knew that Zohar was the principal of OU, and their initial talks involved OU's involvement with a different baked goods manufacturer. Zohar later told Yaron that OU had an opportunity to promote seasonal cookies manufactured by the Germany-based Lambertz companies, to be packaged by Box Tray in China and shipped to the United States for sale. There is no allegation that Box Tray had any contact with NJ Lambertz except through OU, which Yaron knew to be a distinct entity, and there was no agreement, orally or in writing, with anyone but OU (OU does not deny the existence of a contract). Nothing in the course of the transaction, as described by Yaron and Zohar, suggests that Box Tray ever treated with OU as an agent for NJ Lambertz.

Moreover, there is no factual allegation to support the unjust enrichment claim. Unjust enrichment "is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned." (*IDT Corp v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). Box Tray contends that it is entitled to recover under the terms of a contract, so the equitable remedy of unjust enrichment is not available here. Also, there is no allegation of any manner in

¹ The earlier decision noted that Zohar and OU are well known in the food industry as providers of logistical services for food manufacturers.

which NJ Lambertz was enriched, justly or not, and no facts to support an inference that the court's equitable power must be imposed against NJ Lambertz to prevent injustice.

B. Reargument is Denied With Respect to OU

For all the reasons explained in the prior decision and order, OU's motion was properly granted. Box Tray does not identify any material matter misapprehended or overlooked by the court (CPLR 2221[d][2]). The arguments presented by Box Tray on this motion are identical to those made, and rejected, in the prior decision and order. Accordingly, it hereby is

ORDERED that Box Tray's motion to reargue is granted with respect to NJ Lambertz, and otherwise is denied, and upon reargument, the court adheres to its original determination dismissing the amended complaint.

Dated: December / , 2010

ENTER:



J.S.C

JANE S. SOLOMON

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