

Bijou Intl. Corp. v Kohl's Corp.

2008 NY Slip Op 33439(U)

December 10, 2008

Supreme Court, New York County

Docket Number: 601765/08

Judge: Richard B. Lowe

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOHME, III

PART 54

Index Number : 601765/2008
BIJOU INTERNATIONAL
vs.
KOHL'S CORPORATION
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE 8/20/08
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
DEC 24 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/10/08

HON. RICHARD B. LOHME, III
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

-----X

BIJOU INTERNATIONAL CORPORATION,

Plaintiff,

Index No. 601765/08

-against-

KOHL'S CORPORATION and
KOHL'S DEPARTMENT STORES, INC.,

Defendants.

FILED
DEC 24 2008
COUNTY CLERK'S OFFICE
NEW YORK

RICHARD B. LOWE, III, J:

In this action, plaintiff Bijou International Corporation (Bijou) seeks to recover \$18 million from defendants Kohl's Corporation and Kohl's Department Stores, Inc. (together, Kohl's), as a result of Kohl's alleged breaches of contract, fraudulent misrepresentations and violations of section 349 of New York's General Business Law. Kohl's answered the complaint, and now moves to dismiss based upon CPLR 3211 (a) (1), (2), (7) and/or (8).

According to Bijou, on July 1, 2007, the parties entered into an agreement whereby Bijou agreed to replace Kohl's existing "vendor-partner," by purchasing all of Kohls remaining inventory supplied by that prior vendor partner and by supplying Kohl's with an additional line of jewelry at Kohl's order (Complaint, ¶¶ 7-8). Bijou avers that, under this agreement, Bijou also agreed to purchase this inventory in exchange for real estate in Kohl's stores, with the sale and delivery of inventory to Bijou to be processed in accordance with a "Vendor Support Agreement," dated July 3, 2007 (Vendor Agreement), which Kohl's submits a copy of in support of its motion (Invidiata Aff., Ex. C).

The first sentence of the Vendor Agreement states that it "outlines terms and conditions

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governing all purchase orders, in addition to those terms and conditions found at www.connection.kohls.com. This agreement is effective for all Fall 07 orders and will remain in place for all 2007 purchases and until such time as a new signed agreement is entered into" (*id.*).

The "terms and conditions" refer to Kohl's "Merchandise Purchase Order Terms and Conditions" (Terms & Conditions), which state as follows:

[o]ur Purchase Order shall be governed by and construed in accordance with the laws of the State of Wisconsin. Any suit, action or proceeding against us with respect to our Purchase Order or the parties' relationship or actions with respect thereto shall be brought in Waukesha County, Wisconsin, or in the United States District Court for the Eastern District of Wisconsin and you hereby submit to the exclusive jurisdiction of such courts for the purpose of any suit, action or proceeding. You waive any claim that any such suit, action or proceeding brought in any such court has been brought in an inconvenient forum

(*id.*, Ex. D, at 13-14). The Vendor Agreement was signed by Jack Haber (Haber), Bijou's president.

Kohl's also submits a copy of a "Kohl's Department Stores Electronic Data Interchange Trading Partner Agreement" (EDI Agreement), dated July 16, 2007. In a recitals paragraph, the EDI Agreement states the parties:

desire to facilitate purchase, shipping and sales transactions all in accordance with Kohl's Vendor Partnership Requirements as detailed at Kohl's website, <http://www.connection.kohls.com> ("Transactions") by electronically transmitting and receiving data in agreed formats in substitution for conventional paper-based documents, and to assure that such Transactions are not legally invalid or unenforceable as a result of the use of available electronic technologies for the mutual benefit of the parties. Kohl's EDI requirements can also be found on Kohl's website, <https://www.kohlspartners.com>

(*id.* at 1). The EDI Agreement states that it "shall be governed by the [*sic*] interpreted [*sic*]

[* 4]
accordance with the laws of the State of Wisconsin and exclusive jurisdiction of any dispute, claim or lawsuit arising from the agreement shall be Waukesha County, 5 [sic] Wisconsin" (*id.*, Ex. E, at 4). The EDI Agreement is signed by Gary Bondy (Bondy) as Bijou's controller.

Bijou submits an unsigned copy of a "Contractor Confidentiality and Proprietary Materials Agreement" (Confidentiality Agreement), which provides that it "shall be interpreted in accordance with the laws of the State of New York pertaining to agreements made and performed therein, and the courts located in the State of New York, County of New York ... shall have exclusive jurisdiction and venue over all disputes hereunder" (Haber Aff., Ex. 1, ¶ 11).

DISCUSSION

Kohl's moves to dismiss this action, arguing that all of Bijou's claims in this action relate entirely to the business relationship between the parties that was created in its entirety by the Vendor Agreement, the Terms & Conditions, and the EDI Agreement, and, therefore, that the action should be dismissed based upon the forum selection clauses contained in these documents.

Bijou counters that Kohl's waived all jurisdictional defenses, that the forum selection clause contained in Kohl's purchase order never became part of the parties' agreement, and that its "only signed contract with Kohl's that mentions the subject of legal jurisdiction or the State laws that would govern" is the Confidentiality Agreement, which provides that New York law governs, and that New York courts have exclusive jurisdiction concerning any disputes over, Bijou's manufacture and sale of products for Kohl's.

Jurisdiction

Bijou argues that Kohl's served an answer that fails to assert a jurisdictional defense, and that Kohl's also served discovery demands, thereby engaging in, and causing Bijou to engage in,

discovery in New York. Bijou argues that, therefore, Kohl's waived any jurisdictional defense. Kohl's concedes that a defense based upon lack of personal jurisdiction is waived for failure to raise it, but argues that its motion is based upon Bijou's lack of subject matter jurisdiction, which can never be waived.

"It is axiomatic that a court cannot be divested of its subject matter jurisdiction by a contract. Thus, while the forum selection clause at issue here may be enforceable as a term of the contract between the parties, it does not affect the jurisdiction of the Supreme Court" (*Lischinskaya v Carnival Corp.*, __ AD3d __, 865 NYS2d 334, 338 [2d Dept 2008] [internal citations omitted]). "As a term of the contract between the parties, ... a contractual forum selection clause is documentary evidence that may provide a proper basis for dismissal pursuant to CPLR 3211 (a) (1)" (*id.* [internal citations omitted]). Therefore, this decision is not based upon jurisdiction, but rather, it is based upon the forum selection clause contained in the parties' contract.

Forum Selection Clause

[I]t is the well-settled policy of the courts of this State to enforce contractual provisions for choice of law and selection of a forum for litigation. Forum selection clauses, which are prima facie valid, are enforced because they provide certainty and predictability in the resolution of disputes, and are not to be set aside unless a party demonstrates that the enforcement of such would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court

(*Sterling Natl. Bank v Eastern Shipping Worldwide, Inc.*, 35 AD3d 222, 222 [1st Dept 2006] [internal quotation marks and citations omitted]). Language in a forum selection clause that a

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particular court “shall have jurisdiction over any matter arising from or concerning this agreement” is generally “construed as mandatory” (*Micro Balanced Prods. Corp. v Hlavin Indus. Ltd.*, 238 AD2d 284, 284-85 [1st Dept 1997]).

Here, Bijou’s claims arise out of Kohl’s alleged breaches of the parties’ agreements.¹ The Vendor Agreement expressly refers to the Terms & Conditions, which contains the Wisconsin forum selection clause. The EDI Agreement also contains a Wisconsin forum selection clause and refers to the Terms & Conditions. The forum selection clauses state that the courts of “Waukesha County, Wisconsin,” or “the United States District Court for the Eastern District of Wisconsin” shall have “exclusive jurisdiction” of “[a]ny suit, action or proceeding against us with respect to our Purchase Order or the parties’ relationship or actions with respect thereto” (Terms & Conditions, at 13; EDI Agreement, at 4). This clause is prima facie valid.

In support of its argument that the Wisconsin forum selection clause never became part of the parties’ agreement, Bijou cites section 2-207 of the Uniform Commercial Code (UCC). “Under subdivision (1) of section 2-207 ..., an acceptance containing additional terms will operate as an acceptance [of an offer] unless it is ‘expressly made conditional on assent to the additional or different terms’” (*Matter of Marlene Indus. Corp. (Carnac Textiles)*, 45 NY2d 327,

¹ Bijou does not seriously dispute that the majority of its claims arise under the Vendor Agreement or the EDI Agreement. Bijou argues that the Confidentiality Agreement “is directly relevant to Bijou’s Third Cause of action, for damages caused by Kohl’s wrongful refusal to accept Bijou’s timely delivery of the Vera Wang goods” (Bijou Opp. Mem. of Law, at 3). Presumably, this argument refers to Bijou’s fourth cause of action for breach of contract, as Bijou’s third cause of action is for fraudulent misrepresentations unrelated to any alleged refusal to accept delivery of Vera Wang goods. In any event, the Confidentiality Agreement submitted by Bijou is not signed by Kohl’s, and Bijou fails to identify any provision of the Confidentiality Agreement that was breached by Kohl’s or explain how that agreement is relevant to any of Bijou’s claims.

332 [1978]). “Subdivision (2) of section 2-207 provides that any additional terms in an acceptance or a written confirmation are to be considered merely proposals for additions to the contract, and that such terms normally will not become a part of the contract unless expressly agreed to by the other party” (*id.* at 333). Between “merchants,” such additional terms become part of the contract unless “they materially alter it” (*id.*, citing UCC § 2-207 [2] [b]).

Citing section 2-207 of the UCC and *Lorbrook Corp. v G&T Indus.* (162 AD2d 69 [3d Dept 1990]), Bijou argues that the forum selection clauses contained in the Terms & Conditions and EDI Agreement are “subsequent writings” that Kohl’s attempted to “unilaterally add ... through a subsequently delivered purchase order,” and that these clauses materially alter the parties’ underlying agreement (Bijou Opp. Mem. of Law, at 7-8, 10). In *Lorbrook Corp.*, the parties purportedly entered into an oral agreement for the defendant’s purchase of goods manufactured by the plaintiff, evidenced by letters, meetings and telephone conversations between the parties. Thereafter, the defendant sent purchase orders to the plaintiff which, on the reverse side of the orders, included a printed provision stating that “[t]his transaction shall be governed by and interpreted under the laws of, and any legal disputed resolved in, the State of Michigan” (*Lorbrook Corp.*, 162 AD2d at 71). The trial court held that the forum selection clause in the purchase orders constituted an additional term that materially altered the agreement under section 2-207 of the UCC, because the purchase orders were sent by the defendant *after* the parties entered into their agreement. The Third Department affirmed, concluding that “the forum selection provision of defendant’s purchase orders never validly became incorporated in their agreement” (*id.* at 73). The Court stated that, if the parties’ communications constituted an oral agreement:

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defendant's purchase orders would be nothing more than a request to ship a portion of the goods covered by that agreement, and the insertion of the forum selection clause would then be an unsuccessful ploy by defendant unilaterally to add a term not covered by the preexisting binding contract. Alternatively, under the same scenario, defendant's purchase orders could readily be considered as confirmations of the preexisting contract. As such, however, the additional term fixing Michigan as the forum State for litigation never became part of the contract, because it materially altered the prior agreement and plaintiff never expressly assented to it

(*id.* [internal citations omitted]). The Court also considered the possibility that the "plaintiff's letters collectively constituted an offer to enter into an agreement for the sale of its products to defendant, which was accepted by defendant's purchase orders" (*id.* at 73). However, under this scenario, "the choice of forum clause in defendant's purchase order acceptances never became part of the sales agreement because it was an additional term materially altering the contract and was not expressly assented to by plaintiff" (*id.*).

As a preliminary matter, it is not clear to the court how the Vendor Agreement or the EDI Agreement were subsequent writings, as opposed to original writings that Bijou now seeks to enforce. The very first sentence of the Vendor Agreement states that it "outlines the terms and conditions governing all purchase orders" (*Invidiata Aff.*, Ex. C [emphasis added]). Thus, the Vendor Agreement was not a "subsequently delivered purchase order" and the forum selection clause was not "unilaterally add[ed]" by Kohl's, as is argued by Bijou (*Bijou Opp. Mem. of Law*, at 10), but rather, the Vendor Agreement was the original agreement, signed by both parties, that was to govern all purchase orders between the parties.

"The doctrine of incorporation by reference requires that the paper to be incorporated into the written instrument by reference must be so described in the instrument that the paper

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may be identified "beyond all reasonable doubt" (*Kenner v Avis Rent A Car Sys.*, 254 AD2d 704 [4th Dept 1998], quoting *Matter of Board of Comms. of Washington Park*, 52 NY 131, 134 [1873]). Here, the first sentence of the Vendor Agreement states that it "outlines terms and conditions governing all purchase orders, *in addition to those terms and conditions on www.connection.kohls.com*" (*Invidiata Aff.*, Ex. C [emphasis added]). This language clearly refers to the Terms & Conditions contained on Kohl's vendor partner website, and Bijou does not dispute that the Terms & Conditions can be found at this location. The EDI Agreement contains the forum selection clause both expressly and by reference to the Terms & Conditions. Thus, neither document is a subsequent writing, but rather, each contained a forum selection clause that came into force contemporaneously with each contract. In the Vendor Agreement, the clause was incorporated by reference, and in the EDI agreement it was expressly stated and also incorporated by reference. Therefore, Bijou's argument is unpersuasive, and *Lorbrook Corp.* is distinguishable on its facts.

Bijou argues that Haber was not provided with, nor made aware of, the Terms & Conditions upon executing the Vendor Agreement, and that, therefore, Bijou could not have knowingly waived its right to have a New York court adjudicate its claims. Bijou argues that, even if Haber had been advised of the Terms & Conditions, he could not view the document until Bijou registered at Kohl's vendor partner website, a procedure that Kohl's did not communicate to Bijou until several days after the agreement was executed, and even then Kohl's communicated the registration procedure to Bondy, Bijou's controller, who has no authority to enter into customer contracts. According to Bijou, Haber read the reference to "terms and conditions on *www.connections.kohls.com*" in the Vendor Agreement to mean that the "written

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terms above [Haber's] signature included terms that were also on Kohl's' website" (Haber Aff., ¶ 16).

However, "[t]here is a presumption that a deliberately prepared and executed written instrument manifests the true intention of the parties [citation omitted]; such a presumption should apply with even greater force when the instrument is between sophisticated, counseled businessmen" (*Quantum Chem. Corp. v Reliance Group*, 180 AD2d 548, 548-49 [1992]; see also *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990] [stating that a "familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms"]). Moreover, "[a] party that signs a document is conclusively bound by its terms absent a valid excuse for having failed to read it" (*Guerra v Astoria Generating Co.*, 8 AD3d 617, 618 [2d Dept 2004]).

In *Guerra*, the Court granted the third-party plaintiff's motion for summary judgment on its claim for contractual indemnification. The third-party plaintiff made a "prima facie showing that the third-party defendant signed documents in which it agreed to be bound by and acknowledged receipt of 'General Conditions of Contract for Vendor Services' ..., a document that contained an indemnification clause" (*id.*). In opposition, the third-party defendant's excuse was that "it never received the General Conditions and that its president, a sophisticated businessman, thought that the General Conditions mentioned in the documents he executed on behalf of the third-party defendant referred to instructions he was given as he walked around the premises prior to executing the contract" (*id.*). The Court found that this excuse was insufficient to defeat the third-party plaintiff's prima facie showing.

Thus, under *Guerra*, Bijou's excuse that it did not receive the Terms & Conditions is

insufficient, and Bijou fails to provide any legal authority in support of its argument that, under these circumstances, the forum selection clause was never communicated to Haber or Bijou. The Vendor Agreement expressly states in the very first sentence that it is subject to the terms and conditions listed on Kohl's website, which included the Wisconsin forum selection clause. The EDI Agreement contains its own expressly stated Wisconsin forum selection clause, and it also refers to the Terms & Conditions. In short, Bijou fails to provide any legal basis for holding Kohl's responsible for Bijou's failure to obtain the Terms & Conditions prior to signing the Vendor Agreement, or any failure by Bijou to read the EDI Agreement.

Moreover, it is irrelevant that Bondy purportedly lacked authority to bind Bijou. As a preliminary matter, Bondy signed the EDI Agreement, not the Vendor Agreement, which was signed by Haber as Bijou's president. In any event, Bijou concedes that Haber "personally, and alone at Bijou, negotiated each and every term of Bijou's contracts" with Kohl's, that "Haber had the sole power and authority to agree to contract terms," and that "Haber's contract negotiations with Kohl's covered every aspect of the sales" (Haber Aff., ¶¶ 4-6). Haber admittedly "directed Bijou's employee Garry Bondy ... to go to Kohl's Internet vendor website, to learn Kohl's 'e-commerce' procedures and to comply with Kohl's forms needed for Bijou to function with Kohl's" (*id.*, ¶ 22). At a minimum, Haber's "words or conduct ... [gave] rise to the appearance and belief that the agent possess[ed] authority to enter into" the EDI Agreement, which is sufficient to create apparent authority (*Hallock v State of New York*, 64 NY2d 224, 231 [1984]). Bondy did not, "by his own acts imbue himself with apparent authority" (*id.*), but rather, any apparent authority was created by Bijou through Haber.

To the extent that Bijou is arguing that it was induced to enter the Vendor Agreement or

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EDI Agreement as a result of Kohl's misrepresentations or omissions concerning the forum selection clause, that argument is unpersuasive, because Bijou could have inquired about the information contained on Kohl's vendor partner website prior to entering into the contract (*see Abrahami v UPC Constr. Co.*, 224 AD2d 231, 234 [1st Dept 1996] ["where a party has means available to him for discovering, by the exercise of ordinary intelligence, the true nature of a transaction he is about to enter into, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations" [internal quotation marks omitted]). Nor does Bijou allege "any fraud or overreaching, on the part of [Kohl's], with respect to the [forum selection clause] itself [citations omitted], and there has been no demonstration that defendants, if the provision is enforced, would, for all practical purposes, be deprived of their day in court" (*Sterling Natl. Bank*, 35 AD3d at 223).

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: December 10, 2008

ENTER:

HON. RICHARD B. LEVINE, J.S.C.

FILED
DEC 24 2008
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