

**Kings Choice Neckwear Inc. v DHL Airways, Inc.**

2006 NY Slip Op 30071(U)

April 6, 2006

Supreme Court, New York County

Docket Number: 0120513/2002

Judge: Herman Cahn

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

PRESENT: Cahn  
Justice

PART 44m

Kings Choice

INDEX NO. 120513/02

MOTION DATE 9/19/05

MOTION SEQ. NO. 003

MOTION CAL. NO. \_\_\_\_\_

- v -

D N H Airways, Inc

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
APR 19 2006  
COUNTY CLERK'S OFFICE  
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION IN MOTION SEQUENCE .....**

Dated: 4/2/06

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO  
JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS Part 49

-----X

KINGS CHOICE NECKWEAR INC. and JULIE  
SCHNEIDER, on behalf of themselves and all others  
similarly situated,

Index No. 120513/02

Plaintiffs,

- against -

DHL AIRWAYS, INC., DHL WORLDWIDE  
EXPRESS, INC. and DHL INTERNATIONAL, LTD.,

Defendants.

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**HERMAN CAHN, J.:**

Plaintiffs Kings Choice Neckwear Inc. (Kings Choice) and Julie Schneider (Schneider) commenced this putative class action against DHL Airways, Inc., DHL Worldwide Express, Inc. and DHL International, Ltd. (collectively DHL) alleging that defendants wrongfully charged them a duty processing fee. Plaintiffs now move for class certification.

FILED  
JUN 27 2016

The amended complaint alleges as follows: DHL claims to be the “global leader of the international air express industry, accounting for a market share of 37.5%” (amended complaint, ¶ 32). Packages sent from a foreign country to the United States are sometimes subject to a customs duty charge that the U.S. government imposes (*id.*, ¶ 37). Customers who use DHL’s international shipping services must fill out a standard DHL Shipment Airwaybill (Airwaybill) (*id.*, ¶ 39). There is no mention anywhere on the Airwaybill about a “Processing Fee.” DHL deems its “Conditions of Carriage,” contained in its Worldwide Express Guide, to be incorporated as part of the Airwaybill contract of carriage (*id.*, ¶¶ 43, 44). Paragraph “C” of DHL’s guide provides:

“In the event that DHL advances customs or import duties/assessments on behalf of the consignee . . . , a surcharge may . . . be assessed based on a flat rate or a percentage of the total amount advanced.”

DHL relies upon this language to impose a Processing Fee on recipients of international packages equaling 2% of the charges advanced with a minimum charge of \$5.00 (*id.*, ¶¶ 46, 47).

After DHL delivers an international shipment of a dutiable parcel, it prepares a separate invoice for the owed duty (*id.*, ¶ 48). Box 3 of the shipment Airwaybill (“International Worldwide Parcel Express Shipments”) indicates who is to pay the duties and taxes. When box 3 of the shipment Airwaybill is left unchecked, DHL bills the receiver of the parcel for the duty (*id.*, ¶ 49). DHL’s breach of contract occurs when it includes a separately itemized Processing Fee of \$5.00, or more, on the customs duty invoice, in addition to a separate line item for the customs duty (*id.*, ¶ 50). Nowhere on the invoice is there an explanation of the Processing Fee. In addition, DHL does not explain in writing at the time that the recipient receives the international package, that DHL will bill the recipient for a Processing Fee. DHL simply includes the Processing Fee on the invoice, and demands payment of both the customs duty and the Processing Fee (*id.*, ¶¶ 51, 52).

Plaintiff Kings Choice is a tie manufacturer. Its factory is located in Manhattan. As part of its manufacturing process, it uses silk and other materials shipped to it from all over the world. Kings Choice regularly received shipments of international parcels by various carriers including DHL. After delivery of each package, DHL sent Kings Choice “Customs Duty Invoices” that Kings Choice believed were not its responsibility, because third parties shipped the parcels. It wrote to DHL advising it to bill the shipper and not the recipient (*id.*, ¶ 55). DHL typically responded with letters, threatening that it would either report Kings Choice to a credit

agency, and thereby ruin its credit rating, or that it would institute legal proceedings (*id.*, ¶ 56).

As a result, Kings Choice paid some of DHL's custom duty invoices (*id.*, ¶ 58).

Plaintiff, Julie Schneider, a resident of Westchester County, took a vacation in Italy in May 2001. While there, she purchased a coat in Florence. She asked the retail store seller to ship the coat to her home in the United States, which it did, electing to use DHL (*id.*, ¶¶ 22, 63). Sometime after the coat arrived, in mid-May 2001, DHL billed Schneider for customs duty and a \$5.00 Processing Fee. Believing in DHL's good faith with respect to its billing practices, she paid the duty and the Processing Fee that DHL imposed (*id.*, ¶ 64). She contends that she is no different from other recipients of DHL customs duty invoices in that she paid the duty and Processing Fee demanded, unaware of DHL's deceptive billing practices.

The complaint contains one cause of action for breach of contract. It alleges that DHL's Airwaybill constitutes a contract between DHL and the class of receivers of international shipments, because such recipients are either direct parties to the contract or third-party beneficiaries of the Airwaybill contract between DHL and the shippers who use DHL. (*id.*, ¶ 69). The Airwaybill does not make any reference to a Processing Fee, nor does it state that DHL will impose a Processing Fee on plaintiffs and the class. DHL breached its contracts by collecting Processing Fees in violation of the terms of the Airwaybill agreements (*id.*, ¶ 70).

Plaintiffs originally commenced this action in state court. DHL removed the action to federal court, claiming that the federal court had jurisdiction based upon two grounds: (1) the claims arise under federal law pursuant to 28 USC 1331, because plaintiffs' state law claims were preempted by the Airline Deregulation Act (ADA), and (2) diversity jurisdiction exists pursuant to 28 USC 1332. The federal district court found that the ADA did not completely

preempt state-law claims for jurisdictional purposes. It also found that, although there was diversity of citizenship, the claimed damages fell short of the \$75,000 threshold for diversity jurisdiction (*Kings Choice Neckwear, Inc. v DHL Airways, Inc.*, 2003 WL 22283814 [SD NY 2003]). The court granted plaintiffs' motion to remand.

Plaintiffs now seek a determination that the action may proceed as a class action on behalf of:

Subclass 1 (New York DHL Recipients) consisting of all recipients of DHL dutiable international shipments in New York State who have paid and/or been charged DHL Processing Fees from September 18, 1996 to present, and

Subclass 2 (All non-New York DHL Recipients) consisting of all recipients of DHL dutiable international shipments in states outside of New York who have paid and/or been charged DHL Processing Fees from September 18, 1996 to present.

CPLR 901 authorizes a class action if:

- (1) the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
- (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
- (4) the representative parties will fairly and adequately protect the interests of the class; and
- (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy

(CPLR 901 [a]; *Rabouin v Metropolitan Life Ins. Co.*, 25 AD3d 349 [1st Dept 2006]; *Friar v Vanguard Holding Corp.*, 78 AD2d 83 [2d Dept 1980]). Plaintiffs have the burden of establishing compliance with these prerequisites (*Rabouin v Metropolitan Life Ins. Co.*, 25 AD3d

349, *supra*). Plaintiffs have not met their burden.

Numerosity is not at issue.

As for commonality, plaintiffs contend that there are two questions of law that are central to this action, and that they overshadow any individual issues. These include (1) whether DHL breached its contracts with recipients of international parcels by charging extra-contractual Processing Fees, or an amount above that permitted in its contracts, and (2) whether DHL is liable to the class, and, if so, the measure of damages.

Remarkably, plaintiffs assert that the central issues in this action are the meaning of a contract not signed by class members, and whether DHL has levied charges not allowed by that contract (Plaintiffs' Memorandum of Law in Support, at 19). The problem with this assertion is that plaintiffs, as recipients of the DHL shipments, are not parties to the contracts at issue. Thus, there is no issue – common to the proposed class or otherwise – as to whether DHL breached its contracts with them.

Moreover, it appears that plaintiffs do not have standing to bring a contract action upon which they are not parties (*Tepper v Cablevision Sys. Corp.*, 19 AD3d 585 [2d Dept 2005]). Although plaintiffs argue that the court should not consider the action's merits while deciding class certification, as discussed below, whether a class representative has standing impacts on the CPLR 901 analysis. Furthermore, in determining whether an action should proceed as a class action, the courts may consider, in addition to the factors enumerated in CPLR 901, the merits of the action, with a view toward eliminating deficient suits as early as possible (*Hoerger v Board of Ed. of Great Neck Union Free School Dist.*, 98 AD2d 274 [2d Dept 1983]; *Yollin v Holland Am. Cruises*, 97 AD2d 720 [1<sup>st</sup> Dept 1983]; *Seligman v Guardian Life Ins. Co. of Am.*, 59 AD2d

859 [1<sup>st</sup> Dept 1977], *appeal dismissed* 44 NY2d 646 [1978]). A class action should not be used to “bootstrap standing which does not otherwise exist” (*Murray v Empire Ins. Co.*, 175 AD2d 693 [1<sup>st</sup> Dept 1991]; *Tegnazian v Consolidated Edison, Inc.*, 189 Misc 2d 152 [Sup Ct, NY County 2000]). Indeed, it would be the shippers, rather than the recipients of the goods, who are likely to possess relevant information about DHL’s service, which is what is at issue here.

In the case of Schneider, allegedly it was the retail store where she purchased the coat and which shipped it, that entered into a contract with DHL. She states that the store left blank box 3 of the Airwaybill that refers to “duties/taxes.” In the case of Kings Choice, its president, Brian Targovnik, testified at a deposition that his company never used DHL. Rather, it would periodically receive overseas packages that DHL shipped to it at the behest of third parties that transacted business with Kings Choice. Thus, plaintiffs allege that the shippers of the goods, and not the plaintiffs, entered into the contracts at issue here.

But even if plaintiffs and the proposed class members did have standing as third-party beneficiaries, as they assert, class certification would, nevertheless, not be warranted because the court would “be required to engage in the task of distilling the laws” of numerous foreign jurisdictions (*Drizin v Sprint Corp.*, 12 AD3d 245 [1<sup>st</sup> Dept 2004]; *Rabouin v Metropolitan Life Ins. Co.*, 25 AD3d 349, *supra*). Section 14 of the “DHL Worldwide Express Terms and Conditions of Carriage” provides that all disputes are subject to the non-exclusive jurisdiction of the courts, and governed by the law, of the country of origin of the shipment. Although the first subclass consists of only New York residents, the contracts and shipments originated in numerous foreign jurisdictions. These problems of numerous foreign laws governing the disputes, would be even greater in connection with the second subclass consisting of all non-New

York residents. Hence, it would result in a series of mini-trials (*Ackerman v Price Waterhouse*, 252 AD2d 179 [1<sup>st</sup> Dept 1998]; *Small v Lorillard Tobacco Co.*, 252 AD2d 1 [1<sup>st</sup> Dept 1998], *affd* 94 NY2d 43 [1999]).

Plaintiffs have also failed to demonstrate that their claims are typical of the proposed class. As stated above, section 14 of the DHL's "Conditions of Carriage" provides that all disputes are subject to the non-exclusive jurisdiction of the courts, and governed by the law, of the country of origin. In addition, DHL contends that Schneider is subject to unique defenses because she waived her claim by not bringing it within 30 days (*see* ¶ 7 of the Airwaybill). Although plaintiffs agree that, as against Schneider, DHL has waived this claim by not raising it earlier, the waiver argument would be inapplicable to the remainder of the class members.

Plaintiffs have also not established that Kings Choice's claim is typical. According to that plaintiff, DHL billed it the complained-of charges sometime after it received the packages. Thus, obtaining the goods was not conditioned upon the payment of the fees. Kings Choice complains, however, that it paid the charges under duress, because DHL and its collection agent threatened to commence litigation or to take action that would adversely impact upon its credit worthiness. There is no indication in the record that these circumstances are representative of the situation involving the other class members. Thus, class certification is properly denied since plaintiffs fail to establish that questions of fact common to the class predominate over questions affecting only individual members (*Gaidon v Guardian Life Ins. Co. of Am.*, 2 AD3d 130 [1<sup>st</sup> Dept 2003]; *McKinnon v International Fid. Ins. Co.*, 281 AD2d 283 [1<sup>st</sup> Dept 2001]).

Accordingly, it is

ORDERED that the motion for class certification is denied.

Dated: April 6, 2006

ENTER:

  
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J.S.C.

**FILED**  
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