

**Mergent Servs. v Itex Corp.**

2007 NY Slip Op 34484(U)

January 14, 2007

Sup Ct, NY County

Docket Number: 601777/07

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

MERGENT SERVICES and JOHN BAL,  
Plaintiffs,

Index No.: 601777/07

Motion Date: 07/10/07

- v -

Motion Seq. No.: 01

ITEX CORPORATION, NYTO TRADE CORPORATION,  
JOHN CASTORO, personally and in the  
capacity of President and CEO, IZZY GARCIA,  
personally and in the capacity of Manager,  
CORAL HOMOKI, Trade Director, MICHAEL  
MARICH, Trade Director, JESSICA TAVERAS,  
Trade Director, and NEW YORK DAILY NEWS,  
Defendants.

Motion Cal. No.: OSC

The following papers, numbered 1 to 10 were read on this motion for provisional relief.

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

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED	
	1
	2- 4
	5 - 10

Cross-Motion:  Yes  No

Upon the foregoing papers,

**UNFILED JUDGMENT**  
his judgment has not been entered by the County Clerk  
and notice of entry must be served based hereon. To  
obtain entry, a check for the amount of the judgment must  
appear in person at the County Clerk's Desk (Room 1000)

The court shall deny the motion of pro se plaintiff John Bal seeking provisional remedies and shall grant the cross-motion of defendant Itex Corp. seeking to compel arbitration of this dispute pursuant to CPLR 7503 (a) and dismiss the complaint pursuant to CPLR 3211 (a) to stay this action.

It is undisputed on this application that the dispute arises

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

out of transactions conducted on the Itex Marketplace and that to transact on that system a person or entity must be a member and in the membership agreement must agree to be bound by the rules and terms of the Itex Marketplace. Section F.7. of the Trading Rules entitled "Venue" states that "[a]ny action brought by any party to this agreement shall be filed, and venue shall lie only in the courts of King County, Washington, United States of America, to which jurisdiction and venue Member hereby specifically consents.. Section F.10. Of the Trading Rules entitled "Arbitration" states that "[t]he parties agree that in the event of a dispute, the parties will resolve the dispute under the commercial rules of the American Arbitration Association in Bellevue, Washington. Notwithstanding any provision of law, any claim arising out of the creation, performance or termination of this agreement by either party must be brought within one year of the accrual of the cause of action."

As to the forum selection clause, the Court of Appeals has stated that

it is now recognized that parties to a contract may freely select a forum which will resolve any disputes over the interpretation or performance of the contract. Such clauses are prima facie valid and enforceable unless shown by the resisting party to be unreasonable. Forum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes, particularly those involving international business agreements.

Brooke Group Ltd. v JCH Syndicate 488, 87 NY2d 530, 534 (1996) (citations omitted). "A contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court." LSPA Enterprise, Inc. v Jani-King of New York, Inc., 31 AD3d 394, 395 (2d Dept 2006). No party raises any object to the enforcement of the forum selection clause here and therefore the court shall dismiss this action under CPLR 3211 (a) (1).

With respect to the arbitration clause, "[i]n deciding an application to compel arbitration pursuant to CPLR 7503 (a), the court is required to first make a determination whether the parties have entered into a valid arbitration agreement and, if so, whether the issue sought to be submitted to arbitration falls within the scope of that agreement. . . [T]he court is empowered to determine if the dispute sought to be submitted to arbitration is timely. Finally, . . . the court must determine if the subject of the petition sets forth an appropriate ground for judicial intervention under the provisions of CPLR article 75." Koob v IDS Financial Services, Inc., 213 AD2d 26, 30 (1<sup>st</sup> Dept 1995). On the record before this court on these motions, the requisites

for compelling arbitration have been satisfied and therefore the court upon dismissing the action shall compel the parties to arbitrate their dispute.

Accordingly, it is

ORDERED that plaintiff's motion is DENIED; and it is further ORDERED and ADJUDGED that the complaint is DISMISSED as against all defendants pursuant to CPLR 3211 (a) (1); and it is further

ORDERED and ADJUDGED that pursuant to CPLR 7503 (a) the parties are COMPELLED to arbitrate their claims pursuant to the terms of their agreement.

This is the decision and order of the court.

Dated: January 14, 2007

ENTER:

\_\_\_\_\_  
DEBRA A. JAMES  
J.S.C.

**LIMITED JUDGMENT**  
This judgment is subject to review by the County Clerk and notice of entry must be served based hereon. To obtain entry of judgment, the party in whose favor the judgment is entered must appear in person or by counsel at the County Clerk's Office (Room 1200) on the date and time specified on the summons (CPLR 3211(a)).