

<b>Mehmet v Paypal, Inc.</b>
2008 NY Slip Op 30835(U)
March 21, 2008
Supreme Court, New York County
Docket Number: 0110537/2007
Judge: Barbara Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KAPNICK  
Justice

PART 12

MEHMET, B. DAVID

INDEX NO.

110537/07

MOTION DATE

- v -

MOTION SEQ. NO.

02

PAY PAL, INC.

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on 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 IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION

**FILED**

MAR 25 2008

NEW YORK

COUNTY CLERK'S OFFICE

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

Dated:

3/21/08

**BARBARA R. KAPNICK** 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: PART 12

-----X

B. DAVID MEHMET,  
  
Plaintiff,

DECISION/ORDER  
Index No. 110537/07  
Motion Seq. No. 002

- against -

PAYPAL, INC.,

Defendant.

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BARBARA R. KAPNICK, J.:

**FILED**  
MAR 25 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

This is an action commenced by plaintiff pro se for fraud (first cause of action), conversion (second cause of action) and intentional infliction of emotional distress (third cause of action).

Defendant previously moved for an order dismissing the Complaint pursuant to CPLR § 3211(a)(1) on the grounds that defendant's User Agreement contains a forum selection clause mandating that disputes be resolved by a court located in Santa Clara County, California.

The motion was submitted in the Motion Submission Part on default on October 18, 2007.

Plaintiff thereafter contacted the Chambers of the Hon. Bernard J. Fried (who was initially assigned to the case) to

request a two week adjournment in order to enable him to submit papers in opposition to this motion. It appears from plaintiff's letter dated October 22, 2006 [sic] that plaintiff was advised by Judge Fried's Clerk that he would be given an opportunity to submit papers but should first call the defendant's attorney to request that he sign a Stipulation.

Although plaintiff states that defendant's counsel agreed to the two-week adjournment, defendant's counsel contends that he agreed only to "consider" signing a Stipulation, which he ultimately did not sign.

The motion file was first received in IA Part 12 on October 30, 2007. Although plaintiff apparently contacted the Part Clerk and asked for two weeks to move by Order to Show Cause to vacate his default in opposing this motion, no Order to Show Cause was ever submitted.<sup>1</sup>

Defendant's motion was, therefore, granted on default, and the Clerk was directed to enter judgment dismissing plaintiff's

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<sup>1</sup> During oral argument on January 23, 2008, plaintiff indicated that he believed he could not submit an Order to Show Cause to vacate his default until this Court had issued a decision on the motion.

Complaint without prejudice to plaintiff's right to commence a new action in the appropriate forum.

Plaintiff now moves by Order to Show Cause for an order: (i) vacating plaintiff's default pursuant to CPLR § 5015(a)(1); (ii) granting leave to amend the Complaint pursuant to CPLR § 3025 to assert additional theories of recovery; (iii) granting a declaratory judgment pursuant to CPLR § 3001 declaring that defendant has violated New York's Consumer Protection Act, and that said Act invalidates any forum selection clause or contract where there is a concealment of material fact; and (iv) awarding costs.

Plaintiff argues that he has a reasonable excuse for his default; namely, that his wife, Kheira Mehmet, was present in Room 130 on October 18, 2007 to request an adjournment, but did not hear the case called.

Plaintiff further argues that defendant's motion to dismiss should not have been considered because it was untimely, and because defendant attached a modified contract rather than the original contract which he agreed to, and that his claims are meritorious.

As to the merits, plaintiff argues that the forum selection clause must be invalidated based on public policy and on the ground that the designated forum - i.e., California - would be overly burdensome, unjust and unreasonable and would violate the Consumer Protection Act.

Defendant argues in opposition that the order of dismissal should not be vacated because plaintiff has had multiple opportunities to argue the merits of defendant's motion to dismiss.

Moreover, even were this Court to find that plaintiff has established a reasonable excuse for his default,

[i]t is well-accepted policy that forum-selection clauses are *prima facie* valid. In order to set aside such a clause, a party must show that enforcement 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.


British West Indies Guaranty Trust Co. v. Banque Internationale A Luxembourg, 172 A.D.2d 234 (1st Dep't 1991). See also, Sterling National Bank v. Eastern Shipping Worldwide, Inc., 35 A.D.3d 222 (1st Dep't 2006).

Based on the papers submitted and the oral argument held on the record on January 23, 2008, this Court finds that plaintiff has failed to establish that enforcement of the subject forum-selection clause would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching. Nor has plaintiff established that said provision violates the Consumer Protection Act.

Accordingly, the Complaint was properly dismissed without prejudice to plaintiff's right to commence a new action in the appropriate forum.

This constitutes the decision and order of this Court.

Dated: March 21, 2008

  
Barbara R. Kapnick  
J.S.C.

**BARBARA R. KAPNICK**  
J.S.C.

**FILED**  
MAR 25 2008  
NEW YORK  
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