

Redi Bag USA LLC v Falk Paper Co.

2008 NY Slip Op 32151(U)

July 22, 2008

Supreme Court, Nassau County

Docket Number: 9102-07/

Judge: Roy S. Mahon

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

REDI BAG USA LLC,

TRIAL/IAS PART 9

INDEX NO. 9102/07

Plaintiff(s),

MOTION SEQUENCE
NO. 2

- against -

FALK PAPER COMPANY,

MOTION SUBMISSION
DATE: May 7, 2008

Defendant(s).

The following papers read on this motion:

Order to Show Cause	X
Affirmation in Opposition	X

Upon the foregoing papers, the motion by plaintiff, brought by Order to Show Cause, for an Order granting to plaintiff Redi Bag USA LLC renewal and/or reconsideration of this Courts's Order, dated February 20, 2008, pursuant to CPLR §2221, based upon newly-discovered evidence, and upon renewal and reconsideration of the Order, reinstating plaintiff's complaint based upon the conduct of the defendant and/or its counsel subsequent to the issuance of such Order, or, alternatively, dismissing defendant's counterclaim based upon the doctrine of judicial estoppel wherein defendant alleged that this Court lacks jurisdiction over defendant and that this Court is an inconvenient forum for the prosecution of defendant's counterclaim, is determined as hereinafter provided:

In pertinent part, the Court in its prior Order dated February 20, 2008 set forth:

"The instant action involves a Purchase Order for the manufacturing of plastic shopping bags that was entered into between the respective parties on August 18, 2005. In substance the defendant through the affidavit of Bob Margl, a manager of the defendant sets forth that the bags that were produced in the initial shipment were not produced according to specifications. Mr. Margl further contends that the second shipment of bags was not according to specifications. The plaintiff commenced the instant action and a review of the allegations set forth in the First Cause of Action in the Verified Complaint the plaintiff sets forth that any alleged defect in the plastic bags were remedied and thereafter the defendant accepted delivery but has failed to pay the plaintiff for the bags delivered.

The defendant brings the instant application, amongst other things, on the grounds that the Court

lacks personal jurisdiction over the defendant pursuant to the provisions of CPLR §302(a). In pertinent part, said section provides:

"§302. Personal jurisdiction by acts of non-domiciliaries.

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or service sin the state; or

2. commits a tortious act within the sate, except as to a cause of action for defamation of character arising from the act; or

3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or

4. owns, uses or possesses any real property situated within the state."

In support of the defendant's submission, Mr. Margl's affidavit, amongst other things, sets forth:

"2. Falk has had no contacts with the State of New York as outlined below:

a. Falk has never transacted business within the State of New York or contracted to supply goods or services in the State;

b. Falk has never committed a tortious act within the State;

c. Falk has never committed a tortious act outside of the State which caused injury to person or property within the State;

d. Falk does not regularly conduct or solicit business, or engage in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the State;

e. Falk does not expect nor should it reasonably expect that its interactions with Plaintiff, which consisted purely of negotiations and contact with two agents of Plaintiff who were both located and operating in Minnesota;

f. Falk does not own, use, or possess any real property situated within the State of New York.

g. Neither I not any other official of Falk, traveled to New York with respect to the alleged issues raised in the Complaint; and

h. Falk has never consented to litigate, mediate, arbitrate or other wise

defend an action brought against it in the New York Courts.

3. This action concerns an alleged breach of contract stemming from a Purchase Order submitted by Falk to Plaintiff's Minnesota agent for the production and delivery of plastic shopping bags made by Plaintiff.

4. Falk did in fact place a Purchase Order with Redi-Bag USA LLC for the production of plastic shopping bags on or about August 18, 2005; however the order was placed through a Minnesota agent of Plaintiff, namely Century Packaging. The Purchase Order reflects the location of the parties thereto, specifically "Redi Bag, Century Packaging Compa, P.O. Box 128, Circle Pines, MN 55014" and "Falk Paper, 618 North 3rd Street, Minneapolis, MN 55401". All contact, communications, and interactions regarding this Purchase Order took place by and between Falk and Plaintiff's Minnesota agents. A copy of the Purchase Order is annexed hereto as Exhibit "A".

5. On or about January 12, 2006, Falk received the first shipment of plastic bags; however the bags were not produced in accordance with the specifications contained in the Purchase Order. Falk contacted Century Packaging in Minnesota in an attempt to have the deficiency corrected. Century Packaging adjusted the product in Minnesota at Falk's warehouse in order to comply with the specifications. See Exhibit "B".

6. On or about July 25, 2006, Falk received the second and last shipment of plastic bags; however, again, the bags were not produced in accordance with the specifications contained in the Purchase Order. Falk specifically indicated to Redi Bag agent Century Packaging that it would not accept the 2nd shipment and requested that it be returned. See Exhibit "C".

7. At this point, Falk has been contacted by a second agent of Plaintiff who also existed and operated in Minnesota, namely Robert Saley and Associates, who replaced Century Packaging as the Redi Bag agent in Minnesota. See Exhibit "D".

8. Robert Saley came to the Falk warehouse and personally reviewed the deficient bags. As Falk was responsible for providing the bags to its client, it was necessary to retain a second producer in order to meet the requirements and expectations of the client in a timely fashion. Falk did not represent or agree to have the bags corrected by Plaintiff and immediately returned the bags to Plaintiff through its agent Robert Saley.

9. The only indication possible that Redi Bag USA has a New York location was from the small print on the top the bills sent to Falk, which listed Redi Bay USA at a P.O. Box in New Hyde Park, New York. A copy of a Redi Bag bill is annexed hereto as Exhibit "E".

10. Furthermore, the letter sent by Redi Bag USA President, Jeffrey Rabiea, which demanded payment for the returned product, detailed the Redi Bag USA location at two separate distribution centers located in "Garden City Park, New York" and "Sharon, Pennsylvania". However, these distribution

centers are not listed as a "location" on the Redi Bay USA website which details their "locations" as "Central Location, 820 East Indianapolis, Wichita, KS 67202", "Midwest Location, 264 South Dock Street, Sharon, PA 16146", "East Location, 135 Fulton Avenue, New Hyde Park, NY 11040" and "West Location, 620 Spice Island Drive, Sparks, NV 89431". A copy of the letter is annexed hereto as Exhibit "F".

11. Plaintiff specifically states on their website that "Redi-Bag USA makes its products available through locally based marketing representatives. For information or to find a representative in your area Contact Us". At no time in dealing with Plaintiff's "locally based marketing representatives" did Falk expect to defend a claim anywhere other than in Minnesota. A copy of the Redi-Bag USA webpage is annexed hereto, marked Exhibit "G".

12. Plaintiff alleges that there is an "agreement between the parties" which "invests jurisdiction" in the State of New York, County of Nassau. Falk is unaware of any agreement whereby it allegedly consented to jurisdiction of the New York courts. Although Falk has demanded the production of such an agreement which allegedly divests jurisdiction to New York, Plaintiff has failed to produce any evidence of said agreement. A copy of Defendant's Demand for Discovery and Inspection of Documents and Plaintiff's reply in annexed hereto marked Exhibit "H".

The plaintiff in opposition to the requested relief argues that the respective parties agreed pursuant to the "Redi Bag USA Terms and Conditions" (see *plaintiff's Exhibit A*) to venue any disputes relative to the agreement in Nassau County. A review of said alleged agreement in paragraph "19" sets forth that the agreement involves an entity known as "New York Packaging Corp". Based upon the fact that the defendant through Bob Margl states that the alleged terms and conditions were not part of the agreement and that the plaintiff offers no submission from a corporate officer of the plaintiff to dispute the defendant's contention and authenticate the terms and conditions as part of the respective parties' agreement, the Court can not consider the venue provisions set forth therein.

The plaintiff further argues that various phases of discovery have gone forward and as such the defendant has waived any objection to jurisdiction. The Court notes although the instant application was brought on November 9, 2007 pursuant to the provisions of CPLR §3211(a)(8), the Court advised counsel for the respective parties that pursuant to the provisions of CPLR §3214(b), the Court would not stay discovery.

The plaintiff maintains that the defendant has consented to jurisdiction within New York by asserting a counterclaim in its Verified Amended Answer. In examining this issue, the Court in **Textile Technology Exchange Inc. v Davis**, 81 NY2d 595 NYS2d 729, 611 NE2d 768 stated:

"The issue before us is whether the defendant waived his jurisdictional defense by bringing an "unrelated" counterclaim. The Appellate Divisions have developed a rule that interposing a counterclaim related to plaintiff's claims will not waive the defense of lack of personal jurisdiction, but that asserting an unrelated counterclaim does waive such defense because defendant is taking affirmative advantage of the court's jurisdiction (see *Prezioso v Demchuk*, 127 AD2d 576, 511 NYS2d 375, *lv. dismissed*, 70 NY2d

1002, 526 NYS2d 438, 521 NE2d 445; *Liebling v Yankwitt*, 109 AD2d 780, 781, 486 NYS2d 292).

We agree with the underlying rationale of such rule and now adopt it. We clarify, however, that a counterclaim will only be "related" for these purposes when such counterclaim could potentially be barred under principles of collateral estoppel-where the parties or their privies are the same and where the issues in the plaintiff's claims are potentially identical and decisive of issues raised in the counterclaims (see, *Gramatan Home Investors Corp. v Lopez*, 46 NY2d 481, 486, 414 NYS2d 308, 386 NE2d 1328). While all counterclaims are "permissive" (CPLR 3019), the spectre of collateral estoppel often requires a defendant to bring certain counterclaims in order to avoid the risk of later preclusion (see, e.g., *Siegel, NY Prac* §224, at 328, and §452, at 684-685 [2d ed.]). Where a defendant in effect must bring such counterclaims, it would be unfair to deem those counterclaims to waive a jurisdictional defense."

Textile Technology Exchange Inc v Davis, supra at 730

The Court finds that upon review of the defendant's counterclaim that said counterclaim is "related" to the plaintiff's action and as such does not waive the defendant's claim as to jurisdiction.

Based upon all of the foregoing and the absence of any submission by the plaintiff to establish jurisdiction as to the defendant, that branch of the defendant's application which seeks an Order pursuant to the provisions of CPLR §3211(a)(8) based upon the lack of personal jurisdiction pursuant to the provisions of CPLR §302(a), is **granted**."

In examining the issue of renewal, the Court held:

". . . An application for leave to renew must be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court. Renewal should be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application. (*Ecco High Frequency Corp v Amtorg Trading Corp*, 81 NYS2d 897, affd 274 App Div 982, rearg and app den 274 App Div 1056; *Matter of Holad v MVAIC*, 53 Misc 2d 952; *American Trading Co. v Fish, supra*.) Nor should the remedy be available where a party has proceeded on one legal theory on the assumption that what has been submitted is sufficient, and thereafter sought to move again on a different legal argument merely because he was unsuccessful upon the original application. . . ." **Foley v. Roche, supra at 568.**

The plaintiff premises the requested relief upon certain e-mail correspondence between the plaintiff's counsel and the defendant's counsel dated April 16, 2008 as set forth in the plaintiff's Exhibit E. Said e-mails in pertinent part provide:

"-----Original Message-----

From: Ed Weissman [mailto:edweissman@edweissmanlaw.com]

Sent: Wednesday, April 16, 2008 4:54 PM

To: Galvin, Kerry
 Subject: RE: Redi Bag/Fauk

Your suggestion is rejected.

Your claim on behalf of Falk that it now consents to the Court's jurisdiction is as good a basis for re-instating Redi-Bag's claim as I could hope for.

-----Original Message-----

From: Galvin, Kerry [mailto:Kgalvin@Cullen and Dykman.com]
 Sent: Wednesday, April 16, 2008 5:49 PM
 To: Ed Weissman
 Subject: RE: Regi Bag/Falk

I think that we can consent to jurisdiction on our own terms-not forced into a state where we've has no prior interaction. If your client would like to settle, we would consider withdrawing our claim if your client withdraws the appeal and pay lost profits/costs/fees the amount of \$10,000.

-----Original Message-----

From: Ed Weissman [mailto:edweissman@edweissmanlaw.com]
 Sent: Wednesday, April 16, 2008 4:39 PM
 To: Galvin, Kerry
 Subject: RE: Redi Bag/Fauk

Thanks for the update.

It is my position that if the main claim could not be heard in New York then the counterclaim of the party challenging jurisdiction cannot be heard in New York.

I don't think you can have it both ways."

Based upon the foregoing, the Court **grants** renewal. The Court notes that subsequent to the Court's February 20, 2008 Order, the defendant has continued the prosecution of the defendant's counterclaim. In substance, it is upon this fact that the plaintiff seeks the requested relief.

In the Court's Order of February 20, 2008, the Court set forth the Court's holding in **Textile Technology Exchange Inc. v Davis**, 81 NY2d, 56, 595 NYS2d, 729, 611 NE2d 768. The Court notes that the Court therein set forth:

"While all counterclaims are "permissive" (CPLR 3019), the spectre of collateral estoppel often requires a defendant to bring certain counterclaims in order to avoid the risk of later preclusion (*see, e.g., Siegel, NY Prac §224, at 328, and §452, at 684-685 [2d ed.]*). Where a defendant in effect must bring such counterclaims, it would be unfair to deem those counterclaims to waive a jurisdictional defense."

Textile Technology Exchange Inc. v Davis, supra at 730

The defendant's Counterclaim in the instant action sets forth:

"17. Falk repeats and realleges each and every allegation in Paragraphs marked or numbered "1" through "16" with the same force and effect as if fully set forth herein.

18. Plaintiff has failed to perform its obligations pursuant to a purchase order negotiated with Falk by agents of Plaintiff outside of this jurisdiction on or about August 18, 2005 ("Purchase Order").

19. Plaintiff failed to produce goods in accordance with the specifications detailed in the Purchase Order.

20. As a result of Plaintiff's breach of contract, Falk was required to purchase replacement goods.

21. Based upon the foregoing, Falk is entitled to judgment for its total loss of profit and for the reasonable costs, fees and disbursements of defendant this action, in an amount to be determined by this Court but believed to be not less than ten thousand (\$10,000.00) dollars."

By bringing the Counterclaim, which was related to the plaintiff's causes of action as set forth in the Verified Complaint, the defendant did not consent to the jurisdiction of the Court (see, **Textile Technology Exchange, Inc. v Davis**, supra). The defendant's application to dismiss for lack of personal jurisdiction pursuant to CPLR §3211(a)(8) was granted. The Court observes that the respective parties did not seek pursuant to CPLR §2214 any relief at the time of the original application as to the defendant's counterclaim.

In substance, the plaintiff in the instant application based upon the defendant's subsequent prosecution of the defendant's Counterclaim argues that the defendant has retroactively consented to the jurisdiction of the Court to hear all the issues presented. While appealing in the first instance, the Court is unaware of any authority that would retroactively allow such a remedy to establish minimum contacts with New York so as to not offend traditional notions of fair play and substantial justice (see, **International Shoe v Washington**, 326 US 310) after a determination has been made as to a lack of personal jurisdiction.

The Court further notes that in light of the Court's February 20, 2008 Order, the Counterclaim brought pursuant to the provisions of CPLR §3019(a) is the only cause of action currently before the Court. In this regard, the plaintiff's proper remedy is to bring an application to amend its Reply to the Counterclaim. As set forth in **Flaks, Zaslow & Co., Inc. v Bank Computer Network Corporation**, 66 AD2d 363, 413 NYS2d 1 (First Dept., 1979):

"Usually, the dismissal of the complaint would have been the end of this action. It is certainly well settled that the mere interposition of a counterclaim will not waive a defendant's objection to personal jurisdiction over it (**Katz & Son Billiard Prods. v Correale & Sons**, 26 AD2d 52, affd 20 NY2d 903). Defendant, however, engaged in conduct amounting to a waiver when it went far beyond the mere pleading of a counterclaim. Defendant waived its previously sustained jurisdictional objection by moving for summary judgment on its second counterclaim thereby availing itself of a New York court for affirmative relief. (*Goodman v Solow*, 27 AD2d 920; cf. *Revona Realty Corp.*

v Wasserman, 4 AD2d 444, app dsmd 5 NY2d 931; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:60 p 63).

By virtue of the defendant's waiver, the court at Special Term was on sound ground in permitting the plaintiff to amend the reply to assert a claim for affirmative relief identical to its original claim in the now dismissed complaint. As a result, in this procedurally peculiar case the complaint stands dismissed for lack of in personam jurisdiction while the plaintiff is properly permitted to pursue the same claim through its amended reply to an answer containing a second counterclaim that must now be dismissed as the result of a search of the making of which constituted a waiver of defendant's jurisdictional objection. If "man bites dog" in this case, it is purely the defendant's fault."

Textile Technology Exchange Inc. v Davis, supra at 366-367

As such, upon renewal and based upon all of the foregoing, the plaintiff's application for an Order granting to plaintiff Redi Bag USA LLC renewal and/or reconsideration of this Courts's Order, dated February 20, 2008, pursuant to CPLR §2221, based upon newly-discovered evidence, and upon renewal and reconsideration of the Order, reinstating plaintiff's complaint based upon the conduct of the defendant and/or its counsel subsequent to the issuance of such Order, or, alternatively, dismissing defendant's counterclaim based upon the doctrine of judicial estoppel wherein defendant alleged that this Court lacks jurisdiction over defendant and that this Court is an inconvenient forum for the prosecution of defendant's counterclaim, is **denied**.

SO ORDERED.

DATED: 7/22/2008

.....*Roy S. Mahon*.....
J.S.C.

ENTERED
JUL 25 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE