

**New Millenium Windows & Doors, Inc. v Unilux AG**

2008 NY Slip Op 32391(U)

August 18, 2008

Supreme Court, New York County

Docket Number: 0603531/2007

Judge: Richard B. Lowe

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

PRESENT: MOORE, FREDERICK J. JR. JUDGE

PART 56

Index Number : 603531/2007

**NEW MILLENIUM WINDOWS & DOORS**

VS.

**UNILUX AG**

SEQUENCE NUMBER : 002

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE 8/6/08

MOTION SEQ. NO. \_\_\_\_\_

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

n 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**

AUG 28 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 8/18/08

MOORE, FREDERICK J. JR. JUDGE

\_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 56

-----X  
NEW MILLENIUM WINDOWS & DOORS,  
INC., MICHAEL LEVITT and YAKOV  
KLYACHMAN,

Plaintiffs,

Index No.: 603531/07

-against-

DECISION AND ORDER

UNILUX AG, GREGG D'AMATO, JEREMY  
DELK, TRADE WIND DISTRIBUTION LLC,  
THE WINDOW NETWORK LLC and NEW  
MILLENIUM DISTRIBUTION LLC,

Defendants.  
-----X

**Hon. Richard B. Lowe, III:**

Defendant moves pursuant to CPLR §§ 3211 and 327 for an order dismissing the

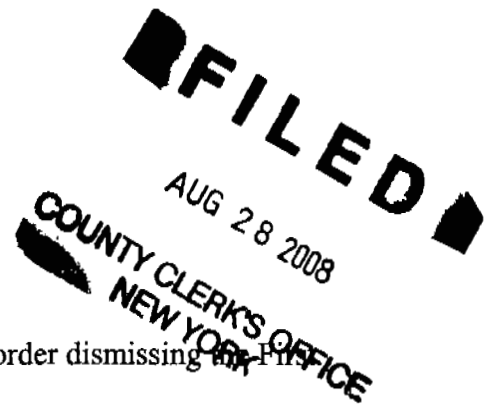
Amended Complaint.

**BACKGROUND**

The underlying dispute arises out of a distribution contract entered into between New Millenium Windows & Doors, Inc. (Millenium), a domestic New York corporation, and Unilux AG (Unilux), a German company. Plaintiffs allege five causes of action against defendants: one, breach of contract, including the failure of Unilux to provide conforming products; two, wrongful termination; three, failure to deliver products after the wrongful termination; four, tortious interference; and five, civil conspiracy by the non-moving defendants to have Unilux terminate the distribution agreement and divert Unilux products to them.

The Distribution Agreement, which was prepared by Unilux, states in § 11 (3):

“[J]urisdiction for any disputes in relation to this



agreement or in business executed by it is the manufacturer's place of business in Salmtal/Germany. Each contract partner also has the right to sue the other at their general jurisdiction."

In addition to the Distribution Agreement, the current business regulations (AGB) of Unilux, in effect at the time the Distribution Agreement was executed, states that the "place of performance for deliveries, including carriage free deliveries, and payment is Salmtal." Further, the AGB states that "German law applies exclusively." The AGB was mentioned in several sections of the Distribution Agreement, but not in § 11.

Based on these provisions, Unilux now moves the court to dismiss the first amended complaint pursuant to CPLR 3211 (a) (2), or to dismiss the action pursuant to the doctrine of forum non conveniens as permitted under CPLR 327 (a); or, in the alternative, to dismiss plaintiffs' fifth cause of action for civil conspiracy pursuant to CPLR 3211 (a) (7).

#### DISCUSSION

CPLR 3211 (a) (2) allows a party to seek dismissal of a case based on the lack of jurisdiction of the court. Unilux' contention is that, according to the provisions of the Distribution Agreement and the AGB, Millenium may only file suit against Unilux in Germany. Consequently, the first issue before the court is whether Unilux is entitled to dismissal pursuant to CPLR 3211 (a) (2), on the ground that the parties have agreed to a forum selection clause requiring the action to be brought in Germany.

Unilux maintains that the provision cited above, stating that "[e]ach contract partner also has the right to sue the other at their general jurisdiction," is to be read to mean that "their general jurisdiction" refers only to the immediately preceding party, the "other" being sued. Conversely, Millenium asserts that the term "their general jurisdiction" applies to "each

\* 4 ]  
contracting party,” thereby permitting the party instituting the action to file suit in its own jurisdiction. Under Unilux’ interpretation, Unilux could sue Millenium either in Germany or the United States (New York in particular because that is where Millenium is located), but Millenium could only sue Unilux in Germany. Millenium’s reading would allow either party to sue the other in Germany or the United States, at the option of the party instituting the action.

To determine whether the clause in dispute allows for only one interpretation or is ambiguous, the threshold question “is whether the agreement on its face is reasonably susceptible of more than one interpretation” (*See Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]), and the determination as to “[w]hether an agreement is ambiguous is a question of law for the courts.” (*Kass v Kass*, 91 NY2d 554, 556 [1998]).

When differing interpretations and constructions of a clause are proffered, and the lack of clarity makes the clause subject to the construction posited by each party, the clause is considered ambiguous. (*See Arrow Communication Laboratories, Inc. v Pico Products, Inc.*, 206 AD2d 922, 923 [4<sup>th</sup> Dept 1994]). When it is determined that a clause is ambiguous, “it is for the court to interpret unless the intent of the parties depends on the credibility of extrinsic evidence.” (*Doldan v Fenner*, 309 AD2d 1274, 1275 [4<sup>th</sup> Dept 2003]).

Unilux asserts that the clause is meant to be read in conjunction with the AGB, which, Unilux maintains, was incorporated by reference in the Distribution Agreement. Unilux argues that when the two documents are read together, there is no ambiguity in the forum selection clause.

The AGB was referred to three times in the Distribution Agreement: first, in § 1, discussing chains of distribution, clientele and the allocation of distribution rights, in which the

distributor agrees to sell exclusively according to the current business regulations appearing in the AGB; second, in § 7 (2), stating that the AGB governs the general terms and conditions of the business; and third, in § 7 (5), concerning Unilux' obligations with respect to compensation for approved claims. The AGB is not referred to in the section of the Distribution Agreement containing the forum selection clause.

The Distribution Agreement did not expressly state that the forum selection clause is subject to the provisions of the AGB. In *George Hyman Constr. Co. v Precision Walls of Raleigh, Inc.* (132 AD2d 523, 526 [2d Dept 1987]), the court stated that, absent a clear intention to the contrary, a forum selection clause is not subject to an outside agreement that is not specifically referred to as limiting the forum selection. Further, the absence of any express incorporation by reference means that the drafter intended that each agreement have and maintain its own identity. (Cf *National Union Fire Ins. Co. of Pittsburgh, Pa. v Williams*, 223 AD2d 395 [1<sup>st</sup> Dept 1996]). Therefore, the court cannot conclude that the AGB is incorporated by reference with respect to the forum selection clause.

“While ambiguous words will be construed most strongly against the party who uses them, when a term of a written contract requires definition in order to make its meaning clear and such definition is not given in the writing itself, it is always permissible to give that definition by extrinsic evidence (internal citations omitted).” (*Premium Coal Company, Inc. v New Hampshire Fire Insurance Company*, 265 AD 320, 321 [1<sup>st</sup> Dept 1942]). In such circumstances, its construction should be determined by trial. *Id.* at 321.

Since the terms of the forum selection clause are ambiguous, and the court lacks sufficient evidence to determine the intent of the parties, Unilux' motion to dismiss pursuant to

[\* 6 ]

CPLR 3211 (a) (2) is denied.

The court must now address Unilux' alternate requested relief of having the action dismissed as being an inconvenient forum.

“The common-law doctrine of forum non conveniens, codified in CPLR 327, permits a court to dismiss an action when it finds that in the interest of substantial justice the action should be heard in another forum. The doctrine is based upon the equitable principles of justice, fairness and convenience, and should be applied flexibly by the court, in its sound discretion, based upon the facts and circumstances of each particular case (internal quotations and citations omitted).”

*Nguyen v Banque Indosuez*, 19 AD3d 292, 294 (1<sup>st</sup> Dept 2005).

“The great advantage of the rule of forum non conveniens is its flexibility ... .” (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984]). In determining whether or not to apply the doctrine of forum non conveniens, among the factors to be considered are: (1) the residency of the parties; (2) where the transaction giving rise to the action occurred; (3) the availability of an alternate forum; (4) the potential hardship to the defendant; (5) the location of the majority of the witnesses; and (6) the burden on New York courts. (*Id.*; *Bank Hapoalim (Switzerland) Ltd. v Banca Intesa S.p.A.*, 26 AD3 286, 287 [1<sup>st</sup> Dept 2006]).

In applying these factors to the instant case, the court concludes that the action should be dismissed based on the doctrine of forum non conveniens.

The defendant is a German company that manufactures its products in Germany. Pursuant to the AGB, which, while inapplicable to the forum selection clause, governs many of the transactions subject of this lawsuit, specifies that the place of performance is Salmtal, Germany (AGB § 9). Millenium itself has stated that it had to make several trips to Germany to

view Unilux' operations because of alleged problems with the products being shipped. Many of the witnesses reside in Germany, and, pursuant to the Distribution Agreement and the AGB, the German courts are able to provide an alternate forum to resolve the dispute. Finally, pursuant to § 1 of the AGB, German law is to be applied to any disputes arising out of the sale of the subject goods.

Although the courts of New York are fully capable of applying foreign law should the need arise (*Anagnostou v Stifel*, 204 AD2d 61, 62 [1<sup>st</sup> Dept 1994]), "the applicability of foreign law is an important consideration in determining a *forum non conveniens* motion weighing in favor of dismissal, given that expert testimony is essential (internal citations omitted)." (*Shin-Etsu Chemical Co., Ltd. v ICICI Bank Limited*, 9 AD3d 171, 178 [1<sup>st</sup> Dept 2004]).

Having considered all of the relevant factors enumerated above, the court concludes that Germany would be a more appropriate forum for the resolution of the instant dispute. (*See Alberta & Orient Glycol Company, Ltd. v Factory Mutual Insurance Company*, 49 AD3d 276 [1<sup>st</sup> Dept 2008]).

Based on the foregoing, Unilux' motion to dismiss plaintiffs' fifth cause of action for civil conspiracy is deemed moot.

### CONCLUSION

It is hereby

ORDERED that defendant Unilux Ag's motion to dismiss pursuant to CPLR 3211 (a) (2) is denied; and it is further


ORDERED that defendant Unilux AG's motion to dismiss plaintiffs' fifth cause of action for civil conspiracy pursuant to CPLR 3211 (a) (7) is deemed moot; and it is further

ORDERED that defendant Unilux Ag's motion to dismiss the complaint pursuant to CPLR 327(a) is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: August 18, 2008

ENTER:



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HON. RICHARD B. LOWE, III

**FILED**  
AUG 28 2008  
COUNTY CLERK'S OFFICE  
NEW YORK