

**Chase Manhattan Bank v United Bldg. Maintenance
Assoc., Inc.**

2009 NY Slip Op 33225(U)

November 9, 2009

Supreme Court, Queens County

Docket Number: 7912/09

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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CHASE MANHATTAN BANK and JP MORGAN
CHASE & CO., and LIBERTY MUTUAL
INSURANCE COMPANY,

Index No.: 7912/09
Motion Date: 7/29/09
Motion Cal. No.: 3
Motion Seq. No: 1

Plaintiffs,

-against-

UNITED BUILDING MAINTENANCE ASSOCIATES,
INC., a/k/a UNITED BUILDING MAINTENANCE CORP.,
THYSSENKRUPP ELEVATOR COMPANY, INC., a/k/a
THYSSENKRUPP ELEVATOR CORPORATION,
ADMIRAL INSURANCE COMPANY and
LEXINGTON INSURANCE COMPANY,

Defendants.

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The following papers numbered 1 to 10 read on this motion by defendant Thyssenkrupp Elevator Company, Inc., a/k/a Thyssenkrupp Elevator Corporation for an order, pursuant to CPLR 3211, dismissing the complaint and any and all cross-claims and/or counterclaims asserted against said defendant, or, in the alternative, pursuant to CPLR 501, transferring venue to the Supreme Court of the State of New York, New York County.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Memorandum of Law in Support-Exhibits.....	5 - 7
Reply Affidavit.....	8 - 10

Upon the foregoing papers, it is hereby ordered that the motion is decided as follows:

This is a breach of contract action commenced by plaintiffs Chase Manhattan Bank and JP Morgan Chase & Co. (“Chase”), and Liberty Mutual Insurance Company (“Liberty Mutual”), the defendants in an underlying personal injury action entitled *Porfirio Nunez v. Chase Manhattan Bank and JP Morgan Chase & Company*, against defendants United Building Maintenance Associates,

Inc. a/k/a United Building Maintenance Corp. (“United Building”), Porfirio’s employer; Thyssenkrupp Elevator Company, Inc. a/k/a Thyssenkrupp Elevator Corporation (“Thyssenkrupp”), the entity responsible for maintenance of the elevator in which Porfirio was injured; Admiral Insurance Company (“Admiral”), defendant United Building’s insurer; and Lexington Insurance Company (“Lexington”), defendant Thyssenkrupp’s insurer; all of whom were insurers or contractees with plaintiff Chase to perform certain services at premises located at 161-10 Jamaica Avenue, New York, including, inter alia, providing liability insurance coverage. Plaintiff Chase seeks a declaration, inter alia, that defendant Thyssenkrupp is liable to plaintiffs for damages incurred by virtue of Thyssenkrupp’s breach of its obligation to provide general liability insurance for the benefit of Chase in the underlying action commenced by Porfirio Nunez. Defendant Thyssenkrupp moves for an order, pursuant to CPLR 3211, dismissing the complaint and any and all cross-claims and/or counterclaims asserted against said defendant, or, in the alternative, pursuant to CPLR 501, transferring venue to the Supreme Court of the State of New York, New York County. The motion to dismiss is predicated upon defendant Thyssenkrupp’s assertion that plaintiff Chase violated Article 8.1 of the Contract at issue, which provides:

In the event of any dispute or disagreement between the parties of any provisions hereunder, each of the parties shall appoint a designated representative to meet within ten (10) days of notification of a dispute. If the dispute is not resolved within such ten (10) day period then a senior official from each party will meet and attempt to resolve the dispute in good faith within thirty (30) days of the dispute notification. No termination of the Agreement or formal proceedings for the judicial resolution of such dispute may be commenced until the date on which either of the appointed senior officials notifies the other in writing that such party has concluded that after conducting informal good faith negotiations an amicable resolution of a dispute does not appear likely. In the event that any dispute, controversy or claim arising out of the Agreement or breach hereunder cannot be resolved between the parties, either party shall be entitled to seek all available remedies hereunder.

The alternative relief sought, change of venue, is predicated upon section 8.2 of the contract provision, which reads that:

Parties hereby consent to the personal jurisdiction of the state and federal courts within the Borough of Manhattan, City of New York, for the adjudication of all claims, disputes and other matters relating to, or arising under, this Agreement or any Purchase Orders hereunder and the parties hereby irrevocably waive, to the fullest extent permitted by applicable law, any objection which they may now or hereafter have to the laying of venue of any such proceeding brought in such a court and any claim that any such proceeding brought in

such court has been brought in any inconvenient forum.

Nowhere does defendant Thyssenkrupp specify the subject of the alleged dispute, alleging instead that “plaintiffs alleged that THYSSENKRUPP has violated its obligations under the contract.” Nor does defendant Thyssenkrupp specify the provision of CPLR 3211 upon which its motion to dismiss is based. This Court, therefore, will consider the motion as being made pursuant to both CPLR 3211 (a)(1), documentary evidence, and (a)(7), failure to state a cause of action.¹

As a preliminary matter, CPLR 3211(e) provides, inter alia:

At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in paragraph two, seven or ten of subdivision (a) may be made at any subsequent time or in a later pleading, if one is permitted.

As the defense of the documentary evidence bar is asserted for the first time on this motion, after the answer, which was attached to the opposing papers, was interposed, defendant Thyssenkrupp waived its right to move to dismiss on that ground. Assuming arguendo that there was no waiver, dismissal pursuant to CPLR 3211(a)(1) still would be denied.

It is well settled that “[a] motion pursuant to CPLR 3211(a)(1), to dismiss the complaint on the ground that the action is barred by documentary evidence may be granted only where the documentary evidence utterly refutes the plaintiff’s factual allegations, thereby conclusively establishing a defense as a matter of law (citations omitted).” Ruby Falls, Inc. v. Ruby Falls Partners, LLC, 39 A.D.3d 619 (2nd Dept. 2007); Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561 (2005); Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314 (2002); 30th Place Holdings, LLC v. 474431 Associates, 54 A.D.3d 753 (2nd Dept. 2008); Levenherz v. Povinelli, 14 A.D.3d 658 (2nd Dept. 2005). “In order to prevail on a motion to dismiss pursuant to CPLR 3211(a)(1), the document relied upon must conclusively dispose of the plaintiff’s claim (citations Omitted).” Mest Management Corp. v. Double M Management Co., Inc., 199 A.D.2d 479, 480 (2nd

¹Defendant Thyssenkrupp set forth in its reply papers that it was moving pursuant to CPLR 3211 (a)(1),(a) (4) and (a) (7). Pursuant CPLR 3211(e), defendant Thyssenkrupp waived its basis for dismissal on the ground of another action pending. Defendant Thyssenkrupp further indicates for the first time in those reply papers that the motion also was made on behalf of defendant Lexington, presumably because defendant Lexington was included in the opposition papers. Defendant Thyssenkrupp also failed to annex to its moving papers a copy of the complaint; this omission was cured in its annexing of the complaint to its reply papers.

Dept. 1993); see also, Goshen v Mutual Life Ins. Co. of New York, 98 N.Y.2d 314 (2002); Montes Corp. v Charles Freihofer Baking Co., 17 A.D.3d 330 (2nd Dept. 2005); New York Schools Ins. Reciprocal v. Gugliotti Associates, Inc., 305 A.D.2d 563 (2nd Dept. 2003). Here, the documentary evidence consists solely of the contract provision. Assuming the dispute was based upon whether defendant Thyssenkrupp breached its duty to provide insurance coverage, no factual allegations were asserted on this motion as to any obligation owed by defendant Thyssenkrupp to plaintiff Chase or to refute allegations in the complaint addressing defendant Thyssenkrupp's breach. Accordingly, there is no basis upon which this Court can grant defendant Thyssenkrupp's motion for dismissal based upon documentary evidence.

Assuming next that the motion to dismiss is based upon section 3211(a)(7), it is well-settled that "on a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference..." Jacobs v Macy's East, Inc., 262 A.D.2d 607, 608 (2nd Dept. 1999). See, Nonnon v. City of New York, 9 N.Y.3d 825 (2007); Zumpano v. Quinn, 6 N.Y.3d 666 (2006); Arnav Indus., Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, 96 N.Y.2d 300, 303, (2001); Leon v Martinez, 84 N.Y.2d 83 (1994); Grazioli v. Encompass Ins. Co., 40 A.D.3d 696 (2nd Dept. 2007); Kempf v. Magida, 37 A.D.3d 763 (2nd Dept. 2007); Gallagher, Kucker & Bruh, 34A.D.3d 419, 419 (2nd Dept. 2006). The determination to be made is whether plaintiff has a cause of action, not whether one was stated [(see, Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330 (1999); Walker v. Kramer, 63 A.D.3d 723 (2nd Dept. 2009); Gershon v. Goldberg, 30 A.D.3d 372 (2nd Dept. 2006); Steiner v. Lazzaro & Gregory, P.C., 271 A.D.2d 596 (2nd Dept. 2000)] or whether the facts as alleged fit within any cognizable legal theory. See, Fitzgerald v. Federal Signal Corp., 63 A.D.3d 994 (2nd Dept. 2009); Farber v. Breslin, 47 A.D.3d 873 (2nd Dept. 2008); International Oil Field Supply Services Corp. v. Fadeyi, 35 A.D.3d 372 (2nd Dept. 2006); EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11 (2nd Dept. 2005). In assessing such a motion, a court properly may freely consider affidavits submitted by the plaintiff for the limited purpose of ascertaining whether they may remedy defects in the complaint or they establish conclusively that plaintiff has no cause of action. See, Rovello v. Orofino Realty Co., Inc., 40 N.Y.2d 633 (1976). Such "affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims." Id., 40 N.Y.2d at 636; see, Cron v. Hargro Fabrics, Inc., 91 N.Y.2d 362 (1998). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." Gershon v. Goldberg, 30 A.D.3d 372 (2nd Dept. 2006); see, Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977); Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330 (1999); Operative Cake Corp. v. Nassour, 21 A.D.3d 1020 (2nd Dept. 2005). Where evidentiary material is submitted in support of a motion to dismiss for failure to state a cause of action, dismissal is warranted only where the evidence conclusively establishes that a material fact alleged by plaintiff is not a fact at all and that plaintiff has no cause of action. See, Guggenheimer v. Ginzburg, supra; Rovello v. Orofino Realty Co., 40 N.Y.2d 633 (1976); Allstate Ins. Co. v. Raguzin, 12A.D.3d 468 (2nd Dept. 2004).

Again, presumably the predicate for this motion is plaintiff's allegedly failure to satisfy the condition precedent for the commencement of an action based upon an alleged contract breach, to

wit, submission of the dispute to the resolution process set forth in the contract. Significantly, defendant Thyssenkrupp failed to articulate the basis for its motion to dismiss pursuant to CPLR 3211(a)(7), except to the extent that its attorney states:

It is black letter law that where a contract contains a dispute resolution mechanism, legal proceedings seeking to resolve a contractual dispute – or allegation of a breach of the contract – must be dismissed where the plaintiff: (i) has not alleged in the complaint that he or she has complied with such dispute resolution mechanism; and (ii) cannot show that he or she has complied with the dispute resolution mechanism.

As nearly as this Court can discern from the opposing papers, not the moving papers that contained neither a copy of the complaint nor defendant Thyssenkrupp's answer, the presumed dispute occurred when defendant Thyssenkrupp's insurance carrier, defendant Lexington, declined to represent plaintiff Chase in the underlying action that was commenced in 2005. Apparently, neither party invoked the process for the "informal good faith negotiations" to reach "an amicable resolution" of the dispute as prescribed by Article 8.1 of the Contract. Given the history of defendant Thyssenkrupp's active involvement in the underlying action, and its invocation of the same alleged procedural bars in the underlying action as those set forth herein, as well as its failure to invoke the dispute resolution process, there is no basis for dismissal of the action on the ground that it fails to state a cause of action. As the complaint states a cause of action for breach of contract, the motion to dismiss on that ground is denied. That a cause of action was stated cannot be diminished by defendant Thyssenkrupp's present contention that suit against it is precluded because of plaintiff Chase's failure to engage in the dispute resolution process.

Also denied is that prong of the motion seeking a change of venue based upon the forum selection clause set forth in the contract. It is beyond cavil that the "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' (citations omitted)." W.J. Deutsch & Sons, Ltd. v. Charbaut America, Inc., 57 A.D.3d 529 (2nd Dept. 2008); see, also, Trump v. Deutsche Bank Trust Co. Americas, 65 A.D.3d 1329 (2nd Dept. 2009). "Absent a strong showing that it should be set aside, a forum selection agreement will control" (DiRuocco v. Flamingo Beach Hotel & Casino, 163 A.D.2d 270, 272, 557 N.Y.S.2d 140)." Horton v. Concerns of Police Survivors, Inc., 62 A.D.3d 836 (2nd Dept. 2009). Moreover, that defendant Thyssenkrupp has participated in the underlying litigation, "did not waive the defense afforded by the forum selection clause." Lischinskaya v. Carnival Corp., 56 A.D.3d 116 (2nd Dept. 2008). The impediment to enforcement, however, is the absence of a showing that this defense was raised in defendant Thyssenkrupp's answer. In Lischinskaya v. Carnival Corp., *supra.*, the Appellate Division, Second Department, enforced a forum selection clause upon its finding that::

Carnival's participation in this litigation did not waive the defense afforded by the forum selection clause. Having raised the defense in

its answer, Carnival was entitled to rely on it later in the litigation (citations omitted) and was not under any obligation to move on it more quickly than it did (citations omitted). If the plaintiff desired a more prompt resolution of the issue, she could have moved to strike the defense on the same grounds that she asserts in response to Carnival's motion (see CPLR 3211[b]), but she did not do so.

Here, there is no evidence that defendant Thyssenkrupp asserted this defense in its answer. Moreover, it would be unreasonable to enforce the forum selection clause where, as here, the parties to the contract containing that provision are only two parties in litigation consisting of multiple parties. Accordingly, based upon the foregoing, the motion is denied in its entirety.

Dated: November 9, 2009

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J.S.C.