

Lakhani v Safdie & Co. Inc.

2010 NY Slip Op 30596(U)

March 10, 2010

Supreme Court, New York County

Docket Number: 111119/09

Judge: Joan A. Madden

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

PRESENT: Hon. Jacob A. M. ...

PART 11

Index Number : 111119/2009

LAKHANI, IQBAL

vs

SAFDIE & CO INC.

Sequence Number : 001

SUMMARY JUDGEMENT

INDEX NO. _____

MOTION DATE 1-21-10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided in accordance with the annexed Memorandum Decision Order.

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

FILED

MAR 23 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: March 10, 2010

[Signature] 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 11

-----X
IQBAL LAKHANI,

Plaintiff,

-against-

SAFDIE & CO. INC.,

Defendant.
-----X

Index No. 111119/09

FILED
MAR 23 2010
NEW YORK
COUNTY CLERK'S OFFICE

JOAN A. MADDEN, J.:

Defendant moves for an order granting summary judgment and dismissing plaintiff's claims based on documentary evidence and on the grounds that New York is an improper forum for this action. Plaintiff opposes the motion and cross moves for partial summary judgment, dismissing defendant's third affirmative defense for lack of subject matter jurisdiction and to impose costs, sanctions, and attorneys' fees against defendant for engaging in frivolous conduct. For the reasons set forth below, this matter is referred to a Special Referee to make a factual determination as to the existence of a forum selection clause in the final version of the contract in question.

This matter arises out of a dispute between plaintiff Iqbal Lakhani ("Lakhani"), a sales representative and defendant Safdie & Co, Inc., ("Safdie") a foreign corporation with its principal office in Montreal, Canada. Safdie manufactures, produces, imports and distributes household linens and Lakhani is a salesman who solicits orders in New York for Safdie's products. Safdie and Lakhani entered into an employment agreement ("Agreement") under which Lakhani agreed to solicit orders for Safdie and Safdie promised to pay Lakhani a monthly fee plus commissions

and expenses.

In his complaint, Lakhani alleges that he performed all his duties under the Agreement and that Safdie breached the Agreement by terminating it without prior notice and without cause. In its Answer, Safdie asserts, *inter alia*, a defense of lack of subject matter jurisdiction on the ground that this action has been brought in an improper forum as the Agreement contains a forum selection clause requiring any litigation to be commenced in Montreal, Canada. Based on this defense, Safdie now moves to dismiss the complaint.

In support of its motion, Safdie submits a version of the Agreement dated September 1, 2007 that is six pages long and signed only by Safdie. Paragraph 22 of the September 1, 2007 Agreement provides that “[t]he present agreement is subject to the laws of the Province of Quebec which shall apply with respect to any disputes or questions arising hereunder. Should there be any dispute between the parties, it shall be submitted to a Court of competent jurisdiction within the judicial district of Montreal.”

Lakhani counters that the forum is proper because the Agreement in its final version did not contain a forum selection clause. In support of his position, Lakhani submits an undated version of the Agreement that is five pages long and signed by both parties. Lakhani maintains that Safdie’s version of the Agreement was merely an unsigned proposal and that Safdie’s allegation that the final Agreement contains a forum selection clause is a “blatant fabrication.” Lakhani Affidavit, ¶ 5.

Lakhani claims that the final version of the Agreement was emailed to him on October 5, 2007 in an attachment titled “iqbalagreementfinal[1].pdf” and states that he signed this final Agreement “eventually” but does not provide a clear date. Lakhani also submits what he claims

to be the final Agreement in which the entire fifth page of the September 1, 2007 version of the Agreement was removed and no forum selection clause was included. Lakhani's version of the final Agreement contains the signatures of both parties.

Lakhani also asserts that he signed the Agreement subject to certain email modifications agreed upon by the parties, including Safdie's agreement to resolve any dispute pursuant to the laws of the United States. Lakhani attaches several emails as exhibits to his cross motion in which he requests that the laws of the United States apply and Safdie appears to agree to the application of U.S. law.

In reply, Safdie maintains that the version of the Agreement submitted by Lakhani has been "obviously altered." In support of its position, Safdie notes that the Agreement submitted by Lakhani is undated, untitled, without page numbers, and that Lakhani's version is identical to the September 1, 2007 version relied on by Safdie except that the entire page with the forum selection clause has been removed and all page numbers have been deleted. Safdie also notes that the title of the document has been deleted.

In his affidavit, Gabriel Safdie, the President and CEO of Safdie states that the only agreement he signed was the September 1, 2007 Agreement submitted with Safdie's moving papers and that he never waived the forum selection clause, and that prior to its submission in connection with this motion, he had never seen the five-page version of the Agreement submitted by Lakhani and had never signed it.

With respect to the emails submitted by Lakhani in which Lakhani requests that the law of the United States be applied, Safdie maintains that these emails have also been altered and that in any event, the emails do not mention forum selection, but only choice of law. Finally, Safdie

notes that in the emails exchanged between the parties after September 1, 2007 show that Lakhani acknowledges the existence of a contract and that while Lakhani takes issue with many aspects of the Agreement, he does not mention the forum selection clause.

To determine the enforceability of a forum selection clause, the court must first determine whether the clause was a part of the parties' contract. See Coopervision, Inc. v. Intek Integration Technologies, Inc., 7 Misc.3d 592, 594 (Sup Ct Monroe County) (2005); see also New Moon Shipping Co., v. Man B&W Diesel AG, 121 F.3d 24, 29-30 (2d Cir. 1997) (holding that before analyzing the enforceability of a forum selection clause, the Court "must directly decide whether the contract included a forum selection clause.") Here, the validity of the forum selection clause turns on the existence of the clause in the Agreement. As the submissions raise factual issues as to whether the Agreement contained a forum selection clause, a hearing must be held before a Special Referee to resolve these issues.

Accordingly it is

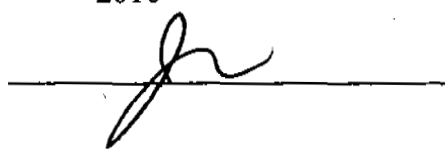
ORDERED that Safdie's motion for summary judgment dismissing the complaint based on the forum selection clause and Lakhani's cross motion to dismiss the defense of lack of subject matter jurisdiction are decided only to the extent of referring the factual issues related to the existence of the forum selection clause in the parties' Agreement to a Special Referee to hear and report with recommendations, except that in the event of and upon filing of a stipulation as permitted by CPLR 4317, the Special Referee or other person designated as referee shall determine said issues; and it is further

ORDERED that Safdie's motion for summary judgment and Lakhani's cross motion to dismiss may be renewed in connection with a motion pursuant to CPLR 4403 upon receipt of the

report and recommendations of the Special Referee or upon receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that on or before April 2, 2010 counsel for Safdie shall serve a copy of this order with notice of entry upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (part 50R) for the earliest convenient date.

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

Dated: March 10, 2010


J.S.C

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

FILED
MAR 29 2010
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