

Kash N' Gold, Ltd. v Fry's Elec., Inc.

2010 NY Slip Op 31969(U)

July 7, 2010

Sup Ct, Suffolk County

Docket Number: 35949/2009

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 35949/2009

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

 KASH N' GOLD, LTD.,

Plaintiff,

-against-

FRY'S ELECTRONICS, INC.,

Defendant.

ORIG. RETURN DATE: DECEMBER 15, 2009
 FINAL SUBMISSION DATE: JANUARY 7, 2010
 MTN. SEQ. #: 001
 MOTION: MG

ORIG. RETURN DATE: DECEMBER 30, 2009
 FINAL SUBMISSION DATE: JANUARY 7, 2010
 MTN. SEQ. #: 002
 CROSS-MOTION: XMD

PLTF'S/PET'S ATTORNEYS:

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Upon the following papers numbered 1 to 13 read on this motion _____
TO DISMISS AND CROSS-MOTION TO AMEND PLEADINGS

Notice of Motion and supporting papers 1-3; Memorandum of Law 4; Notice of Cross-motion and supporting papers 5-7; Memorandum of Law 8; Replying Affidavits and supporting papers 9-12; Reply Memorandum of Law 13; it is,

ORDERED that this motion by defendant for an Order, pursuant to CPLR 327 and 3211 (a) (1), dismissing the claims asserted herein by plaintiff against defendant on the ground that plaintiff agreed in writing in a Vendor Agreement that any action to enforce or for breach of the Vendor Agreement shall be brought exclusively in the Courts of the State of California, County of Santa Clara, is hereby **GRANTED** for the reasons set forth hereinafter; and it is further

ORDERED that this motion by plaintiff for an Order, pursuant to CPLR 3025, granting plaintiff leave to amend its complaint to increase damages, is hereby **DENIED** as moot in light of the Court's ruling on defendant's motion to dismiss.

This action was commenced by plaintiff on September 18, 2009, to recover damages based upon defendant's alleged failure to pay for goods sold by plaintiff to defendant. According to the within complaint, plaintiff is in the business of the design, importation, and sale of consumer electronics and other products, sold by it at wholesale, and defendant is in the business of the sale, at retail, of consumer electronics and other products. Plaintiff alleges that in connection with its business, defendant regularly purchased goods from plaintiff for resale to defendant's customers, beginning in or about 1995. Specifically, plaintiff claims that from on or about July 15, 2008 to on or about May 29, 2009, plaintiff sold to defendant goods valued at \$32,084.50, for which defendant failed to pay. Plaintiff seeks to recover on causes of action sounding in breach of contract and an account stated.

Defendant now moves to dismiss plaintiff's complaint on the ground that plaintiff agreed in writing in a Vendor Agreement dated December 1, 2004 ("Vendor Agreement") that any action to enforce or for breach of the Vendor Agreement shall be brought exclusively in the Courts of the State of California, in the County of Santa Clara. Defendant informs the Court that defendant operates a chain of superstores headquartered in Silicon Valley, California, and that its stores are located primarily on the west coast of the United States, as well as in Illinois, Texas, Georgia and Indiana. Defendant indicates that it operates no stores in the north-east region of the United States.

Defendant relies upon Section K(8) of the Vendor Agreement, which provides in its entirety as follows:

The parties agree that the place of making and performance of this Agreement is the City of San Jose, County of Santa Clara, State of California and that the exclusive venue for any action to enforce or for breach of this Agreement shall be in the Courts of the State of California, in the County of Santa Clara.

Defendant argues that as the Vendor Agreement expressly provides for exclusive venue of any such action in the Courts located in Santa Clara, California, plaintiff has commenced this action in an improper forum. Thus, defendant seeks dismissal of the action.

Plaintiff opposes defendant's motion and has filed the instant cross-motion to amend its complaint to increase damages. Plaintiff argues that the Vendor Agreement does not control the transactions at issue, but rather that the terms of sale on the reverse side of the subject invoices are controlling. Plaintiff relies upon paragraph 1(f) of the terms of sale, which provides that customers, such as defendant, consent to in personam jurisdiction within the Courts of the State of New York for purposes of resolving a claim by plaintiff, as well as paragraph 7 which provides that in any dispute arising thereunder, the law of New York only shall apply. Moreover, plaintiff relies upon paragraph 6 of the terms of sale, entitled "Whole Agreement/Merger Clause," which provides that the terms of sale reflect the entirety of the understanding of the parties, and that all prior discussions, writings of any kind, if any, between the parties concerning the sale "are merged herein and extinguished." Plaintiff alleges that its complaint is not based upon a breach of the Vendor Agreement, but rather upon a breach of the terms of sale contained on all the invoices sent to defendant. Further, plaintiff contends that the Vendor Agreement is ineffective by its own terms, as it was never executed by an authorized representative of defendant and delivered to plaintiff. In support of the foregoing, plaintiff has submitted, among other things, an affidavit of its president made upon personal participation in the events underlying this matter.

In addition, plaintiff seeks to increase the damages sought herein from \$32,084.50 to \$40,555.25, the balance allegedly now due plaintiff. Plaintiff claims that since the commencement of the instant action, defendant has paid to plaintiff the sum \$2,078.58, but that an additional amount of \$10,591.75 in invoiced goods sold to defendant has gone unpaid. Thus, plaintiff seeks to increase the ad damnum clause in the complaint to \$40,555.25.

In reply, defendant claims that from 1995 until 2004, the relationship of the parties was governed by a prior Vendor Agreement, dated October 30, 1995, which was signed by both plaintiff and defendant. Since that time, defendant alleges that the parties have "conducted business in accordance with the terms of the Vendor Agreement, even when the terms of the Vendor Agreement contradict those found in plaintiff's invoices," i.e., with respect to the

return procedure for goods ordered from plaintiff or with respect to certain discounts for advertising and marketing expenses.

Regarding defendant's motion to dismiss pursuant to CPLR 3211 (a) (1), where a defendant moves to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Trade Source, Inc. v Westchester Wood Works, Inc.*, 290 AD2d 437 [2002]; see *Del Pozo v Impressive Homes, Inc.*, 29 AD3d 621 [2006]; *Montes Corp. v Charles Freihofer Baking Co.*, 17 AD3d 330 [2005]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 [2003]).

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 (*Brooke Group v JCH Syndicate 488*, 87 NY2d 530 [1996]; *Columbia Cas. Co. v Bristol-Myers Squibb Co.*, 215 AD2d 91 [1995]; *Price v Brown Group*, 206 AD2d 195 [1994]). Forum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes (see *The Bremen v Zapata Off-Shore Co.*, 407 US 1 [1972]; *British W. Indies Guar. Trust Co. v Banque Internationale A Luxembourg*, 172 AD2d 234 [1991]).


In the instant application, the Court finds that the documentary evidence submitted by defendant, to wit: the Vendor Agreement and the Vendor Agreement dated October 30, 1995, resolve all factual issues as a matter of law as to the proper forum, and conclusively dispose of plaintiff's claim in this Court. The Court finds that the terms of the Vendor Agreement of 1995 governs the parties' relationship and thus the issue of where the parties agreed to litigate any disputes between them. Initially, both parties acknowledge that their business relationship began in 1995, and it is undisputed that both parties executed the Vendor Agreement of 1995. The Court notes there is no end date to the term of the Vendor Agreement of 1995. In addition, the Vendor Agreement of 1995 contains the same forum selection clause as the Vendor Agreement and, additionally, provides that "[t]he terms of this Agreement shall override and supercede any conflicting terms in any other document between the parties including, but not limited to, [plaintiff's] invoice." Moreover, although defendant never actually executed the Vendor Agreement in 2004, plaintiff executed it, thereby becoming bound by its terms (see *e.g. Vista Props. v Rockland Ear, Nose & Throat Assoc., P.C.*, 60 AD3d 846 [2009]), and the parties' have

conducted business in accordance with the terms of the Vendor Agreement since that time, even when the terms of the Vendor Agreement contradicted those terms found in plaintiff's invoices.

Accordingly, defendant's motion to dismiss based upon an improper forum is **GRANTED**. In view of the foregoing, plaintiff's cross-motion to amend its complaint is **DENIED** as moot.

The foregoing constitutes the decision and Order of the Court.

Dated: July 7, 2010



HON. JOSEPH FARNETI
Acting Justice Supreme Court