

**Movado Group, Inc. v Mozaffarian**

2010 NY Slip Op 33270(U)

November 19, 2010

Supreme Court, New York County

Docket Number: 603070/2009

Judge: Saliann Scarpulla

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

SALIANN SCARPULLA

PRESENT: \_\_\_\_\_  
Justice

PART 19

Index Number : 603070/2009  
**MOVADO GROUP, INC.**  
vs.  
**MOZAFFARIAN, SHAPUR**  
SEQUENCE NUMBER : 002  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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

decided per the memorandum decision dated \_\_\_\_\_  
which disposes of motion sequence(s) no. 001 and 002.

**FILED**

NOV 24 2010

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 11/19/10

*Saliann Scarpulla*  
SALIANN SCARPULLA  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X  
MOVADO GROUP, INC., f/k/a North American  
Watch Corporation, d/b/a Concord Watch Co.,

Plaintiff,

Index No.:603070/2009

- against-

SHAPUR MOZAFFARIAN, a/k/a  
Shapur Mohamad Mozaffarian, individually and  
d/b/a Shapur Mozaffarian, d/b/a Shapur Mozaffarian  
Jewelry, and d/b/a Shapur Mozaffarian Fine Jewelry,  
and ARYA MOZAFFARIAN,

DECISION AND ORDER

Defendants.

**FILED**

NOV 24 2010

For Plaintiff:  
Gregg J. Borri Law Offices  
61 Broadway, Suite 2820  
New York, NY 10006

For Defendants:  
Storch Amini & ~~NEW YORK~~  
COUNTY CLERK'S OFFICE  
Two Grand Central Tower, 25th Floor  
New York, NY 10017

Papers considered in review of this motion for default judgment and motion to dismiss for lack of jurisdiction:

Notice of Motion . . . . .	1
Affs in Support . . . . .	2
Memo of Law in Opp . . . . .	3
Aff in Opp . . . . .	4
Reply Memo of Law . . . . .	5
Reply Aff . . . . .	6
Notice of Motion . . . . .	7
Aff in Support . . . . .	8
Memo of Law in Support . . . . .	9
Aff in Opp . . . . .	10
Memo of Law in Opp . . . . .	11
Reply Aff . . . . .	12
Reply Memo of Law . . . . .	13
Sur-Reply . . . . .	14
Sur-Reply . . . . .	15

HON. SALIANN SCARPULLA, J.:

In this action for breach of contract, account stated and recovery under a guaranty, plaintiff Movado Group, Inc., f/k/a North American Watch Corporation, d/b/a Concord Watch Co. ("Movado") moves for a default judgement against defendants Shapur Mozaffarian, a/k/a Shapur Mohamad Mozaffarian, individually and d/b/a Shapur Mozaffarian, d/b/a Shapur Mozaffarian Jewelry, and d/b/a Shapur Mozaffarian Fine Jewelry, and ("Shapur") and Arya Mozaffarian ("Mozaffarian") (collectively the "defendants"). The defendants oppose the motion for default judgment, and in a separate motion sequence, move to dismiss Movado's complaint for lack of jurisdiction pursuant to CPLR 3211(a)(2) and (8).

Defendants operate a jewelry boutique in San Francisco, California, and applied to receive watches on credit from Movado. Arya Mozaffarian executed an application of credit on behalf of Shapur. The credit application provides in part that Aryan Mozaffarian "hereby acknowledges receipt of and, in the event credit is granted, agrees to the Terms and Conditions of sale contained on each invoice."

The Terms and Conditions of sale (the "Terms and Conditions") provide, in pertinent part that:

All contacts entered into between SELLER [Movado] and CUSTOMER [defendants] shall be governed by the law of the territory in which SELLER is domiciled, without regard to any rules regarding conflict of law. All disputes arising out of or in connection with contracts hereunder shall be exclusively resolved by the ordinary courts in the territory in which SELLER is domiciled.

Defendants maintain, and Movado does not deny, that the Terms and Conditions are not a part of the credit application and defendants were not provided with the Terms and Conditions at the time of the execution of the credit application. Instead, the Terms and Conditions were printed on the backs of the invoices included in the shipments of watches delivered to defendants.<sup>1</sup>

Upon receipt of certain watches, defendants found them to be unsatisfactory, and attempted to return them to Movado in Paramus, New Jersey. Movado told defendants that they could not return the watches. Defendants paid Movado for all other watches delivered.

On or about October 7, 2009, Movado initiated this action against defendants in New York County Supreme Court to recover the amounts owed for the watches defendants had attempted to return. In its complaint, Movado alleges that it is “a corporation organized and existing under the laws of the State of New York.”<sup>2</sup> Movado served defendants with copies of the summons and complaint at the jewelry boutique in San Francisco, California. As defendants have not answered the complaint, Movado moves for a default judgment. In response, defendants move to dismiss the complaint on the ground of lack of personal jurisdiction.

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<sup>1</sup> For the first time in their sur-reply, defendants assert that certain of the invoices were sent via facsimile, and that only the front page was transmitted.

<sup>2</sup> Defendants maintain that Movado’s principal place of business is in New Jersey, as all of defendants’ correspondence and dealing with Movado were addressed to a New Jersey office.

[\* 5]

## Discussion

“As the [party] seeking to assert personal jurisdiction, the [plaintiff bears] the burden of proof on this issue. That burden, however, does not entail making a prima facie showing of personal jurisdiction; rather, the plaintiff[] need only demonstrate that facts may exist to exercise personal jurisdiction over the defendant[s].” *Brinkmann v. Adrian Carriers, Inc.*, 29 A.D.3d 615, 616 (2d Dep’t 2006) (internal citations omitted). Movado asserts that there is a contractual basis for jurisdiction in New York based on the Terms and Conditions, which were referenced in the application for credit.

The Terms and Conditions provided, in pertinent part, that “All contacts entered into between SELLER [Movado] and CUSTOMER [defendants] shall be governed by the law of the territory in which SELLER is domiciled . . . .” Defendants argue that they did not receive the Terms and Conditions until they began receiving shipments of watches, and that regardless of when received, the forum selection clause is not a part of the parties’ agreement pursuant to NY UCC 2-207(2)(b).

“NY UCC 2-207, which applies to the parties’ contracts because they are for the sale of goods, provides that a written confirmation operates as an acceptance of a contractual offer for the sale of goods despite the inclusion of additional terms. ‘The additional terms are to be construed as proposals for addition to the contract’ and, between merchants, actually become part of the contract unless ‘they materially alter it.’” *Arcelormittal-Stainless*

[\* 6]

*Inter'l USA, LLC v. Jermax, Inc.*, 2009 NY Slip Op 30958U, at \*7 (Sup. Ct. N.Y. Co. 2009) (quoting NY UCC 2-207(2)(b)).

“For a term to ‘materially alter’ a contract, it must result in surprise or hardship if incorporated without express awareness by the other party.” *Arcelormittal*, 2009 NY Slip Op 30958U at \*7 (citing NY UCC 20207, Comment 4). “Such a provision works more of a surprise on the other party when, as here, it appears in the boilerplate language on the back side of a confirmation memo, a portion of a memo that often is never read.” *K I C Chemicals, Inc. v. ADCO Chemical Co.*, 1996 U.S. Dist. LEXIS 3244, at \*14 (S.D.N.Y. 1996).

Under New York law, a forum-selection clause which is asserted for the first time in an invoice, confirmation or acknowledgment materially alters a contract, and “therefore would not be deemed a part of the agreement without express consent.” *Id.* See also *Hugo Boss Fashions, Inc. v. Sam’s European Tailoring, Inc.*, 293 A.D.2d 296, 297 (1<sup>st</sup> Dep’t 2002) (forum selection clause found in invoices sent for accepted merchandise “materially alters the parties’ oral contacts”); *Lorbrook Corp. v. G & T Industries, Inc.*, 162 A.D.2d 69, 72 (3d Dep’t 1990) (“the additional term fixing Michigan as the forum State for litigation never became part o the contract, because it materially altered the prior agreement and [objecting party] never expressly assented to it”).

Even if defendants had been in possession of the Terms and Conditions at the time the credit application was executed, “the forum-selection clause would not be a part of the

parties['] agreement since it is a material alteration to-which [defendants] never expressly agreed." *Arcelormittal*, 2009 NY Slip Op 30952U, at \*8 (citing *K I C Chemicals, Inc. v. ADCO Chemical Co.*, 1996 U.S. Dist. LEXIS 3244 (S.D.N.Y. 1996)).

As Movado solely asserts the Terms and Conditions language as the basis for personal jurisdiction over defendants in New York, this action is dismissed for lack of personal jurisdiction and the motion by Movado for a default judgment against defendants is denied.

In accordance with the foregoing, it is

ORDERED that the motion by defendants Shapur Mozaffarian, a/k/a Shapur Mohamad Mozaffarian, individually and d/b/a Shapur Mozaffarian, d/b/a Shapur Mozaffarian Jewelry, and d/b/a Shapur Mozaffarian Fine Jewelry, and Arya Mozaffarian to dismiss the complaint is granted; and it is further

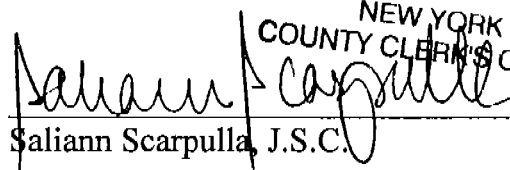
ORDERED that the motion by plaintiff Movado Group, Inc., f/k/a North American Watch Corporation, d/b/a Concord Watch Co. for a default judgment is denied; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the action.

This constitutes the decision and order of the Court.

Dated: New York, New York  
November 19, 2010

ENTER:

  
Saliann Scarpulla, J.S.C.

**FILED**

NOV 24 2010

NEW YORK  
COUNTY CLERK'S OFFICE