

**All Parts, Inc. v U-Haul Metro**

2011 NY Slip Op 30325(U)

January 27, 2011

Sup Ct, Nassau County

Docket Number: 15269/10

Judge: Jeffrey S. Brown

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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN  
JUSTICE**

-----X **TRIAL/IAS PART 21**  
ALL PARTS, INC., Individually and d/b/a DANKEN  
AUTO SUPPLY,

**Plaintiffs,**

*- against -*

UHAUL METRO and U-HAUL INTERNATIONAL, INC.,

**Defendants.**

**Index No. 15269/10  
Mot. Seq. #02  
Mot. Date 12-15-10  
Submit Date 1-19-11**

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The following papers were read on this motion:	Papers Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1,2,6
Answering Affidavit .....	3
Reply Affidavit.....	4,5

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Defendant U-HAUL INTERNATIONAL, INC. (hereinafter referred to as "UHI"), moves by notice of motion for the following relief: pursuant to CPLR 3211 (a)(7), and (8), dismissing the Verified Complaint of plaintiff ALL PARTS INC., individually and d/b/a DANKEN AUTO SUPPLY (hereinafter referred to as "plaintiff").

UHI states that the complaint asserts two causes of action: 1) breach of contract, and 2) unjust enrichment. While the complaint names two separate defendants, the allegations are pled as if the two separate defendants are one entity. UHI asserts that the complaint fails to state a cause of action for breach of contract against it due to improper pleadings, to wit: it fails to identify the existence of a contract between UHI and plaintiff; whether said contract was verbal or written; what benefit UHI received from plaintiff; the terms of an alleged contract between UHI and plaintiff; with whom the parties negotiated; the consideration ; and any contractual obligation breached by UHI. Significantly, UHI states the complaint never alleges that UHI and plaintiff actually entered into a verbal or written contract.

Furthermore, in its cause of action for breach of contract, plaintiff does not state that it actually performed under an alleged contract; it simply alleges that defendant breached a purported contract by not paying. Additionally, plaintiff must plead that UHI was actually a party to the contract allegedly breached. UHI argues that it is improperly lumped together with U-Haul Metro as if they are one in the same company, which they are not.

Since plaintiff's claim fails to allege a contract with UHI, fails to specify the terms of the alleged agreement, and fails to allege any actual performance by plaintiff, UHI contends that the breach of contract claim against it must be dismissed.

UHI additionally claims that plaintiff's unjust enrichment claim must be dismissed due to its failure to state a claim for relief. Here, plaintiff claims that "defendants U-HAUL has been unjustly enriched" by allegedly benefitting from services allegedly performed by plaintiff without paying for such services. Plaintiff fails to allege that UHI, separate and distinct from U-Haul Metro was unjustly enriched, and none of the "print screens"<sup>1</sup> attached to plaintiff's complaint reference UHI. Rather, the documents reference U-Haul Metro, which, according to the affidavit of George R. Olds, assistant secretary of UHI, is not a division or d/b/a for UHI.

Defendant UHI finally asserts that plaintiff's claims against it must be dismissed due to lack of personal jurisdiction pursuant to CPLR 301. UHI contends it is a Nevada corporation with its principal place of business in Phoenix, Arizona. It has no contacts with the state of New York sufficient to confer personal jurisdiction; maintains no offices or telephone listings in New York, owns no real property in New York, does not solicit business in New York, is not qualified to do business in New York, nor is licensed to do business in New York, and does not own a bank account in New York. Nor does UHI have "minimum contacts" with New York to subject it to long-arm jurisdiction pursuant to CPLR 302.

Plaintiff opposes the application and asserts that it has indeed stated a cause of action against UHI and can further demonstrate proof of UHI's acknowledgment of debt to plaintiff. Further, plaintiff contends that it has properly pled its causes of action and all are proper under the facts and circumstances herein. Moreover, plaintiff states that the court can exercise personal jurisdiction over UHI and that UHI transacted business with New York.

Plaintiff denies that it states its allegations in the complaint against UHI and U-Haul Metro as if they are one party; it simply collectively refers to the defendants as "U-Haul" for ease of pleading so as not to have to repeat the same allegations twice.

Plaintiff asserts that UHI has ties to U-Haul Metro as franchisor and has acknowledged liability of debt by its repeated partial payments of same over an extended period of time.

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<sup>1</sup>The court notes that attached to plaintiff's complaint are records which purport to list invoices, payments and balances due with respect to U-Haul Metro, referred to herein by the parties as "print screens."

Plaintiff argues that this is enough to establish that UHI received an acknowledged benefit as the result of the plaintiff. Plaintiff believes that UHI, as franchisor, received a benefit, accepted same and paid for same.

With respect to the allegation that the pleadings are insufficient, plaintiff, in essence, acknowledges that they were “inartistically” drawn. However, they give sufficient notice of the transactions to be proved at trial; any further particulars beyond that which is required to meet the notice requirement may be explored in discovery. Plaintiff claims that its attachment of print screens to the verified complaint demonstrates the transaction frequency and dates of each invoice between the parties, of which neither defendant has paid plaintiff in full. These attachments allegedly show an ongoing relationship between plaintiff and UHI, and the practice of acceptance of the benefit that plaintiff bestowed.

Plaintiff states that on or about January 18, 2010, UHI made several payments towards defendants’ debt, thus acknowledging that it somehow received a benefit from plaintiff.<sup>2</sup> Plaintiff argues that if UHI received no benefit from plaintiff, it would not have issued these checks. Therefore, the pleadings are sufficient to put UHI on notice of plaintiff’s claims.

Plaintiff argues, alternatively, that if the court finds that plaintiff has not pled sufficient facts to demonstrate an actual contract, then at the very least, that facts pled herein give rise to a contract implied in law. Plaintiff argues that defendants ought not to retain benefits without paying for them, out of equity and good conscience.

If the court finds that plaintiff has not properly pled a cause of action for breach of contract, plaintiff requests leave to amend its claims to provided greater particularity. However, the court notes that plaintiff has failed to move by cross-motion for such relief, nor has plaintiff submitted its proposed amended pleading, therefore, the request will not be considered.

With respect to the cause of action for unjust enrichment, plaintiff argues that UHI “must have” received a benefit from plaintiff having delivered auto parts to U-Haul Metro, or else it would not be paying toward said debt. Plaintiff states it “can only imagine” that the copies of checks from UHI to plaintiff represent payments for a benefit received as the result of the transactions described herein, as plaintiff “cannot imagine” why UHI would send plaintiff checks for any other reason as plaintiff had no other known dealings with either defendant. Plaintiff argues that the sampling of checks represents repeated partial payment by UHI, demonstrating that UHI has recognized some form of benefit received by the plaintiff and if a contract is found not to exist, the plaintiff’s best chance of recovery is under a theory of unjust enrichment for retaining and accepting a benefit bestowed by plaintiff without paying for same in full.

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<sup>2</sup>The court notes that attached to plaintiff’s opposition papers are what purport to be copies of checks from UHI to Danken Auto Supply.

With respect to the issue of jurisdiction, plaintiff argues that UHI transacted business in New York, thereby subjecting itself to the jurisdiction of the court. Plaintiff argues, inasmuch as UHI made payments toward the auto parts that plaintiff shipped, it benefitted from said shipment in some form and further accepted said benefit, forming some “articulable nexus” between the business transacted and the cause of action sued upon. Thus, plaintiff argues that personal jurisdiction pursuant to CPLR 302(a)(1) is proper as demonstrated in part by UHI’s partial payments of the debt owed.

In reply, UHI reiterates that the complaint should be dismissed as it fails to state a cause of action for breach of contract against UHI, fails to state a cause of action for unjust enrichment and does not establish that the court has personal jurisdiction over UHI. Nothing in plaintiff’s opposition changes these facts. UHI submits another affidavit from George R. Olds of UHI in reply to opposition.

UHI argues that Mr. Olds’ affidavit demonstrates that UHI merely performs accounting services for state operating entities, such as U-Haul Metro; and that some of these services include issuing checks to vendors for the state operating entities at their request. Any check issued by UHI to plaintiff solely would have been issued at the request of a state operating entity for goods or services that the requesting entity received; not for the benefit by UHI. UHI would have issued checks, such as those attached to plaintiff’s opposition, at the request of a state operating entity and would have charged back that entity for any checks issued.

With respect to the breach of contract cause of action, UHI states that plaintiff’s attempt to rely on the prints screens it attached to the complaint fails to demonstrate the transaction frequency and dates of each invoice between the parties as alleged in plaintiff’s opposition. The print screens reference U-Haul Metro, not UHI, therefore, the parties that plaintiff is referring to appears to be plaintiff and U-Haul Metro. Although plaintiff asserts in its opposition that it is not simply lumping defendant UHI with U-Haul Metro, it only asserted one factual allegation with respect to UHI which is that “UHI made several payments toward defendants’ debt.” UHI argues that this mere assertion alone does not state a cause of action for breach of contract.

UHI asserts that plaintiff’s attempt to further salvage its pleading deficiencies by asking the court to find that there was a contract implied in law, is unavailing. Here, plaintiff has not alleged or demonstrated the basis for any obligation on the part of UHI to pay plaintiff. Therefore, pleading the theory of implied contract does not relieve the plaintiff of its requirement to plead an agreement to which UHI was a party, which it has failed to do.

With respect to plaintiff’s cause of action for unjust enrichment, UHI argues that plaintiff has failed to demonstrate that UHI is a party to a contract. Plaintiff merely surmises that UHI “must have” received a benefit” and “can only imagine” that the copies of checks represent payments for a benefit received. Plaintiff fails to plead facts or supplement its pleading with an affidavit as required.

Finally, in reply to its assertion that UHI is not subject to jurisdiction in New York, UHI asserts it does not transact business in this state nor does it have sufficient contacts with this state to justify this court's exercise of personal jurisdiction, as demonstrated in the affidavit of George R. Olds. UHI contends that plaintiff's assertions that it transacted business within the state as evidenced by the payments UHI made to plaintiff, are incorrect, unsupported by anything other than evidence of mere payments made to plaintiff by UHI, outside the State of New York. UHI indicates plaintiff fails to understand the U-Haul corporate structure.

**Based on the foregoing, the decision of the court is as follows:**

On a motion to dismiss for failure to state a cause of action, pursuant to CPLR § 3211(a)(7), the court must determine whether, from the four corners of the pleading "factual allegations are discerned, which taken together, manifest any cause of action cognizable at law" (*Salvatore v Kumar*, 45 AD3d 560 [2nd Dept. 2007], lv to app den. 10 NY3d 703 [2008], quoting *Morad v Morad*, 27 AD3d 626, 627 [2006]). Further, the pleading is to be afforded a liberal construction, the facts alleged in the complaint accepted as true, and the plaintiffs accorded the benefit of every possible favorable inference (see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, "[w]hile the allegations in the complaint are to be accepted as true when considering a motion to dismiss . . . , 'allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration' " (*Garber v Board of Trustees of State Univ. of N.Y.*, 38 AD3d 833, 834 [2007], quoting *Maas v Cornell Univ.*, 94 NY2d 87, 91 [1999]).

The facts and documents establish that plaintiff has failed to state a cause of action for breach of contract and unjust enrichment as against defendant UHAUL INTERNATIONAL, INC.

With respect to the cause of action for breach of contract, the pleadings fail to allege what benefit plaintiff bestowed on UHI or the plaintiff's performance under the contract. Additionally, the pleadings fail to reference terms of the agreement that it alleges were breached. "[i]n order to plead a breach of contract cause of action, a complaint must allege the provisions of the contract upon which the claim is based . . . The pleadings must be sufficiently particular to give the court and [the] parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved as well as the material elements of each cause of action or defense" (*Maldonado v. Olympia Mech. Piping & Heating Corp.*, 8 A.D.3d 348, 350 quoting, *Atkinson v Mobil Oil Corp.*, 205 A.D.2d 719, 720, 614 N.Y.S.2d 36 [1994]; see *Rattenni v Cerreta*, 285 A.D.2d 636, 637, 728 N.Y.S.2d 401 [2001]; *Lynch v Upper Crust*, 294 A.D.2d 237, 238, 743 N.Y.S.2d 17 [2002]; *Muka v Greene County*, 101 A.D.2d 965, 477 N.Y.S.2d 444 [1984]; *Vanscoy v Namic USA Corp.*, 234 A.D.2d 680, 681, 650 N.Y.S.2d 877 [1996]). The "print screens" attached as exhibits to plaintiff's verified complaint do not establish a contractual relationship between UHI and plaintiff inasmuch as they refer to U-Haul Metro, a distinct entity

in and of itself. Furthermore, although not required to attach a copy of the contract to the pleadings, plaintiff has failed to expressly reference the terms of the contract in the complaint within the meaning of the statute.

With respect to the cause of action for unjust enrichment, plaintiff has failed to show that UHI is a party to an alleged contract. Plaintiff's conclusory allegations that UHI "must have" received a benefit from plaintiff having delivered auto parts to U-Haul Metro, or else it would have not cut checks to plaintiff towards debt incurred, is without merit. UHI submitted evidence, namely an affidavit from George R. Olds, assistant secretary of UHI, which delineated the corporate structure and explained how UHI merely performs accounting services for state operating entities, such as U-Haul Metro; and that some of these services include issuing checks to vendors for the state operating entities at their request. Any check issued by UHI to plaintiff solely would have been issued at the request of a state operating entity for goods or services that the requesting entity received; not for the benefit by UHI. UHI would have issued checks, such as those attached to plaintiff's opposition, at the request of a state operating entity and would have charged back that entity for any checks issued. In opposition to the application in chief, plaintiff failed to supplement its pleadings with an affidavit explaining how UHI was unjustly enriched under the terms and conditions of the alleged contract (see, *One Acre, Inc. v. Town of Hempstead*, 215 A.D.2d 359 [N.Y. App. Div. 2d Dept 1995]; *Star Contractor Co. v. McDonald's Corp.*, 201 A.D.2d 721 [N.Y. App. Div. 2d Dep't 1994]).

With respect to the allegation that the court lacks personal jurisdiction over UHI, CPLR §302 (a) (1) provides as follows:

"a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent: transacts any business within the state or contracts anywhere to supply goods or services in the state"

By this "single act statute," proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted (see, *Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, 7 N.Y.3d 65 [2006], cert den. 549 U.S. 1095 [USNY 2006]; *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460 [1988]). Hence, to avail itself of this statute, the plaintiff must not only establish that the defendant purposefully transacted business within the State of New York, but must also show a substantial relationship, which may pertain to a single act, between the transaction and the claim asserted (*Zottolo v. AGI, Group, Inc.*, 63 A.D.3d 1052 [2nd Dept. 2009]; see, *Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, supra; *Bogal v. Finger*, 59 A.D.3d 653 [2nd Dept. 2009]; *Kreutter v. McFadden Oil Corp.*, supra; *Krobath v. The Tractor Barn*, September 29, 2009, NYLJ at p. 31, col.1 [Sup. Ct., Nassau County, LaMarca, J.]).

The totality of the nonresident defendant's activities within the forum state are considered in order to determine whether its contacts satisfy the "transacting business" requirement (*see Longines-Wittnauer Watch Co. v. Barnes & Reinecke*, 15 N.Y.2d 443 [1965]). "Purposeful activities are those with which a defendant, through volitional acts, 'avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" (*Fischbarg v. Doucet*, 9 N.Y.3d 375 [2007], quoting *McKee Elec. Co. v. Raulaund-Borg Co.*, 20 N.Y.2d 377 [1967]). Such acts may be contrasted with "random, fortuitous, or attenuated contacts, . . . [or] unilateral activity of another party or a third person" (*Burger King Corp. v. Rudzewicz*, 471 U.S. 462 [1985] [internal quotations omitted]).

In support of its motion to dismissed based upon a lack of jurisdiction pursuant to CPLR 3211 (8), UHI submits an affidavit of George R. Olds. Mr. Olds swears under penalties of perjury that UHI is a Nevada corporation with its principal place of business in Phoenix, Arizona. It has no contacts with the State of New York sufficient to confer personal jurisdiction; maintains no offices or telephone listings in New York, owns no real property in New York, does not solicit business in New York, is not qualified to do business in New York, nor is licensed to do business in New York, and does not own a bank account in New York.

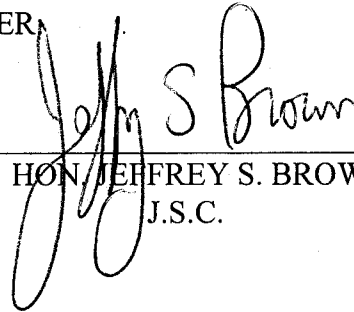
Plaintiff's opposition stating that there is some "articulable nexus" between the business transacted and the cause of action sued upon as evidenced by UHI's partial payments to plaintiff, is unavailing. Plaintiff concludes, without basis, such as referencing their contract, that UHI ordered or approved an order for auto parts, or benefitted from said shipment in some form and further accepted said benefit by making partial payments for same. As affirmed by Mr. Olds, UHI performs accounting services for state operating entities such as U-Haul Metro. Some of those services include issuing checks to vendors for the state operating entities at their request. Any check issued by UHI to plaintiff would have been issued in Arizona and not for UHI's benefit. As stated in the affidavit, UHI would charge back the state operating entity for any checks issued (*see, Stengel v. Black*, 28 AD3d 401, 813 NYS 2d 428). Plaintiff has wholly failed to show, by documentary evidence, any act taken by UHI directed at the forum state and has failed to assert that UHI made any "purposeful" acts in New York sufficient to confer jurisdiction.

Accordingly, defendant UHAUL INTERNATIONAL, INC's motion to dismiss the complaint as to UHAUL INTERNATIONAL, INC. pursuant to CPLR §§3211 (a) (7) and (8) is **GRANTED**.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York  
January 27, 2011

ENTER



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