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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 7

ORKAL INDUSTRIES, LLC,

Plaintiff,

- against -

ARRAY CONNECTOR CORPORATION,

Defendant.

INDEX NO.: 003512/2010
MOTION DATE: 3/9/11
SEQUENCE NO.: 02

The following documents were read on this motion:

Motion for leave to reargue and renew Order of November 30, 2011	1.
Plaintiff's Memorandum of Law in Support of Motion to Reargue	2.
Affirmation of Glenn S. Goldstein, Esq. in Opposition to Motion	3.
Reply Memorandum of Law in Further Support of Motion	4.
March 7, 2011 correspondence of Glenn S. Goldstein objecting To late Service of Reply Memorandum	5.

PRELIMINARY STATEMENT

Plaintiff moves for leave to reargue or renew a prior motion by defendants to dismiss the complaint. By Order dated November 30, 2010 this Court granted defendant's motion to dismiss each of the five causes of action.

BACKGROUND

This action involves purchase orders from plaintiff, located in Carle Place, New York, for goods distributed by Array from their location in Miami, Florida. There is also a claim for unpaid commissions under a Sales Representative Agreement. Three purchase orders are at issue: order # 20070491, dated September 17, 2007 was responded to by

Array by Customer Order Acknowledgment dated January 11, 2007; order # 20080531, which was responded to by Customer Order Acknowledgment dated November 12, 2008; and Purchase Order # 20100027 dated January 20, 2010, which was not responded to by Array, based on their claim that it was supposed to be a reiteration of material from a prior Customer Order and, to the extent additional items were included, Array had determined that it no longer wished to transact business with Orkal, and did not confirm the Purchase Order.

The prior Order dismissed the First and Second Causes of Action based upon the fact that the Customer Order Acknowledgments in response to the purchase orders included as a condition of sale a provision that the parties would submit to arbitration and apply Florida law. Plaintiff claims that this determination was erroneous for the following reasons:

- That portion of Array's order acknowledgment form is unintelligible, ambiguous and meaningless, and does not require arbitration;
- Array has not raised an issue of arbitration in its answer or affirmative defenses;
- Array has not demanded arbitration in response to Orkal's claims;
- Array has argued that Orkal should bring these claims in Florida;
- CPLR § 7501 does not authorize the Court to compel arbitration where neither party has demanded it;
- Array can object to arbitration and insist, as it has, that the action must be brought in Florida;
- Array has waived its right to arbitrate by demanding that all Orkal's claims should be brought in a Court action in Florida;
- Array has waived its right to arbitrate by making discovery demands and a motion concerning the alleged failure to produce documents;
- Orkal never expressly agreed to the arbitration clause in Array's

acknowledgment, and it is not part of the parties' contract;

- Arbitration clauses are not commonplace in the airplane parts industry; and,
- Article 3 of Orkal's "Terms and Conditions of Purchase" precluded inclusion of an arbitration clause.

As to the Third Cause of Action, plaintiff argues that Orkal never consented to the forum selection clause in Array's Acknowledgment, and, as such, it was not part of the agreement for the sale of the goods by Array to Orkal. Plaintiff relies on UCC § 2-207, dealing with additional terms in an acceptance and confirmation. It provides that additional terms are to be construed as proposals, and, between merchants, they become a part of the contract unless, among other things, they materially alter it.

In addition, plaintiff asserts that the Court's conclusion that Purchase Order # 20080531 was only intended to be a reiteration of # 20100027 and not a separate contract is a question of fact which precludes summary judgment.

The Fourth Cause of Action seeks commissions owed by Array. Article VIII(c)of the Sales Representative Agreement calls for the resolution of disagreements in a court in Miami, Florida. Plaintiff argues that the language of this Clause is permissive, and does not mandate that the action be brought in Miami, Florida.

The prior Order of this Court dismissed the Fifth Cause of Action, in which plaintiff asserted that, upon information and belief, Array has interfered with the relationship between Orkal and its own customer. The prior Order dismissed this Cause of Action for failure to assert the four elements which are essential for a claim of tortious interference with a contract.

DISCUSSION

With respect to the First and Second Causes of Action, plaintiff contends that defendant never demanded arbitration, has waived its right to make such a claim, and that the Court is without authority to impose arbitration, even it is a component of the contract. Plaintiff does not concede, however, that the arbitration clause is part of the contract. They

contend that Orkal never expressly agreed to the term, the insertion of the term is precluded by Art. 3 of the Purchase Order, and that the insertion of an arbitration clause in the confirmation by Array constitutes a material change in the contract, and, according to UCC 2-207, it is not adopted as part of the agreement.

The following is printed at the bottom of the Orkal Purchase Orders: "SEE ORKAL TERMS AND CONDITITONS AT WWW.ORKAL.COM". Para. 22 of the terms and conditions on that website provides as follows:

> **22. Applicable Law and Jurisdiction**
> This purchase order and matters connected with the performance thereof shall be construed, interpreted, applied and governed in all respects by the laws of the State of New York. The Purchaser and Seller consent to the exclusive jurisdiction of any Court sitting in the Counties of Nassau or Suffolk, State of New York for determination of any and all disputes arising out of, relating to and in connection with this agreement or order.

The effect of the insertion of additional terms in an acceptance or confirmation is dealt with in UCC § 2-207:

> **§ 2-207. Additional Terms in Acceptance or Confirmation**
>
> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> (a) the offer expressly limits acceptance to the terms of the offer;
>
> (b) they materially alter it; or
>
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
>
> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such

> case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

Plaintiff, in its Reply Memorandum, contends that the change from the venue selection in their website to arbitration under Florida law is a material change of the terms of the agreement, citing *Marlene Indus. Corp. v. Carnac Textiles, Inc.*, 45 N.Y.2d 327 (1978). Pertinent language of Judge Gabrielli in that decision at p. 333 provides:

> The parties to this dispute are certainly merchants, and the arbitration clause is clearly a proposed additional term, whether Carnac's form be considered an acceptance of an oral or written offer or a written confirmation of an oral agreement. As such, it became a part of the contract unless one of the three listed exceptions is applicable. We hold that the inclusion of an arbitration agreement materially alters a contract for the sale of goods, and thus, pursuant to Section 2-207 become a part of such a contract unless both parties explicitly agree to it.

The foregoing would appear to be a per se rule, that the inclusion of an arbitration clause in an acceptance or confirmation constitutes a material alteration, and will not be incorporated in a contract for the sale of goods. In the very next year, however, the Court substantially retreated from the per se rule of *Marlene*. In *Schubtex, Inc. v. Allen Snyder, Incorporated,* 49 N.Y.2d 1, 5 — 6 (1979), J. Jasen stated as follows:

> (t)he rationale underlying *Marlene* was that a litigant ought not to be forced into arbitration and, thus, denied the procedural and substantive rights otherwise available in a judicial forum, absent evidence of an express intention to be so bound. In other words, unless it can be shown that the parties contemplated the use of arbitration, they will not be held to have relinquished their right to litigate their disputes in the courts.

The Court then took the position that prior dealings between the parties would be sufficient to warrant a determination that the parties had affirmatively agreed to be bound

by an arbitration clause. The Court concluded that the only prior dealings between the parties involved the same arbitration clause in a purchase order confirmation, and there is no evidence that they ever arbitrated any disagreements in the past. Under these circumstances, there was no evidence of an express agreement to arbitrate, and the trial court's denial of a motion to stay arbitration was erroneous. Of interest is the fact that Judge Gabrielli, the author of *Marlene,* concurred in the result, but disagreed with the suggestion in the majority that the Court could impose an obligation to arbitrate in the absence of an express agreement, and based on past dealings or a trade custom.

Both of the above cases are more than 30 years of age, and were decided at a time that the Courts more jealously guarded their jurisdiction, and predated the popularity of arbitration among the judicary. In fact, *Marlene* has been pointedly criticized in more recent judicial opinions. In *I.K. Bery, Inc. v. Boody & Co.,* 2000 WL 218398 (S.D.N.Y.) J. Scheindlin, pointed out that the rule of *Marlene* does not apply to cases arising under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq. See, *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela,* 991 F.2d 42, 46 (2d Cir. 1993). Designed to prohibit discrimination against arbitration clauses the FAA states that "(a) written provision in a . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract". 9 U.S.C. § 2.

The supremacy clause of the U.S. Constitution mandates that the prohibition against discriminating against arbitration clauses in a contract is equally applicable to state and federal judicial proceedings. (*Southland Corp. v. Keating,* 465 U.S. 1, 2 [1984]). The Statute in question in *Southland* was the California Franchise Investment Law, which provided that "(a)ny condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or

order hereunder is void". Cal. Corp.Code § 31512. The Supreme Court of California concluded that this statute was an impermissible conflict with 9 U.S.C. § 2,

The issue, then, is whether the provision of UCC § 2-207, declaring that an amendment or modification of a contract in an acceptance or confirmation which materially alters the agreement, are not to constitute enforceable modifications to the contract contradicts 9 U.S.C. § 2. Upon review, the Court concludes that it does not constitute a preclusion against arbitration, as did the statute in *Southland*; rather; it is essentially neutral on the subject of the clause which is considered to constitute a material change to the contract. (*J.J.'s Mae, Inc. v. H. Warshow & Sons, Inc.*, 277 A.D.2d 128 [1st Dept. 2000]).

Marlene, cited by plaintiff, would, however, seem to conflict with 9 U.S.C. § 2, in that it concluded that, in every instance, the insertion of an arbitration clause in a purchase order confirmation constituted a material change, precluding the arbitration clause from being incorporated in the contract. The next question is whether the modification of *Marlene* in *Schubtex*, which determined that an arbitration clause may not constitute a material change if the prior history of the parties reflected reliance upon arbitration as a means of resolving disputes.

The Court concludes that the absence of a per se rule declaring insertion of an arbitration clause a material change, precluding enforcement, does not constitute a conflict with 9 U.S.C. § 2. Thus, under *Schubtex,* the arbitration clause would be enforceable if there were a history between the merchants of reliance upon the arbitration clause in prior disputes. There is no such evidence presented to the Court.

The Court therefore grants the motion of plaintiff to reargue, and upon reargument, modifies its earlier decision and concludes that the arbitration clause did not become an integral part of the agreement between the parties. Plaintiff's selection of Nassau County as the venue for an action at law is an appropriate one, based upon the residence of plaintiff. CPLR § 503 (a). The Court need not rule on the efficacy of the reference by

plaintiff in its purchase order to the "terms and conditions of purchase" located at its designated website.

The claim in the First Cause of Action is for damages in the amount of $12,476.72 for breach of contract. The Second Cause of Action seeks the same monetary damages. Consequently, this claim meets neither the $100,000 threshold for assignment to the Commercial Part of the Supreme Court, nor does it exceed the $15,000 jurisdictional limit of the District Court. U.S.D.C.A. § 201. The fact that the causes of action for the same relief under different theories cumulatively exceed $15,000, does not divest the District Court from jurisdiction. NYS Const. Art. 6 § 11; See also, *Benson v. Cohoes School Bd.* 98 Misc.2d 110 (Albany Co. County Ct. 1979). The Supreme Court is authorized to remove the action to a lower court without consent of the parties. CPLR § 325 (d), and hereby does so.

The Court adheres to its prior determination in dismissing the Third Cause of Action. The language of the confirmation, referencing only Purchase Order # 20080531, provides that the resolution of any dispute or difference which may arise under, out of, or in relation to the order of contract or touching the meaning and construction of the same shall be submitted to a court of competent jurisdiction in Miami, Florida, under the laws of Florida. While this is a change to the terms of the contract, it is not the material change with which the Court of Appeals were concerned in *Marlene* and *Schubtex.* Plaintiff is not being denied the procedural and substantive rights available in a judicial forum, as was the rationale for the Court's determination in *Marlene. Schubtex,* 49 N.Y.2d at 5 — 6. The forum selection clause contained in the Array confirmation became an integral part of the contract pursuant to UCC 2-207. The Court also adheres to its previous position that, with respect to Purchase Order # 20100027, there has been no confirmation and therefore no contract which has been breached.

The Fourth Cause of Action seeks commissions under the terms of the Sales

Representation Agreement. This agreement explicitly states that the parties agree to be subject to the jurisdiction of the Courts of the State of Florida, or any Federal Court in the State of Florida for the resolution of their disputes. There is no "battle of the forms", but rather a single agreement in which the parties mutually agreed to refer disputes under the agreement to a court of competent jurisdiction in the State of Florida. The motion to reargue as to the Fourth Cause of Action is granted, and upon reconsideration, the Court adheres to its original decision.

The same is true as to the Fifth Cause of Action. Plaintiff has failed to plead the essential elements for a claim of tortious interference with a contract. CPLR § 3013 provides that "(s)tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense". The allegations in the Sixth Cause of Action are so non-specific that they are wholly inadequate to apprise defendant of the "transactions, occurrences, or series of transactions or occurrences, intended to be proved as material elements of the cause of action. The motion to reargue as to the Fifth Cause of Action is granted, and upon reconsideration, the Court adheres to its original decision.

CONCLUSION

The First and Second Causes of Action are severed, and the Clerk of the Court is directed to transfer these causes of action to the District Court pursuant to CPLR§325 (d). The Third, Fourth and Fifth Causes of Action are dismissed.

This constitutes the Decision and Order of the Court.

Dated: May 16, 2011

J.S.C.

ENTERED
MAY 20 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE