

Madison Indus., Inc. v Garden Ridge Co.

2011 NY Slip Op 31866(U)

July 3, 2011

Supreme Court, New York County

Docket Number: 111640/2010

Judge: Doris Ling-Cohan

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

PRESENT: Hon Doris Ling-Cohan
Justice

PART 36

Index Number : 111640/2010
MADISON INDUSTRIES, INC.
vs.
GARDEN RIDGE COMPANY
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for dismiss

PAPERS NUMBERED

1, 2

3, 4

5

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

Cross-Motion: Yes No

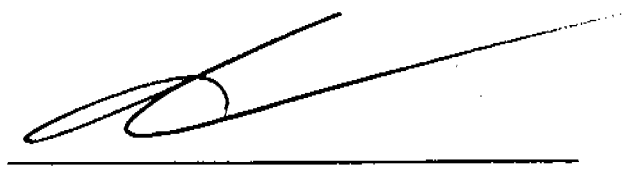
Upon the foregoing papers, it is ordered that this motion to dismiss is granted
in accordance with the attached memorandum
decision.

FILED

JUL 08 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/3/11



DORIS LING-COHAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
MADISON INDUSTRIES, INC.,

Plaintiff,

Index # 111640/2010

-against-

DECISION & ORDER

GARDEN RIDGE COMPANY, GARDEN RIDGE
CORPORATION, GARDEN RIDGE, L.P., GARDEN
RIDGE HOLDINGS, INC., GARDEN RIDGE
MANAGEMENT, INC., GARDEN RIDGE
MANAGEMENT, LLC, GARDEN RIDGE, INC.,
GARDEN RIDGE OF TEXAS, L.P., GARDEN RIDGE
and THREE CITIES RESEARCH, INC.,

Motion Seq. No.: 001

FILED

Defendants.
-----X

JUL 07 2011

NEW YORK
COUNTY CLERK'S OFFICE

LING-COHAN, DORIS, J.S.C.:

In this breach of contract action, defendants Garden Ridge Company, Garden Ridge Corporation, Garden Ridge, L.P., Garden Ridge Holdings, Inc., Garden Ridge Management, Inc., Garden Ridge Management, LLC, Garden Ridge, Inc., Garden Ridge of Texas, L.P., Garden Ridge and Three Cities Research, Inc. (collectively, the Garden Ridge defendants) move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint on the ground that the parties' agreement contains an exclusive forum selection clause that requires the parties to litigate this action in the district court of Harris County, Texas.

Alternatively, the Garden Ridge defendants move, pursuant to CPLR 3211 (a) (1) and (7) to dismiss the second (quantum meruit), third (unjust enrichment), fifth (conversion), sixth (fraud in the inducement) and seventh (promissory fraud) causes of action on the ground that they are duplicative of the first and third contract causes of action; and/or to dismiss all of the causes of action alleged against each of the Garden Ridge defendants except Garden Ridge, L.P. (GR) on the ground that GR is the only defendant who entered into a contract with plaintiff, Madison Industries, Inc. (Madison).

The complaint, which refers to all of the Garden Ridge defendants except Three Cities Research, Inc. as "Garden Ridge," alleges that on March 9, 2010, Garden Ridge ordered goods from Madison in the amount of \$19,258.80 (Invoice 1), that Madison shipped goods to Garden Ridge and that Garden Ridge did not reject the goods but, to date, Madison has not received payment for Invoice 1; that on March 25, 2010, Garden Ridge ordered goods from Madison in the amount of \$52,272.00 (Invoice 2), that Madison shipped the goods to Garden Ridge and that Garden Ridge did not reject the goods but, to date, Madison has not received payment for Invoice 2; that on April 20, 2010, Garden Ridge ordered goods from Madison in the amount of \$5,391.00 (Invoice 3), that Madison shipped the goods to Garden Ridge and that Garden Ridge did not reject the goods but, to date, Madison has not received payment for Invoice 3. Madison asserts that, despite due demand, no portion of the \$76,921.80 due and owing on all three invoices has been paid.

The complaint states causes of action for breach of contract, quantum meruit, unjust enrichment, account stated, conversion, fraud in the inducement and promissory fraud.

Defendants argue that the complaint must be dismissed because the agreement between GR and Madison, which incorporates by reference GR's terms and conditions, provides that, "[a]ll civil actions filed as a result of any disputes arising out of the purchase order or the commercial relationships created thereby, shall be filed in the state district courts of Harris County, Texas" (Rottenberg Aff., Ex. 2).

Alternatively, the defendants argue that all the defendants except GR should be dismissed because the documentary evidence demonstrates that the agreements were between GR and Madison and they also contend that all causes of action except breach of contract and account stated must be dismissed because they are duplicative of the contract causes of action.

In opposition to dismissal, Madison contends that it never agreed to the forum selection

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clause, that the terms and conditions were not made a part of any agreement between the parties and that Madison never saw the terms and conditions which included the forum selection clause because it was not able to access the terms and conditions on GR's website. In addition, Madison argues that GR's fraud voids the forum selection clause, if there was one, and that, because of the historical interrelationship between the defendants, it would be premature, at this juncture, to dismiss any of the Garden Ridge defendants.

"A motion pursuant to CPLR 3211 (a) (1) to dismiss the complaint on the ground that the action is barred by documentary evidence may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law" (*Mendelovitz v Cohen*, 37 AD3d 670, 670 [2d Dept 2007]; see *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). "On a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts alleged fit within any cognizable legal theory (*Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008]; see *Leon v Martinez*, 84 NY2d 83, 87 [1994]).

Forum Selection Clause

The documents reveal that the forum selection clause upon which defendants rely is contained in GR's "terms and conditions," a document which is posted on the GR's website (gardenridge.com). In a letter agreement dated December 1, 2008, GR informed Madison:

We are writing this letter to confirm that you understand how our process works and agree when a binding agreement is created. As always our agreement is contained in the combination of this letter, the Purchase Order and the Vendor Compliance Manual. Please visit

www.gardenridge.com often to remain current on the Terms and Conditions in this manual.

The December 1, 2008 letter agreement further informed Madison that each vendor has three days to reject any purchase order it receives; otherwise it is deemed to have accepted GR's purchase order, as well as the associated terms and conditions. Madison countersigned the letter agreement on December 23, 2008 (Rottenberg Aff., Ex. 4).

The purchase orders at issue in this litigation were dated March 9, 2010, March 25, 2010 and April 20, 2010, and each of the three purchase orders at issue instructed Madison to go to the GR website to view the terms and conditions (Rottenberg Aff., Ex. 3).

Madison's argument that it cannot be bound by the forum selection clause because it never saw the terms and conditions is without merit. It is a fundamental principal of contract law that documents may be incorporated by reference into an executed agreement (*see Kachurin v Barr*, 272 App Div 391, 398 [1st Dept 1947] *aff'd* 297 NY 889 [1948]; *Shah v Monpat Const., Inc.*, 65 AD3d 541, 544 [2d Dept 2009]). Here, the terms and conditions were incorporated by reference into the December 1, 2008 letter agreement, which Madison signed, and each of the purchase orders directed Madison to go to the website to review the terms and conditions.

Moreover, it is well settled that a person who signs a contract is presumed to know its terms and consents to be bound (*see Imero Fiorentino Assoc. v Green*, 85 AD2d 419, 420 [1st Dept 1982]). Failure to read a contract is not an excuse or defense to enforcement of the contract terms (*see Fiore v Oakwood Plaza Shopping Ctr.*, 78 NY2d 572, 582 [1991] *cert denied* 506 US 823 [1992]). "Ordinarily, the signer of a deed or other instrument, expressive of a jural act, is conclusively bound thereby. That his mind never gave assent to the terms expressed is not material . . . If the signer could read the instrument, not to have read it was gross negligence; if he could not read it, not to procure it to be read was equally negligent; in either case the writing

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binds him” (*Sterling Natl. Bank & Trust Co. of N.Y. v I.S.A. Merchandising Corp.*, 91 AD2d 571, 572 [1st Dept 1982], citing *Pimpinello v Swift & Co.*, 253 NY 159, 162 [1930]).

Madison’s assertion that the website was password protected, that Madison did not have a “login,” and it was, therefore, unable to access the terms and conditions, is belied by Madison’s own document which shows that the log-in information instructed, “If you do not have a login, please contact vendorcompliance@gardenridge.com” (Harris Aff., Ex. B). Here, Madison does not claim that it contacted vendor compliance and was denied access to the site. Accordingly, it appears that its ignorance of the terms and conditions, including the forum selection clause, was a result of its own negligence in failing to procure a password, if, in fact, it did not have one, so that it could review the terms and conditions which had been incorporated by reference into the contract.

In addition, the fact that Madison alleges that it did not receive a copy of the terms and conditions does not mean that the forum selection clause was not reasonably communicated to it (*see Anwar v Fairfield Greenwich, Ltd.*, 742 F Supp 2d 367, 373 [SD NY 2010][enforcing a forum selection clause despite plaintiff’s allegation that he never saw the agreement that contained the clause]).

Moreover, Madison’s reliance on the 2009 Marketing Contract and the 2010 Replacement Marketing Contract, which do not incorporate the terms and conditions, is also unavailing because those contracts are unrelated to the 2008 letter agreement which discusses when and how purchase orders are accepted and when they are considered binding. The 2008 letter specifically states that the agreement between the parties is contained in “this letter, the Purchase Order and the Vendor Compliance Manual” and it further states that the vendor compliance manual can be found on the GR website (Rottenberg Aff., Ex. 4).

As the forum selection clause was incorporated by reference into the agreement, the law

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is well settled that such forum selection clause “is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that the trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court” (*KMK Safety Consulting, LLC v Jeffrey M. Brown Assoc., Inc.*, 72 AD3d 650, 651 [2d Dept 2010] [internal quotations and citation omitted]).

Madison alleges that the forum selection clause was procured by fraud because the terms and conditions were only accessible on a password-protected website and that GR somehow duped Madison into believing that the terms and conditions only related price, quantity and product. In addition, Madison argues that the allegations of fraud in the complaint are sufficient to void the agreement *ab initio*; that the forum selection clause was procured by overreaching because it is unconscionable to charge one party to the contract with an ongoing obligation to determine the terms of an agreement; that enforcing the clause will deprive a New York corporation of its right to bring this action in a local venue for a case arising entirely in New York and that the terms and conditions are invalid, because terms that are unrelated to the forum selection clause are unreasonable.

A party seeking to avoid a forum selection clause must make a strong showing that the provision should be set aside (*Bernstein v Wysoki*, 77 AD3d 241, 249 [2d Dept 2010]; *Baosteel Am., Inc. v M/V Ocean Lord*, 257 F Supp 2d 687, 688 [SD NY 2003]). Vague conclusory assertions that a forum selection clause is unconscionable or unreasonable are insufficient to defeat such a clause (*KMK Safety Consulting, LLC v Jeffrey M. Brown Assoc., Inc.*, 72 AD3d at 651).

Here, Madison is a sophisticated entity which has been in business for over 70 years and is well versed in commercial transactions (Complaint, Ex. D). It has offered no evidence that the

cost of commencing this action in Texas would be financially prohibitive so that, for all practical purposes, it would be deprived of its day in court (*see Horton v Concerns of Police Survivors, Inc.*, 62 AD3d 836, 836-837 [2d Dept 2009]). Moreover, Madison's vague allegations that it was somehow duped into agreeing to the clause because it did not know it was part of the terms and conditions is insufficient to circumvent the agreement. This is so because the evidence demonstrates that Madison was informed of how to access and could have obtained access to the terms and conditions prior to shipping the merchandise requested in GR's purchase order by simply requesting a password that would have allowed it access to the vendor's terms and conditions. Madison's lack of diligence is not a ground for setting aside the agreement.

Moreover, Madison's fraud causes of action plead that the defendants did not intend to perform the contracts when they made them. "To say a contracting party intends when he enters onto an agreement not to be bound by it is not to state 'fraud' in an actionable area, but to state a willingness to risk paying damages for breach of contract" (*Briefstein v Rotondo Constr. Co.*, 8 AD2d 349, 351 [1st Dept 1959]; *see also Hotel 71 Mezz Lender LLC v Mitchell*, 63 AD3d 447, 448 [1st Dept 2009]; *Tesoro Petroleum Corp. v Holborn Oil Co.*, 108 AD2d 607 [1st Dept 1985]). Accordingly, the allegations of fraud in the complaint do not constitute a ground for voiding the forum selection clause. Finally, Madison's belated claim that the terms and conditions as a whole are unconscionable is insufficient to defeat the forum selection clause (*see Master Lease Corp. v Manhattan Limousine*, 177 AD2d 85, 90 [2d Dept 1992][the doctrine of unconscionability is not applicable in a commercial setting because there is a presumption that businessmen deal at arm's length with equal bargaining power]).

Accordingly, it is

ORDERED that defendants Garden Ridge Company, Garden Ridge Corporation, Garden Ridge, L.P., Garden Ridge Holdings, Inc., Garden Ridge management, Inc., Garden Ridge

Management, LLC, Garden Ridge, Inc., Garden Ridge of Texas, L.P., Garden Ridge and Three Cities Research, Inc.'s motion to dismiss to complaint is granted to the extent that the complaint is dismissed based on the forum selection clause which requires the parties to litigate this action in the district court in Harris County, Texas and the Clerk of the Court shall enter a judgment of dismissal, without costs;¹ and it is further

ORDERED that within 30 days of entry of this order, defendants shall serve a copy upon plaintiff with notice of entry.

FILED

JUL 07 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

DATE: 7/3/11



Doris Ling-Cohan, J.S.C.

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¹ Because the court has granted dismissal based upon the forum selection clause, it declines to address the parties other arguments.