

Sherwood Apparel LLC v Active Brands Intl., Inc.

2012 NY Slip Op 33284(U)

January 5, 2012

Supreme Court, New York County

Docket Number: 651223/2011

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 49

SHERWOOD APPAREL LLC and PAUL PALMERI,

Plaintiffs,

INDEX NO. 651223/2011

-against-

MOTION DATE Jan. 5, 2012

ACTIVE BRANDS INTERNATIONAL, INC.,
ACTIVE BRANDS ACQUISITION INC.,
DEAN HEINEMANN and BERNARD FINDLEY,

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

Defendants.

The following papers, numbered 1 to _____ were read on this motion to dismiss action.

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

PAPERS NUMBERED

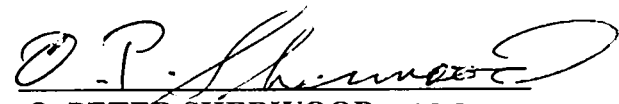
Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that defendants' motion to dismiss the complaint is decided in accordance with the accompanying decision and order.

Dated: January 5, 2012


O. PETER SHERWOOD, 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 49**

-----X
SHERWOOD APPAREL LLC and PAUL PALMERI,

Plaintiffs,

-against-

**ACTIVE BRANDS INTERNATIONAL, INC.,
ACTIVE BRANDS ACQUISITION INC.,
DEAN HEINEMANN and BERNARD FINDLEY,**

Defendants.

-----X
O. PETER SHERWOOD, J.:

**DECISION AND
ORDER**

Index No. 651223/2011

Defendants, Active Brands Acquisition, Inc. (“ABAI”), Dean Heinemann (“Heinemann”) and Bernard Findley (“Findley”, together with ABAI and Heinemann “Defendants”) move, pursuant to CPLR 3211 (a)(1), to dismiss the complaint in its entirety based on Plaintiffs’ Sherwood Apparel, LLC and Paul Palmeri (“Plaintiffs”) failure to comply with a forum selection clause requiring that all disputes arising out of an assets sale agreement be litigated in Delaware.

According to the complaint, plaintiffs seek to enforce a term sheet (the “Term Sheet”) executed between defendant, Active Brands International (“Active International”), and Plaintiffs. Defendant, ABAI, is the assignee of Active International. The individual defendants (Heinmann and Findley) are officers of ABAI. Plaintiff, Palmeri, is a former officer of plaintiff, Sherwood Apparel. The Term Sheet was intended to facilitate the wind up of Active International’s business affairs and to assign its interests to ABAI. The complaint alleges that ABAI committed an array of unlawful acts which gave rise to causes of action for tortious interference with contract, intentional harm to plaintiff’s business and unfair competition, breach of covenant of good faith and fair dealing,

declaratory judgment, cancellation and return of promissory note. The Term Sheet, however, provides that all disputes arising out of the Term Sheet shall be litigated in Delaware courts.

DISCUSSION

The opening line of the complaint reads: “[t]his action is brought by the Plaintiffs to enforce the provisions of [the] Term Sheet.” The Term Sheet contains a forum selection clause, which reads:

Any dispute or controversy arising out of or related to this Term Sheet shall be governed by the internal laws of the State of Delaware and subject to the jurisdiction of the state and federal courts of Delaware. Licensee and Licensor each irrevocably consents to the jurisdiction or venue for purposes of any such disputes

Plaintiffs do not claim that the forum selection clause is invalid. Instead, they assert that the forum selection clause should be set aside because New York is a more appropriate forum than Delaware for the dispute at issue; and that the forum selection clause applies only to the corporate entities, not individual defendants. Neither argument has merit and the motion should be granted.

Both corporations are Delaware corporations that contracted to make Delaware the forum for resolution of any dispute arising out of the Term Sheet. Forum selection clauses are prima facie valid and New York courts have consistently held that a forum selection clause is documentary evidence which may serve as a proper basis for dismissal pursuant to CPLR 3211 (a)(1) (*British West Indies Guaranty Trust Co v Banque International A Luxembourg*, 172 AD2d 234 [1st Dept 1991]; *Lischinskaya v Carnival Corporation*, 56 AD3d 116, 123 [2d Dept] [2008]). The burden of establishing that the forum selected in the contract is improper is substantial and must be satisfied by the party opposing the motion to dismiss (*Shah v Shah*, 215 AD2d 287 [1st Dept 1995]). Forum selection clauses may be set aside only if they are so seriously inconvenient as to “deny the party its day in court.” (*Yoshida v PC Tech USA*, 22 AD3d 373 [1st Dept 2005]).

Plaintiffs have not shown that Delaware is an inconvenient forum. Instead, plaintiffs argue merely that New York is a *more convenient* forum than Delaware. They have not shown that Delaware is so inconvenient as to deny Plaintiffs their day in court. Even if one were to accept, as plaintiffs claim that “all the parties either live or conduct substantial business within the State of New York,” that “counsel for both plaintiffs and defendants have their principal law offices within the State of New York” and that “all of the witnesses are either in New York or Connecticut,” these facts do not trump the provisions of the forum selection clause agreed to by the parties.

Plaintiff’s request for leave to amend the complaint to bring their claims against the individual defendants, should be denied. The forum selection clause applies to “any dispute or controversy arising out of or related to this Term Sheet.” The claims in this case, whether brought by the corporate defendants or the individual defendants, arise out of and are related to the Term Sheet. Further, given that defendants are officers of the corporate defendants,¹ the individual defendants may not be precluded from benefitting from the forum selection clause the corporations entered into (*Dovin Construction, Inc. v C. Raimondo & Sons Construction Co.*, 29 AD3d 365 [1st Dept 2006] [allowing individual defendants to enforce forum selection clause in suit brought against them in their individual capacity when the corporation was the signatory to the contract]). Amending the pleadings to permit plaintiffs to bring their claims against only the individual defendants would only delay an inevitable result—that this dispute, whether against the corporations or officers of those corporations, must be litigated in Delaware.

¹Technically they are officers of ABAI only. As ABAI is the assignee of Active International, the two corporations are referenced jointly.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the complaint in its entirety **GRANTED**; and
it is further

ORDERED that plaintiffs' cross-motion for leave to amend the complaint is **DENIED**.

This constitutes the decision and order of the Court.

DATED: January 5, 2012

ENTER,



O. PETER SHERWOOD

J.S.C.