2470 Cadillac Resources, Inc. v DHL Express (USA), Inc.
2013 NY Slip Op 30298(U)
January 10, 2013
Sup Ct, New York County
Docket Number: 603613/2008
Judge: Charles E. Ramos

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Ramos **PART** 53
Justice

Index Number : 603613/2008
2470 CADILLAC RESOURCES
vs.
DHL EXPRESS (USA)
SEQUENCE NUMBER : 007
PARTIAL SUMMARY JUDGMENT

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

The following papers, numbered 1 to _____ **, were read on this motion to/for** _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with accompanying memorandum decision and order.

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

Dated: 1/10/13

_____, J.S.C.
HON. CHARLES E. RAMOS

1. **CHECK ONE:** ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION
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2470 CADILLAC RESOURCES, INC., A&E WORLDWIDE, INC. AAA EXPRESS, LLC, ABBA UNIVERSAL, INC., ACREE ENTERPRISES d/b/a WWE NW ARKANSAS, AEKC, LLC, AIR DELIVERY CONSULTANTS, LTD, AIR EXPRESS OF ILLINOIS, INC., AIR EXPRESS OF MICHIGAN, INC., ANGLICORR, INC., AUSTIN WORLDWIDE EXPRESS, LP, BALCONY VENTURES, INC., BAZOOKA CRUSH HOLDINGS, INC., BEAR FRANCHISING (CONNECTICUT), LLC, BEAR FRANCHISING (DALLAS), LLC, BEAR (LA), LLC, BEAR FRANCHISING (LICENSING), LLC, BEAR FRANCHISING (MANHATTAN), LLC, BEAR FRANCHISING (NEW JERSEY), LLC, BEAR FRANCHISING (RALEIGH), LLC, BEAR FRANCHISING, LLC, BKT WORLDWIDE, INC., BLACKSTONE RIDGE HOLDINGS, INC., BUCKEYE INCORPORATED, CJ&J ENTERPRISES OF CENTRAL FLORIDA, INC., CNM EXPRESS INC., COG EXPRESS, INC., D&C, LLC, DETROIT OVERNIGHT, LLC, DIRECT LLC, DM MARKETING GROUP, INC., DOUBLE BOTTOM, INC., DPX INTERNATIONAL, LLC, DSM SERVICES, INC., EFFECTABIZ, INC., ELMORE FRANCHISES I, INC., FUSION PARTNERS, LLC, HARRISBERG VENTURES, LLC, HIGH TIDE EXPRESS SHIPPERS, INC., HIRAW, LCC, HK PARTNERS DC, LLC, HOPSON ENTERPRISES, INC., HOPSON MCANAMON, INC., IGWT, INC., IRANI, INC., JBH ENTERPRISES, INC., JENKINS ENTERPRISES, INCORPORATED, KENT CLARK, KIGER COMPANY, INC., KIMAT L.P., L.A. OVERNIGHT, LLC, LBK/AMA WWEX, LP, LETTERS EXPRESS INCORPORATED, LINDREW, INC., INC., LINEAGE INVESTMENTS, INC., LM4, INC., MANAGED MAIL, INC., MARALO, INC., MATT FOLDS, MEMPHIS OVERNIGHT, LLC, NATIONS SHIPPING, LLC, NORMAN A. HARRIS, INC., ORANGE COUNTY OVERNIGHT, LLC, OTEY INTERESTS, LP, OVERNIGHT AIR EXPRESS OF NORTHERN INTDIANA, INC., OVERNIGHT AIR EXPRESS, INC., PHOENIX OVERNIGHT, LLC, PIGS INCORPORATED, RJD AND ASSOCIATES, LLC, RKK INCORPORATED, RYPAT, LLC, SAN FRANCISCO OVERNIGHT, LLC, SCHILLING ENTERPRISES, INC., SDL ENTERPRISES, INC., SHAMROCK OVERNITE SERVICE, LLC, SHIP EXPRESS, LLC, SHIPPING SOLUTIONS LP, SKYWAY EXPRESS, INC., SOUTHWEST FLORIDA EXPRESS INCORPORATED, STARS EXPRESS, LLC, STEWARD CORPORATION, TAVA, INC., TPL, INC., TRB INDUSTRIES, INC., TRINITY ONE, INC., UTAH OVERNIGHT, LLC, VEGAS OVERNIGHT, LLC, VENTURINE VENTURES, LLC, VIRGINIA BUSINESS EXPRESS INC., WORLDWIDE EXPRESS OF THE UPSTATE, INC., WORLDWIDE EXPRESS MOUNTAIN WEST, LCC, WORLDWIDE EXPRESS OF KNOXVILLE, INC., WW XPRESS, LLC,

Plaintiffs,

- against -

Index No.
603613/2008

DHL EXPRESS (USA), INC. and
DEUTSCHE POST AG,

Defendants.

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DHL EXPRESS (USA), INC.,

Counterclaim Plaintiff,

- against -

2470 CADILLAC RESOURCES, INC., et al.,

Counterclaim Defendants.

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Charles E. Ramos, J.S.C.:

Motion sequence numbers 007 and 008 are consolidated for disposition.

In motion sequence number 007, defendant DHL Express (USA), Inc. (DHL) moves for partial summary judgment dismissing the tenth and eleventh causes of action in plaintiffs' second amended complaint.

In motion sequence number 008, plaintiffs move, pursuant to CPLR 3211 (a) (1) and (5), to dismiss the first and second counterclaims.

Background

Plaintiffs are 100 franchisees of nonparty Worldwide Express Operations (WWE). In 1993, WWE's predecessor-in-interest, CGI,

and DHL's predecessor-in-interest, nonparty Airborne, entered into a reseller agreement (the Reseller Agreement), pursuant to which WWE's franchisees resold DHL's shipping services. The franchisees were not signatories to the Reseller Agreement.

The parties amended the Reseller Agreement sixteen times. The sixteenth amendment (Sixteenth Amendment) to the Reseller Agreement took effect September 26, 2008. It permitted DHL and WWE to terminate the Reseller Agreement upon ninety days notice, at any time and for any reason.

After years of struggling to compete as a domestic shipper in the U.S., DHL began to plan its departure from the domestic market in order to re-direct its efforts and resources to its international shipping business. On November 10, 2008, DHL announced publicly that it would cease providing domestic shipping services and to expand into international shipping. Allegedly, DHL solicited the franchisees' international shipping customers, discontinued domestic shipping without giving the franchisees the 90 days' notice required in the Reseller Agreement, and engaged in other acts detrimental to plaintiff franchisees.

Plaintiffs originally asserted nine causes of action. Previously, DHL moved to dismiss the complaint on the ground that federal law relating to air carriers preempted plaintiffs' claims. The First Department affirmed this Court's determination

that states may not enact laws affecting an air carrier's prices, rates, routes, or services (*2470 Cadillac Resources, Inc. v DHL Exp. [USA], Inc.*, 84 AD3d 697 [1st Dept 2011], *lv dismissed* 18 NY3d 921 [2012]). Thus, claims that DHL reduced its routes, removed drop boxes, discontinued guaranteed shipping rates, increased rates, misappropriated plaintiffs' confidential information, engaged in fraud, tortiously interfered with prospective relations, and violated the unfair/deceptive trade practice acts of several states were deemed preempted as improperly seeking to regulate DHL's manner of providing its services. In addition, plaintiffs failed to state claims for the torts.

The Court determined that federal law did not preempt claims based on an air carrier's failure to honor its own self-imposed obligations, asserted in connection with claims for improper notice of termination of the Reseller Agreement, overcharging, and improper billing. Those state law claims were based on promises and undertakings entered into by DHL, such as the Reseller Agreement, and the billing practices agreed to between DHL and the franchisees. Nonetheless, plaintiffs did not have standing to enforce claims based on the Reseller Agreement, because they were neither parties to that agreement, nor third-party beneficiaries. Remaining to plaintiffs were the claims of improper billing and overcharging, deriving from the franchisees'

and DHL's practices. The first, third, fourth, fifth, sixth, seventh and ninth claims were dismissed.

DHL answered the complaint and asserted two counterclaims. Plaintiffs moved for leave to amend their complaint to add two more causes of action, the tenth and eleventh, and to renew the motion dismissing their claims, which was granted as to amendment and denied as to renewal (2010 Decision). The decision stated that DHL's counterclaims alleged "a direct contractual relationship based upon DHL's provision of pick-up and delivery services on plaintiffs' behalf without reference to the Reseller Agreement" (2010 Decision, 7).

In its answer, DHL alleges that plaintiffs established accounts for their customers with DHL and DHL assigned account numbers to the accounts. Plaintiffs collected letters and packages from their customers and tendered those to DHL for pick up and delivery. DHL then invoiced plaintiffs according to rates set forth in schedules to the Reseller Agreement.

DHL's first counterclaim alleges that a contract was created each time that DHL made a pick up and delivery on behalf of a plaintiff, which plaintiffs breached by failing to pay the invoices for DHL's services. The second counterclaim sounds in account stated, based on plaintiffs' alleged practice of retaining and never objecting to DHL's invoices.

Plaintiffs' tenth cause of action sounds in breach of

contract. Plaintiffs allege that each franchisee was required to sign DHL's Sales Code of Ethics for Resellers (The Code), which constituted an enforceable agreement between DHL and the franchisee, pursuant to which they abided by DHL's Advertising and Promotion Policy (Advertising Policy). These documents were attached to the first amended Reseller Agreement.

The Code lists the franchisees/resellers' obligations, which were to: learn about DHL's services in order to provide accurate information to customers; solicit new customers; submit complete and accurate data on customers to DHL; adhere to DHL's advertising and promotion policies; refrain from disclosing to third parties material information about DHL; make economical requests for supplies, such as airbills and packaging supplies, which were expensive; and conduct business in a professional manner. The last item is that the reseller should uphold all other contract obligations, and "[t]his document is not intended to represent the complete agreement with DHL".

Although the Code does not expressly place any obligations on DHL, plaintiffs allege that it obligated DHL to do the following: process the franchisees' customer information in a timely manner; assign account numbers to the franchisees' customers; provide shipping services; provide monthly reports of DHL's shipping activity for the franchisees's customers; provide shipping supplies; bill the franchisees; refrain from increasing

the franchisees's rates by more than 5% each year; and provide services until September 26, 2019, unless services were terminated in accordance with the terms of the Reseller Agreement and other contracts between DHL and the franchisees. Plaintiffs also contend that the Code was part of the Reseller Agreement and that, by signing the Code, the franchisees became party to the Reseller Agreement.

The tenth cause of action alleges that DHL breached its obligations under the Code. Allegedly, DHL ceased performing before the term of the Reseller Agreement and other contracts expired, did not provide notice of termination in accordance with the contracts, misappropriated confidential customer information and used it to contact the franchisees' customers to solicit their international shipping business, and disclosed to the franchisees' customers the rates that DHL charged the franchisees.

Plaintiffs' eleventh cause of action sounds in breach of contract and alleges the same breaches alleged in the tenth cause of action. The eleventh cause of action is pleaded in the alternative to the tenth cause of action. It is based on the claim in DHL's answer that DHL's counterclaims are not based on the Reseller Agreement, but other agreements between DHL and plaintiffs which were created each time that DHL performed pick up and deliveries for plaintiffs. Plaintiffs allege that the

terms of those contracts were the same as the terms in the Reseller Agreement.

Plaintiffs' tenth and eleventh causes of action must be dismissed.

The Court's prior decision addressed the identical allegations set forth in plaintiffs' tenth and eleventh claims, which were dismissed on the ground of federal preemption and lack of standing. To the extent plaintiffs attempt to allege that a contract was formed with DHL on the basis of the Code, plaintiffs fail to establish that they became parties to the Reseller Agreement merely by signing the Code, as the Code makes no mention of its incorporation into the Reseller Agreement. The Code does not bestow any rights on plaintiffs, nor does it bind DHL with any obligations. DHL did not sign the Code, and plaintiffs submit no evidence that DHL intended to create a binding contract with plaintiffs based upon the Code.

Even assuming arguendo that DHL executed the Code (which it did not), the documents that comprise the Code could not constitute an enforceable contract. While the Code contains general guidelines, it lacks all of the material terms of the alleged agreements including fees, duration, or termination (*James V. Acquavella, M.D., P.C. v Viola*, 17 NY3d 741, *rearg denied* 17 NY3d 880 [2011]; *Tradewinds Fin. Corp. v Repco Sec.*, 5 AD3d 229, 230-31 [1st Dept 2004] ["The documents relied upon by

plaintiffs could not be cobbled together as a writing sufficient to satisfy the statute (of frauds), since material terms were missing"]; *compare Kasowitz, Benson, Torres & Friedman, LLP v Reade*, 98 AD3d 403, 404 [1st Dept 2012] ["An exchange of e-mails may constitute an enforceable agreement if the writings include all of the agreement's essential terms, including the fee, or other cost, involved"]).

To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms (*Express Industries and Terminal Corp. v New York State Dept. Of Transp.*, 93 NY2d 584 [1999]). Here, the record is devoid of any evidence tending to demonstrate the manifestation of mutual assent required to create a contract between DHL and the plaintiffs.

As to the motion to dismiss DHL's counterclaims, plaintiffs contend that they are barred by collateral estoppel. On December 9, 2008, WWE commenced an action against DHL in Texas state court for breach of the Reseller Agreement, money had and received, unjust enrichment, fraudulent inducement, fraudulent concealment, tortious interference with contract, and trade secret misappropriation. DHL asserted a counterclaim to collect under the guaranty provision in the second amendment to the Reseller Agreement, pursuant to which WWE "agree[s] to guarantee

payment if any [WWE] franchisee defaults in payments to [DHL]" (Alavi Affidavit [Aff.], Ex. E).

Following a jury trial, question number 9 of the charge to the jury addressed the guaranty: "Did [WWE] fail to comply with the guarantee provision of the Second Amendment to the Reseller agreement?" (*id.*, Ex. A). The jury answered in the negative, and a final judgment was entered on October 11, 2011.

Both sides agree that the law of the rendering jurisdiction, here Texas, applies to determine the collateral estoppel effect of the judgments of other states' courts (*see Schultz v Boy Scouts of Am.*, 65 NY2d 189, 204 [1985]; *GATX Flightlease Aircraft Co. Ltd. v Airbus S.A.S.*, 15 Misc 3d 1143[A], *6, 2007 NY Slip Op 51124[U] [Sup Ct, NY County], *affd* 40 AD3d 445 [1st Dept 2007]).

To invoke collateral estoppel, plaintiffs must establish that: (1) the same facts sought to be litigated "were fully and fairly litigated in the previous action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action" (*Sysco Food Servs. v Trapnell*, 890 SW2d 796, 801 [Tex 1994]). Plaintiffs may argue the applicability of the doctrine even though they were not party to the Texas action, as the law does not require complete identity of parties. Rather, it is enough that "the party against whom the doctrine is asserted was a party or in privity

with a party in the first action" (*id.* at 801-802). The party asserting the defense has the burden of proving it (*id.* at 802).

> Collateral estoppel ... bars only the relitigation of identical issues of fact or law that were actually litigated and essential to the judgment in a prior suit. More specifically, the doctrine extends only to those matters [issues] that were either expressly determined or necessarily determined in an adjudication and not to those matters which might have been, but were not, raised and adjudicated therein

(*Avila v St. Luke's Lutheran Hosp.*, 948 SW2d 841, 847 [Tex Ct App 1997].

In the Texas case, WWE argued that DHL could not prove that it was owed money and produced evidence that DHL submitted inaccurate bills, failed to apply payments, and destroyed underlying records of accounts. The Texas jury determined that WWE was not liable under the guaranty.

According to plaintiffs, the effect of the verdict is that they do not owe DHL any payments. Plaintiffs argue that because a franchisee's failure to pay triggers the guaranty, the jury must have found that no franchisee failed to pay. Otherwise, plaintiffs' rationale continues, the jury would have found that WWE liable under the guaranty.

DHL asserts that the Texas jury, by finding that WWE owed nothing to DHL under the guaranty, did not as a consequence find that the franchisees also owed nothing, nor did it find that the franchisees owed nothing to DHL. In support of its argument, DHL produces evidence from trial transcripts to show that, during the

trial, WWE repeatedly acknowledged that some debt was owed to DHL.

For instance, in opening and closing statements, WWE's counsel told the jury that the amount of the franchisees' debt would be determined in the New York action (this action). Also, during the trial, WWE contended that, because the franchisees' dispute had not been resolved in the New York action, the franchisees had not yet defaulted in payment. WWE's counsel argued that WWE was not responsible for paying on the guaranty when the principal debtors, the franchisees, had not been adjudged owing.

WWE asserted several affirmative defenses to DHL's counterclaim, including business justification, anticipatory breach, fraud, equitable estoppel, and failure to mitigate. DHL contends that any of those could have resulted in the jury's verdict. DHL asserts that the Texas verdict does not concern its counterclaims in this action, because the Texas action was based on the guaranty in the Reseller Agreement, while its counterclaims in this action are based on other agreements.

Plaintiffs fail to show that the issue of the amount of their indebtedness to DHL was fully litigated in the Texas action. The same facts sought to be litigated here, namely, the franchisees' liability on DHL's invoices, were not litigated in the Texas action. Moreover, plaintiffs do not demonstrate that

the Texas verdict was based on a finding that the franchisees had no debt to DHL. For these reasons, DHL persuasively argues that the doctrine of collateral estoppel does not bars its counterclaims.

To conclude, it is

ORDERED that motion sequence number 007 by defendant DHL Express (USA), Inc. (DHL) for partial summary judgment dismissing the tenth and eleventh causes of action in plaintiffs' second amended complaint is granted and the tenth and eleventh causes of action are dismissed as against said defendant; and it is further

ORDERED that motion sequence number 008 by plaintiffs, pursuant to CPLR 3211 (a) (1) and (5), to dismiss the first and second counterclaims is denied.

Dated: January 10, 2013

ENTER:

J.S.C.

HON. CHARLES E. RAMOS