

**Dulcette Tech., LLC v MTC Ind., Inc.**

2013 NY Slip Op 32315(U)

September 24, 2013

Sup Ct, Suffolk County

Docket Number: 60071-2013

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

**COPY**

*Present:*

HON. EMILY PINES  
J. S. C.

Motion Date: 07-02-2013  
Submit Date: 07-30-2013  
Motion No.: 001 MG

\_\_\_\_\_ X  
DULCETTE TECHNOLOGIES, LLC.,  
Plaintiff,

- against -

MTC INDUSTRIES, INC., and UNICHEM  
ENTERPRISES, INC.,  
Defendants.

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New York, New York 10118

MTC Industries, Inc.  
29-30 137 th Street #3G  
Flushing, New York 11354

**ORDERED** that the motion by defendant Unichem Enterprises, Inc. for an order dismissing the action as asserted against it is granted; and it is further

**ORDERED** that counsel for movant shall serve a copy of this Order with Notice of Entry upon counsel for plaintiff and other defendant, pursuant to CPLR 2103(b)(1), (2) or (3), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court; and it is further

**ORDERED** that counsel for the remaining parties are directed to appear for a

preliminary conference on November 4, 2013 at 9:30 a.m. in D.C.M. located at One Court Street, Riverhead, New York.

In this breach of contract action, the plaintiff alleges that the defendants separately breached express and implied warranties of the purity of a product named sucralose. The complaint also alleges fraud. The record reveals that the plaintiff is a wholesaler of food and feed grade antioxidants. It sold the product sucralose since 2007 under its trade name Splenda, which was imported from India. The record also reveals that the sucralose must be 99.7% pure pursuant to the United States Food and Drug Administration's Food Chemical Codex Specifications. The complaint alleges that, due to severe market conditions, the plaintiff purchased sucralose separately from the defendants and after delivering it to a client, the client rejected the product as substandard and contaminated. The complaint further alleges that subsequent testing by an independent testing lab, non-party National Food Lab found that the sucralose was only 97.5% pure. The complaint alleges that due to the poor quality of the sucralose, the plaintiff lost its biggest client, causing damages in the amount of \$5,000,000.

The defendant Unichem Enterprises now moves to dismiss the complaint pursuant to CPLR 3211 (a) (1), on the ground that its document, called Terms and Conditions, contains a forum selection clause; and CPLR 327, that the forum is inconvenient. In support, the defendant submits, *inter alia*, the complaint, the personal affidavit of Mark Grieco, and copies of invoices and order confirmations, the application for credit terms, and a copy of UniChem Enterprises Terms and Conditions.

Mark Grieco states in his affidavit that he is employed as that Sales Director for Unichem. He states that the Terms and Conditions were incorporated by reference into the parties' agreement. After receiving a purchase order from the plaintiff, Unichem forwarded a purchase order confirmation on August 30, 2012, which provided the following: "By signing below you certify that all above information is

correct and accurate, and you agree to the terms stipulated below and in other sections on this Sales Confirmation.” Mr. Grieco states that the purchase order confirmation was forwarded to the plaintiff and was accompanied with “Unichem Enterprises Terms and Conditions.” Grieco further states that the plaintiff completed and forwarded to Unichem an Application for Credit Terms, which provides, “By signing this application, I authorize Unichem or its agent to investigate the credit history and financial records pertaining to the above referenced company and I agree UniChem Terms and Conditions.” Grieco states that on September 12, 2012, Unichem forwarded a revised Purchase Order Confirmation, revising the shipping and handling charges for the order. On that same day, the plaintiff signed the order confirmation and returned it to Unichem. Paragraph 1 of the Terms and Conditions provides that all purchases of products by buyer from seller are subject to the terms and conditions set forth herein. Paragraph 13 (c) of the Terms and Conditions provides that the Agreement is governed by and construed under the laws of California, and that any cause of action that may arise in any way under or due to this agreement shall be brought in the County of Los Angeles, California. Grieco states that the plaintiff expressly agreed to Unichem’s Terms and Conditions by signing both the Application for Credit Terms and the Purchase Order Confirmation, which refer to the Terms and Conditions.

In opposition, the plaintiff submits, *inter alia*, the complaint and the personal affidavit of Melvin Blum. The plaintiff claims that he never saw the Credit Terms and Conditions and the two forms which he signed did not refer specifically to the Unichem Enterprises Terms and Conditions.

In order to prevail on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211 (a) (1), the movant must demonstrate that the documentary evidence conclusively refutes the plaintiff’s claims. *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 808 NYS2d 573 (2005). To be considered “documentary,” for purposes of a motion to dismiss based on documentary evidence, evidence must be unambiguous and of undisputed authenticity. From the

cases that exist, it is clear that judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are “essentially undeniable,” would qualify as “documentary evidence” in the proper case. If the document does not reflect an out-of-court transaction and is not essentially undeniable it is not documentary evidence within the intendment of CPLR 3211(a)(1). See *Fontanetta v Doe*, 73 AD3d 78, 898 NYS2d 569 (2nd Dept 2010).

Here, the evidence submitted by the defendant in support of the motion under CPLR 3211 (a) (1) include an affidavit, and copies of the order confirmations, credit application, and the Terms and Conditions. An affidavit is not considered “documentary” evidence. See *Norment v Interfaith Center of N.Y.*, 98 AD3d 955, 951 NYS2d 531 (2nd Dept 2012). Furthermore, while the order confirmations, credit application and Terms and Conditions may be authentic, they do not utterly refute the plaintiff’s factual allegations, or conclusively establishing a defense as a matter of law.

Turning to the defendant’s alternate ground for dismissal, CPLR 327(a) permits the court to stay or dismiss an action in the interest of substantial justice when the court finds that the action should be heard in another forum. Under CPLR 327(a) and the common-law doctrine of forum non conveniens, the court may stay or dismiss an action when it determines that, although it has jurisdiction over the action, the action would be better adjudicated elsewhere. See *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479, 478 NYS2d 597 (1984). The burden is on the defendant to establish that the selection of New York as the forum will not best serve the ends of justice and the convenience of the parties. See *Banco Ambrosiano, S.p.A. v Artoc Bank & Trust, Ltd.*, 62 NY2d 65, 74, 476 NYS2d 64 (1984); *Islamic Republic of Iran v Pahlavi, supra* at 479). It is well established that, unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should not be disturbed. See *Waterways, Ltd. v Barclays Bank PLC*, 174 AD2d 324, 327. 571 NYS2d 208 (1991).

The New York courts consider and balance various competing factors when

evaluating whether or not to retain jurisdiction over a particular action. *Islamic Republic of Iran v Pahlavi*, *supra* at 479). Although not every factor is necessarily articulated in every case, collectively, courts have considered and balanced the following factors: the existence of an adequate alternative forum, the situs of the underlying transaction, the residency of the parties, the state of incorporation, the potential hardship to the defendant, the location of documents, the location of a majority of the witnesses, and the burden on the New York courts. *World Point Trading PTE, Ltd. v Credito Italiano*, 225 AD2d 153, 649 NYS2d 689 (1st Dept 1996); *Evdokias v Oppenheimer*, 123 AD2d 598, 506 NYS2d 883 (2nd Dept 1986). The determination rests within the exercise of the court's sound discretion, and no one factor is controlling. *Islamic Republic of Iran v Pahlavi*, *supra* at 479. Here, the Court notes that Unichem is a corporation organized under the laws of the State of California with a principal place of business in California. Mark Grieco, Unichem's Sales Director, avers in his affidavit that Unichem has no presence in New York, and that the subject sale took place in California. In addition, all Unichem's witnesses and documents are located in California. Moreover, the main witness, non-party National Food Lab is located in Livermore, California.

The court finds that, on balance, the various factors weigh in favor of dismissal. Given Unichem's incorporation in California and the lack of a substantial nexus between this action and the State of New York, the ends of justice and the convenience of the parties would best be served if the litigation were to proceed in California. Accordingly, the motion is granted and the complaint is dismissed as asserted against Unichem.

The court also notes that Plaintiff has asserted no connection between the sale of products by Unichem and the co-defendant, MTC Industries, Inc.

**Dated: September 24, 2013**  
Riverhead, New York

  
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**EMILY PINES**  
J. S. C.

Final  
 Non Final