

**U.S. Corrugated, Inc. v Scott**

2014 NY Slip Op 31287(U)

May 13, 2014

Sup Ct, New York County

Docket Number: 651762/2013

Judge: O. Peter Sherwood

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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**U.S. CORRUGATED, INC.,**

**Plaintiff,**

**DECISION AND ORDER  
Motion Seq. No.: 003**

**-against-**

**Index No.: 651762/2013**

**WILLIAM SCOTT,**

**Defendant.**

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**O. PETER SHERWOOD, J.:**

This is a suit seeking payment pursuant to a guarantee. Here, the defendant moves to dismiss the action for lack of personal jurisdiction, despite the inclusion of a forum selection clause in the guarantee.

***BACKGROUND***

According to the non-moving plaintiff, U.S. Corrugated, Inc., (plaintiff or U.S. Corrugated) is a “corrugated packaging solutions provider, authorized to conduct business in the State of New York” (Pl. Opp., NYSECF Doc. No. 46, at 3). It maintains its principal place of business in New York. Defendant Scott is the principal and managing member of Blegalbloss, LLC (Blegalbloss), which “markets and designs cardboard storage boxes for commercial and customer use” (*id* at 4). Scott negotiated with U.S. Corrugated in New York on behalf of Blegalbloss. Scott disputes these facts.

As the result of these negotiations, U.S. Corrugated gave Blegalbloss a line of credit with which to purchase its goods. Blegalbloss was obligated to pay U.S. Corrugated the purchase price of those goods when they came due. Defendant Scott gave a personal guarantee for Blegalbloss’ payment under the line of credit (the Guaranty). The Guaranty includes a venue provision as follows:

Guarantor hereby irrevocably submits to the non-exclusive jurisdiction of the courts located in the State of New York, over any suit, action or proceeding arising out of or relating to this Guarantee, and hereby irrevocably waives, to the fullest extent permitted by law, any objection which it may now or hereafter have to the laying of the venue of any such suit, action or proceeding brought in any such court and any claim that any such suit, action or proceeding has been brought in an inconvenient forum

(Guaranty, attached as Exhibit A to the Verified Complaint, at ¶5).

After the Guaranty was executed and the line of credit established, U.S. Corrugated sold goods to Blegalbloss until U.S. Corrugated suspended Blegalbloss' account for non-payment. U.S. Corrugated subsequently obtained a judgment against Blegalbloss in the Ohio Court of Common Pleas, and Blegalbloss was "adjudicated bankrupt" by the United States Bankruptcy Court for the Southern District of Ohio (Pl. Opp. at 7). U.S. Corrugated claims it is still owed \$295,000.

This action was filed in May 2013. In June, Scott filed a pre-answer motion to dismiss for lack of personal jurisdiction (Mot. Seq. No. 001). The motion was withdrawn without prejudice by stipulation, pending compliance with the settlement of an Ohio case between the same parties. Plaintiff has now alleged non-compliance with that settlement and defendant has revived the motion to dismiss.

### ***DISCUSSION***

CPLR §3211(a)(8) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the court has not jurisdiction of the person of the defendant." When presented with a motion under CPLR 3211 (a)(8), "the party seeking to assert personal jurisdiction, the plaintiff[,], bears the ultimate burden of proof on this issue" *Marist Coll. v Brady*, 84 AD3d 1322, 1322-23 (2nd Dept 2011). Plaintiff points to the language in the Guaranty.

Defendant claims that this suit is about a personal guarantee which was made entirely in Ohio, regarding goods made in Ohio and delivered to defendants in Ohio. The only connection to New York is the forum selection clause. Defendant argues that since there is no "proper basis for jurisdiction in New York," the "forum selection clause is unenforceable," and the motion to dismiss should be granted (Def. Motion, NYSECF Doc. No. 44 at 2). Additionally, defendant claims that this court lacks jurisdiction because the guarantee clause is non-exclusive, rather than mandatory, and therefore does not confer personal jurisdiction.

Defendant Scott, concededly a sophisticated businessman, states that he "conducts no business in, owns no property in, and has no other possible ties to New York." He claims that where a forum selection clause in an agreement is the only connection to New York, the clause is "unreasonable and unenforceable" (Def. Mem. at 1, citing *3H Enterprises v. Bennett*, 276 AD2d 965, 966 [1<sup>st</sup> Dept 2006]). Scott also asserts that if the clause is enforceable, it still does not provide

jurisdiction over Scott, because the clause provides only “non exclusive jurisdiction,” that such a clause cannot “confer personal jurisdiction,” and that while the clause may allow the claim to be brought in New York, it does not require the claim to be brought here. Accordingly, the lack of connection between the matter and the State of New York suggests that Ohio would be the “more appropriate forum” (*id* at 8-10, quoting *Krell Investor LLC v. KI, Inc.*, 2011 N.Y. Misc. LEXIS 6942 at 4 n.6 [Sup Ct, New York County 2011] [stating in dicta, “[t]here is no dispute that the LLC Agreement’s forum selection clause is non-exclusive and therefore cannot confer personal jurisdiction”])).

U.S. Corrugated argues that the Guaranty allows for New York jurisdiction, contains a waiver of any *forum non conveniens* arguments, and that Scott has a “substantial nexus” to New York (Pl. Opp. at 16). Plaintiff points out that Scott came to New York to negotiate a business deal between plaintiff and defendant’s company, Blegalbloss. Scott also called plaintiff’s offices in New York and e-mailed plaintiff in New York to negotiate the Guarantee and the underlying arrangement with Blegalbloss (*id* at 17)

U.S. Corrugated also points out that, since Scott now lives in Florida, there is not much difference to Scott whether he is required to defend the action in New York or in Ohio (*id* at 18). Several relevant facts are disputed. For example, plaintiff claims that New York is its principal place of business, but Scott says that neither plaintiff’s website, nor the representations of its CEO in this action, listed any locations in New York State (Bogatin Reply Affirmation at ¶¶ 4-8).

As noted, defendant relies on *3H Enters. v. Bennett*, 276 AD2d 965. The parties in that case had a written agreement to sell a mortgage, which contained a forum selection provision specifying Delaware County, New York as the forum for any disputes (*see id* at 966). After a complaint was filed in Delaware County, the elderly Floridian defendants moved to dismiss on the basis of *forum non conveniens*. The court held that “[w]hile a contractual forum selection clause is prima facie valid, it may nevertheless be unreasonable and unenforceable if the chosen forum is seriously inconvenient for the trial of the action” (*id*). Many of the cases cited by Scott relate to motions for dismissal on the grounds of *forum non conveniens*. The instant motion, however is not a motion for dismissal on grounds of *forum non conveniens*. The Guaranty in this case explicitly waives such an argument. The issue here is whether the contract creates *jurisdiction* over the defendant.

“[A] New York court will rarely dismiss an action on personal jurisdiction or *forum non conveniens* grounds in the face of a binding agreement to litigate in New York. A forum selection clause that designates New York should generally operate as a waiver by the parties of any objections based on personal jurisdiction, improper venue, or *forum non conveniens*” ( NYPRAC-COMM § 12:4). As noted by the Appellate Division, First Department,

the very point of forum selection clauses . . . is to avoid litigation over personal jurisdiction . . . , and it is the well-settled ‘policy of the courts of this State to enforce contractual provisions for choice of law and selection of a forum for litigation [which] are not to be set aside unless a party demonstrates that the enforcement of such would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court.

*Sterling Natl. Bank v. Eastern Shipping Worldwide*, 35 AD2d 222, 222 (1<sup>st</sup> Dept 2006)(citations and quotations omitted). In this case, defendant has made no such showing. Scott has not asserted fraud or overreaching. He merely argues that it would be inconvenient to litigate in New York, which argument does not amount to a denial of his day in court.

As to Scott’s arguments focusing on the non-exclusive nature of the waiver of jurisdiction in the Guarantee, in a case dealing with an agreement in which a defendant consented to “non-exclusive personal jurisdiction of the New York State courts [and] waiv[ing] objection to venue in any such court,” the court considered that language an explicit consent to jurisdiction (*Ramada Franchise Syst. v. Cusack Development*, 1997 WL 304885, \*1 [SDNY, June 6, 1997, No. 96 Cav. 8085 (MGC)]. There, as here, the defendant argued “that less deference should be given to the forum selection clause because it is permissive and not exclusive.” The court held that the impact of the non-exclusive jurisdiction clause was to leave the plaintiff a choice of forum, but once the plaintiff chose New York, the defendant’s consent was mandatory (*id* at \*3).

Defendant having failed to make any showing that enforcement of the forum selection clause in the Guaranty would be unreasonable or unjust, the motion to dismiss for lack of personal jurisdiction must be denied. Scott contractually agreed to the jurisdiction of New York courts and waived any right to object to it as an inconvenient forum.

Accordingly, it is hereby

**ORDERED** that defendant's motion to dismiss the complaint (motion sequence number 003) is DENIED; and it is further

**ORDERED** that defendant shall serve and file his answer by June 20, 2014 and all counsel shall appear for a preliminary conference on Tuesday, July 8, 2014 at 10:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

**DATED: May 13, 2014**

**ENTER,**



**O. PETER SHERWOOD**

**J.S.C.**