Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE, ALLAN B. WEISS IA Part 2
Justice

DUPAL ENTERPRISES LLC d/b/a CECI CELA PATISSERIE,

Plaintiff,

DEAN & DELUCA NEW YORK, INC. d/b/a DEAN & DELUCA SOHO PASTRY, ET AL,

Defendants.

Index No.: 705434/18

Motion Date: 6/13/18

Motion Seq. Nos.: 1 & 2

x

The following papers numbered E2 to E30 were read on these motions by defendants, both seeking to dismiss plaintiff's complaint as against them, pursuant to CPLR 3211 (a) (1) (6), and (8).

	Papers Numbered
Notices of Motion - Affirmations - Affidavits - Exhibits	E2-E7,E22-E26
Answering Affidavits - Affirmations - Exhibits	E15-E20, E27-E29
Reply Memoranda of Law	E15-E20, E30

Upon the foregoing papers, it is ordered that said defendants' motions are determined as follows:

This action was commenced by plaintiff to recover money judgments against defendants for goods sold and delievered, and for accounts stated. Plaintiff signed a Terms & Conditions agreement, dated November 2014, with defendant, Dean & Deluca, and has been supplying baked goods to defendants since then. Plaintiff claims defendants owes it a sum of money for unpaid products received by defendants in a sum of over $20,000.00. Plaintiff commenced a lawsuit in this court in April 2018 to recover the amount allegedly due and owing.

Defendants move, in separate motions (Seqs. 1 and 2), to dismiss plaintiff's

complaint, pursuant to CPLR 3211 (a) (1), founded upon defenses based on documentary evidence; CPLR 3211 (a) (6), for an improper counterclaim; and CPLR 3211 (a) (8), based upon lack of jurisdiction. Plaintiff opposes.

Initially, the sole criterion to dismiss a complaint is whether the pleading, and the factual allegations contained within its four corners, manifests any cause of action cognizable at law (*see Gaidon v. Guardian Life Ins. Co. of America*, 94 NY2d 330 [1999]; *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]). "To withstand dismissal, the requisite elements of the cause of action must be discernable from the pleadings, and the complaint must give notice of the transactions and occurrences to be proved" (CPLR 3013; *see Dolphin Holdings, Inc. v Gander & White Shipping, Inc.*, 122 AD3d 901[2014]).

Defendants move to dismiss the complaint pursuant to CPLR 3211 (a) (1). In this branch of defendants' motions, the evidence submitted in support, in the form of the Terms & Conditions agreement between Dean & Deluca and plaintiff, was "documentary" within the meaning of CPLR 3211 (a) (1), as it conclusively established a prima facie defense to plaintiff's claims as a matter of law (*see Shofel v DaGrossa*, 133 AD3d 649 [2015]). Such evidence undeniably supported movants' claims or utterly refuted plaintiff's factual allegations (*see Goshen v Mutual Life Ins. Co. of NY,* 98 NY2d 314, 326 [2002]; *Clarke v Laidlaw Tr., Inc.*, 125 AD3d 920 [2015]; *Comprehensive Mental Assessment & Medical Care, P.C. v Gusrae Kaplan Nussbaum, PLLC*, 130 AD3d 670 [2015]; *DiMauro v United, LLC*, 122 AD3d 568 [2014]; *Neckles Bldrs., Inc. v Turner*, 117 AD3d 923 [2014]). For the evidence to be considered "documentary," under that statute, such evidence must be of undisputed authenticity, unambiguous and undeniable (*see Anderson v Armento*. 139 AD3d 769 [2016]; *Pasquaretto v Long Island University*, 106 AD3d 794 [2013]; *Kopelowitz & Co., Inc. v. Mann*, 83 AD3d 793 [2011]). "To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence which forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of plaintiff's claim" (*Sciadone v Stepping Stones Associates, L.P.*, 148 AD3d 953 [2017]; *see Philips v Taco Bell Corp.*, 152 AD3d 806 [2017]). In the case at bar, the Terms & Conditions agreement constituted documentary evidence, as it was an out-of-court transaction, i.e., a contract, "the contents of which are essentially undeniable" (*Philips v Taco Bell Corp.*, 152 AD3d at 807).

Said Terms & Conditions agreement, signed by plaintiff on November 4, 2014, states, in relevant part, at § 23, that "[v]enue for any action ... arising out of or relating to these Terms and Conditions or any DEAN & DELUCA-issued Purchase Order, or the breach thereof, shall be in Sedgewick County, Kansas, U.S.A." Defendants contend that this forum selection clause is enforceable in New York, and, as a result, the instant New York action should be dismissed. Plaintiff opposes, asserting that such Terms & Conditions document is nothing more than an unenforceable contract of adhesion.

"The parties to an agreement 'may freely select a forum which will resolve any disputes over the interpretation or performance of the contract'" (*Horton v Concerns of Police Survivors, Inc.*, 62 AD3d 836, 836 [2d Dept 2009], quoting *Brooke Group v JCH Syndicate 488*, 87 NY2d 530, 534 [1996]). "A contractual 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 thjat a 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" (*LSPA Enter., Inc. v Jani-King of N.Y., Inc.*, 31 AD3d 394, 395 [2d Dept 2006]; *see Puleo v Shore View Center for Rehabilitation and Health Care*, 132 AD3d 651 [2d Dept 2015]; *Casale v Sheepshead Nursing & Rehabilitation Ctr.*, 131 AD3d 436 [2d Dept 2015]). In the case at bar, plaintiff contends that the Terms & Conditions agreement is a contract of adhesion, while also arguing that it is not a contract at all. There is no denial that plaintiff signed the Terms & Conditions, and conducted business pursuant to said agreement for approximately four years prior to this action. Further, there is no allegation of fraud or overreaching (*see Fritche v Carnival Corp.*, 132 AD3d 805 [2d Dept 2015]), or of any contravention of public policy. Plaintiff argues only that the agreement was not the product of negotiation, and that the enforcement of the contractual venue selection provisions would be unreasonable and unjust.

However, plaintiff's "vague and conclusory assertions" that the forum selection clause is unreasonable, are inadequate to defeat defendants' prima facie entitlement herein (*KMK Safety Consulting, LLC v Jeffrey M. Brown Assoc., Inc.*, 72 AD3d 650, 651 [2d Dept 2010]). Unlike the determination by the Second Department in *U.S. Mdse., Inc. v L&R Distribs., Inc.*, 122 AD3d 613 (2d Dept 2014), which found that a selected forum of Delaware was "unreasonable" because "neither the parties nor the agreement has any connection to the State of Delaware," in the case at bar, defendants' corporate headquarters are located in Sedgewick County, Kansas, and the parties had been transacting business pursuant to the Terms & Conditions agreement for approximately four years prior to this lawsuit (*see Karlsberg v Hunter Mtn. Ski Bowl, Inc.*, 131 AD3d 1121 [2d Dept 2015]; *Horton v Concerns of Police Survivors, Inc.*, 62 AD3d 836 [forum in Missouri permitted]).

Plaintiff's contention that the Terms & Conditions agreement amounted to a contract of adhesion is without merit. A contract of adhesion is one which contains terms that are unfair and nonnegotiable, and arise from a bargaining power imbalance and/or oppressive tactics (*see David v #1 Mktg. Serv., Inc.*, 113 AD3d 810 [2d Dept 2014]; *Molino v Sagamore*, 105 AD3d 922 [2d Dept 2013]). The fact that the Terms & Conditions agreement was a standardized form, and not the product of negotiation, does not render it, in and of itself, unenforceable (*see Molino v Sagamore*, 105 AD3d 922; *DiRuocco v Flamingo Beach Hotel & Casino, Inc.*, 163 AD2d 270 [2d Dept 1990]). Plaintiff has failed to demonstrate that the agreement herein was the result of an inequality of bargaining power, or that plaintiff was placed in a disadvantageous bargaining position (*see Horton v Concerns of Police Survivors, Inc.*, 62 AD3d 836 [no adhesion, even though plaintiff was a single mother]), or

that defendants resorted to "high pressure tactics or deceptive language in the contract" (*Sablosky v Gordon Co.*, 73 NY2d 133, 139 [1989]). Moreover, plaintiff failed to proffer any evidence, monetary, witnesses, or otherwise, that a trial in Kansas "would be so gravely difficult that, for all practical purposes, (it) would be deprived of (its) day in court" (*Casale v Sheepshead Nursing & Rehabilitation Ctr.*, 131 AD3d 436, 437 [2d Dept 2015]; *see Puleo v Shore View Center for Rehabilitation and Health Care*, 132 AD3d 651]). Consequently, the forum selection clause in the Terms & Conditions agreement is enforceable.

Plaintiff's remaining contentions and arguments in opposition are either without merit or need not be addressed in light of the foregoing determinations.

Accordingly, defendants' motions, seeking dismissal of plaintiff's complaint pursuant to CPLR 3211 (a) (1), founded upon the defense of forum selection, based on documentary evidence, are granted, and plaintiff's complaint is dismissed.

Dated: September 4, 2018

J.S.C.

FILED
SEP 10 2018
COUNTY CLERK
QUEENS COUNTY