

Sabr Chems. Group, LLC v Northeast Chems., Inc.
2019 NY Slip Op 33890(U)
September 27, 2019
Supreme Court, New York County
Docket Number: 650608/2019
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES

PART IAS MOTION 59EFM

Justice

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INDEX NO. 650608/2019

SABR CHEMICALS GROUP, LLC,

MOTION DATE 09/26/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

NORTHEAST CHEMICALS, INC.,

INTERIM DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37 were read on this motion to/for DISMISS

ORDER

PAPERS RECEIVED
OCT 3 - 2019
NYS SUPREME COURT - CIVIL ORDER SECTION - RM 119A

Upon the foregoing documents, it is

ORDERED that the motion of defendant to dismiss this action pursuant to CPLR 3211(a)(7) for lack of personal jurisdiction over the defendant is denied; and it is further

ORDERED that the motion of defendant to dismiss the complaint on the ground that the parties have contractually agreed that jurisdiction and venue of plaintiff's claims lie exclusively in the State of Jersey is held in abeyance; and it is further

ORDERED that pursuant to CPLR 3211(c), the court provides notice to the parties that it shall treat the latter aspect of the motion as one for summary judgment and the parties may submit evidence that could properly be considered on a motion for summary judgment on the issue of whether paragraph 8 "Governing Law and

Dispute Resolution" attached as Exhibit C of defendant's notice of motion to dismiss the complaint, or paragraph 8 "Governing Law and Dispute Resolution" attached as K to plaintiff's affidavit in opposition were the terms to which the parties agreed, on or before the October 31, 2019 and counsel are directed to appear for continued argument on such motion for summary judgment on the 14th day of November 2019, 9:30 AM; and after such oral argument; the question shall be referred for an immediate trial on such issue; as follows, and it is

ORDERED that this matter having come on before this court on September 26, 2019, on motion of the defendant to dismiss on the grounds that the parties contractually agreed that jurisdiction and venue of the plaintiff's claim lie exclusively in the State of New Jersey, and the plaintiff having appeared by Eric Grayson, Esq., and the defendant having appeared by Christopher E. Chang, Esq., and, pursuant to CPLR 4212, the court having on its own motion determined to consider the appointment of a referee to hear and report, it is now hereby

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

(1) the issue of whether paragraph 8 "Governing Law and Dispute Resolution" attached as Exhibit C of defendant's notice of motion to dismiss the complaint or paragraph 8 "Governing Law and Dispute Resolution" attached as K to plaintiff's affidavit in opposition were the terms to which the parties agreed, and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR, and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical

thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

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ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that, unless otherwise directed by this court in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in any motion identified in the first paragraph hereof shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this court thereon.

DECISION

This court finds that it has personal jurisdiction over the defendant pursuant to CPLR 302(a)(1). By the concession of its own principal in his reply affidavit, defendant concedes that its transaction of business within New York State was not "the result of the mere placement of an order and delivery of goods" (Cotia (USA) Ltd. v Lynn Steel Corp., 134 AD3d 483 [1st Dept. 2015]). Defendant's president agrees with plaintiff that defendant requested plaintiff, a New York based company, to act as its intermediary purchaser from a China based pharmaceutical company, as defendant was not an "Importer of Record" ("IOR") with United States Customs and Border Protection", and "as such, could not import ascorbic acid into the United States from China, whereas plaintiff did have the IOR designation with U.S.

Customs, and was interested in acting as the 'middleman'".

There is no dispute that the transaction on the part of defendant was not its merely placing an order with plaintiff for delivery of the goods to defendant in New Jersey but involved defendant's arranging for plaintiff to purchase the ascorbic acid from the non-party China based company for delivery of such goods to New York, and then under a separate purchase order, contracting to have such goods shipped from New York to defendant's New Jersey factory. On that basis, this court finds that non domiciliary defendant transacted business within the State of New York and/or contracted to supply goods in New York State and thus is subject to the long arm jurisdiction of this court.

However, plaintiff puts forth no evidence that plaintiff's terms and conditions attached as Exhibit I to its opposition papers, which plaintiff purportedly mailed to defendant "prior to the transaction" governed the parties' transaction, were ever incorporated by reference or otherwise into any of the purchase orders before the court. Compare Movado Group, Inc. v Mozaffarian, 92 AD3d 431, 431-432 (1st Dept. 2012).

Both parties have submitted evidence in the form of the foregoing terms and conditions and the dueling paragraphs 8 entitled "Governing Law and Dispute Resolution", attached as Exhibit C to defendant's supporting papers and as Exhibit K to

plaintiff's opposition papers, averring that such were the terms and conditions accepted by each side, which exhibits may not be considered on this pre-joinder motion to dismiss. For reasons of judicial economy, the court converts the herein motion into one for summary judgment, of which it hereby notifies counsel. Counsel shall submit further evidence, if any, after service thereof and appear for further oral argument as stated in the above decretal paragraph.

9/27/2019
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED SETTLER ORDER GRANTED IN PART OTHER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE