

**Massoud v Patterson Dental Supply, Inc.**

2023 NY Slip Op 31839(U)

May 31, 2023

Supreme Court, New York County

Docket Number: Index No. 650544/2023

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ARLENE P. BLUTH PART 14**

*Justice*

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YEHIA MASSOUD

Plaintiff,

- v -

PATTERSON DENTAL SUPPLY, INC.,

Defendant.

-----X

INDEX NO. 650544/2023

MOTION DATE 05/30/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for DISMISS.

Defendant’s motion to dismiss is granted in part and denied in part.

**Background**

Plaintiff runs a dentistry practice in Manhattan and brings this lawsuit in connection with various items he purchased from defendant. He contends that defendant told him he should purchase a particular suction unit and insisted it was the best available model for his needs. Plaintiff maintains he spent \$10,995.00 for the unit, but it malfunctioned multiple times. He argues that these failures caused plaintiff to incur expenses to replace the product and he lost out on revenue from running his dental practice. Plaintiff admits that the manufacturer eventually replaced the model he purchased and sold plaintiff a more basic model. He complains that defendant did not refund to plaintiff the difference between the initial unit and the replacement model.

Plaintiff also details his complaints about two other products he purchased from defendant, including a dental unit and a dental chair, both of which were allegedly substandard

and caused plaintiff to consequential damages to replace or fix them. He insists he relied upon defendant's recommendations to purchase these items and that defendant knew about various issues with these products.

Defendant offers a different view about the circumstances here. It points out that plaintiff entered into three separate equipment finance agreements and that it already has commenced a lawsuit in Minnesota (where defendant is located) based upon plaintiff's defaults under those agreements. It points out that there is a forum selection clause in each agreement that requires disputes to be handled in Dakota County, Minnesota and so this case should be dismissed on that ground.

Defendant also argues that plaintiff cannot seek relief against defendant based on the alleged inadequacies in the products he purchased. It observes that each agreement contains a waiver regarding and product defects and emphasizes that it is not the manufacture of the items that plaintiff purchased.

In opposition, plaintiff contends that his first two causes of action do not have to be brought in Minnesota because they do not arise out of any agreement with such a forum selection clause. With respect to the third cause of action, plaintiff contends that the forum selection clause is only permissive, rather than mandatory and so he is entitled to bring that claim here. Plaintiff also argues that there is no documentary evidence limiting him from recovering damages because, at least for the first two causes of action, there is no agreement that contains such a limitation.

In reply, defendant claims that it is not responsible for any defect or issues with the equipment. It argues that plaintiff selected the equipment based on his own judgment and needs. And defendant does not provide documentation to show a forum selection clause in an agreement for the first two causes of action.

## Discussion

As an initial matter, the Court severs and dismisses the third cause of action based on the Minnesota forum selection clause. “It is well-accepted policy that forum-selection clauses are prima facie valid. In order to set aside such a clause, a party must show that enforcement 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” (*Br. W. Indies Guar. Tr. Co., Ltd. v Banque Internationale a Luxembourg*, 172 AD2d 234, 234 [1st Dept 1991]).

For this third cause of action, plaintiff admits that there is a forum selection clause and asks the Court to ignore it. This Court declines to invalidate a clear and unambiguous provision and so this cause of action is severed and dismissed. Plaintiff failed to meet its burden to show that this clause is somehow unjust or unreasonable.

However, the Court is unable to dismiss the first and second causes of action. Defendant seeks to dismiss these causes of action on the ground that there is a forum selection clause and a limitation of liability clause contained in various agreements signed by the parties. The notice of motions cites CPLR 327 and CPLR 3211(a)(1). In opposition, plaintiff maintains that there are no agreements for the first two causes of action (which seek relief based upon a suction unit and a BienAir iOptima dental unit purchased by plaintiff from defendant).

For some reason, defendant failed to address this issue—whether there are agreements for these items—in its reply. Although defendant’s memo of law references three installment agreements, they do not appear to directly apply to the two products at issue here. Defendant mentions “a Vacstar 80 Neo bearing serial number VS08-17090007 (365 Agreement); a


Ichiropro + Micro Ca 1700440-001 bearing serial number sdmqsn314hg5f (031 Agreement); and a Intego Pro Treatment Center Ambidextrous bearing serial number 520030” (NYSCEF Doc. No. 7 at 5).

In other words, it seems that plaintiff purchased multiple items from defendant and, on this record, defendant did not include the installment agreements related to two of the three causes of action. That prevents this Court from dismissing these claims on documentary evidence or on forum selection grounds. The Court also observes that the notice of motion did not seek dismissal on a failure to state a claim pursuant to CPLR 3211(a)(7) and so the Court cannot evaluate whether dismissal is appropriate under that provision as the parties did not brief it.

Accordingly, it is hereby

ORDERED that defendant’s motion to dismiss is granted only to the extent that the third cause of action is severed and dismissed and the motion is denied with respect to the remaining relief demanded, and defendant shall answer pursuant to the CPLR.

Conference: August 3, 2023 at 11 a.m. By July 27, 2023, the parties are directed to upload 1) a discovery stipulation signed by all remaining parties, 2) a stipulation of partial agreement about discovery that identifies the areas in dispute or 3) letters explaining why no agreement about discovery could be reached. Based on these submissions, the Court will assess whether an in-person conference is required. The failure to upload anything by July 27, 2023 will result in an adjournment of the conference.

<p><u>5/31/2023</u> DATE</p>	 <hr/> ARLENE P. BLUTH, J.S.C.	
<p>CHECK ONE:</p>	<p><input type="checkbox"/> CASE DISPOSED</p> <p><input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED</p> <p>APPLICATION: <input type="checkbox"/> SETTLE ORDER</p> <p>CHECK IF APPROPRIATE: <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN</p>	<p><input checked="" type="checkbox"/> NON-FINAL DISPOSITION</p> <p><input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER</p> <p><input type="checkbox"/> SUBMIT ORDER</p> <p><input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE</p>