

**Dongtai Wulong Holding Import & Export Co., Ltd v  
Mindsinsync Inc.**

2024 NY Slip Op 31895(U)

May 30, 2024

Supreme Court, New York County

Docket Number: Index No. 653049/2017

Judge: Sabrina Kraus

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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. SABRINA KRAUS PART 57M**

*Justice*

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DONGTAI WULONG HOLDING IMPORT AND EXPORT  
CO., LTD

Plaintiff,

- v -

MINDSIN SYNC INC.,

Defendant.

-----X

INDEX NO. 653049/2017

MOTION DATE 03/22/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion to/for COMPEL ARBITRATION.

**BACKGROUND AND PROCEDURAL HISTORY**

Plaintiff commenced this action alleging that it sold Defendant goods in 2015 and 2016 for an agreed price of \$309,925.41 that defendant failed to pay for.

Plaintiff filed the summons and complaint on May 5, 2017. The complaint asserts three causes of action: failure to pay for the goods requested and delivered, unjust enrichment and account stated.

On July 13, 2017, Defendant appeared by counsel and the parties entered into a stipulation extending Defendant’s time to answer through July 27, 2017.

On July 26, 2017, Defendant filed an answer asserting twelve affirmative defenses including failure to state a cause of action, that the claims are barred by documentary evidence and the statute of frauds, accord and satisfaction, that the goods were defective, and that delivery was not timely made. Notably, the answer did not assert a claim that arbitration was required.

On August 18, 2017, Plaintiff filed a request for a preliminary conference.

An initial preliminary conference was had resulting in an order October 17, 2017, which provided that both sides would serve document demands by November 8, 2017, and responses by November 30, 2017. A further compliance conference was scheduled for January 18, 2018.

On January 18, 2018, the parties entered into a compliance conference order before Justice Reed which provided for party depositions to be conducted by April 30, 2018, and paper discovery to be exchanged. In February and March 2018. A note of issue date was set for November 30, 2018.

The parties entered into 6 more discovery orders on May 18, 2018, January 28, 2019, June 27, 2019, September 16, 2019, December 13, 2019, February 24, 2020.

On May 14, 2020, Plaintiff's counsel wrote to the court to seek an extension of time to file the note of issue. Counsel stated the following:

Our office represents the Plaintiff in the above-referenced matter. Pursuant to the February 24, 2020 Status Conference Order, the Note of Issue is currently due on May 15, 2020. Due to Covid-19, the parties have not yet completed discovery in this case. EBTs are still outstanding. The plaintiff's EBT was scheduled for March 13, 2020. Our office was prepared to move forward on that date, and plaintiff's witness flew into New York on March 12, 2020 from Canada. However, the Court reporter's office was unwilling to provide a Court reporter due to Covid-19 concerns. Then State was then shut down the following week.

As such, it is requested that the Note of Issue deadline be extended for 90 days to September 11, 2020. Defendant's counsel has consented to the request. No prior request for this relief has been made. (NYSCEF Doc #20).

Nothing further happened in Court until 2022, when Plaintiff's counsel requested a conference with the court because discovery had stalled, and Defendant's counsel raised with the court for the first time the issue of compulsory arbitration.

### **PENDING MOTION**

On April 16, 2024, Defendant moved for an order pursuant to CPLR § 7503(a) staying the instant action and compelling Plaintiff. to submit the dispute to arbitration for settlement.

The motion was fully briefed and marked submitted on May 3, 2024, and the Court reserved decision. For the reasons set forth below, the motion is denied.

### **DISCUSSION**

Because arbitration provides an expeditious means of resolution it is favored in New York courts as a matter of policy [*Stark v Molod Spitz* 9 NY3d 59 (2007)] and New York courts interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration. *Life Receivables Tr. v. Goshawk Syndicate 102 at Lloyd's*, 66 A.D.3d 495, 496, (2009), *aff'd*, 14 N.Y.3d 850 (2010).

However, the right to arbitration may be waived by the conduct of the parties. *Sherill v Grayco Bldrs* 64 NY2d 261 (1985),

The issue before the Court is whether Defendant has waived its right to compel arbitration in this action. “Generally, when addressing waiver, courts should consider the amount of litigation that has occurred, the length of time between the start of the litigation and the arbitration request, and whether prejudice has been established. *Cusimano v. Schnurr*, 26 N.Y.3d 391, 400 (2015). While the length of time between the start of the litigation and the demand for arbitration is an element to be reviewed when considering waiver, absent prejudice it is insufficient on its own to effectuate a waiver. *NBC Universal Media, LLC v. Strauser*, 190 A.D.3d 461 (2021).

Additionally, courts will consider whether defendant raised arbitration as an affirmative defense and how long defendant participated in the litigation. *LaRosa v Abrusman* 74 AD3d 601, 604 (1<sup>st</sup> Dept., 2010).

In this case Defendant waited an astonishing 7 years before moving to compel arbitration. This delay has not been explained to the Court’s satisfaction. Defendant states that it was

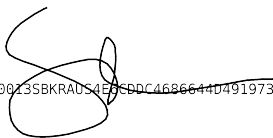
unaware of the agreement containing the arbitration agreement until April 2021. Defendant provides no explanation as to why it was unaware of an agreement it was a party to. Moreover, Defendant provided an unsigned copy of the complete vendor agreements form, containing the arbitration clause agreement upon which it relies in response to Plaintiff's discovery demands in May 2018.

Plaintiff has been prejudiced by this substantial delay. It has made over 15 court appearances, and incurred expenses in the ongoing litigation of this action. While due to the pandemic discovery stalled, Plaintiff flew in a witness of a deposition from Canada and both parties have engaged in paper discovery.

This unreasonable delay coupled with defendant's participation in the lawsuit is indicative of acceptance of the judicial forum. *De Sapio v Kohlmeyer* 35 NY2d 402, 405 (1974). Additionally, an important difference between judicial actions and arbitration is the availability of disclosure devices. Defendant having engaged in discovery constitutes an election of the judicial forum. *Id.*

Based on the totality of all these factors, the unreasonable delay, the failure to raise arbitration as an affirmative defense in its answer, the participation in over a dozen court dates and discovery, and the prejudice suffered by Plaintiff, the Court finds that Defendant has waived the right to compel arbitration in this action and the motion is denied.

This constitutes the decision and order of the Court.

  
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<u>5/30/2024</u> DATE					<u>SABRINA KRAUS, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE