

**MGK Intl. DWC LLC v Parkway Iron & Metal Co.,
Inc.**

2026 NY Slip Op 31598(U)

April 15, 2026

Supreme Court, New York County

Docket Number: Index No. 652328/2023

Judge: Ashlee Crawford

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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:	<u>HON. ASHLEE CRAWFORD</u>	PART	38
	<i>Justice</i>		
	-----X	INDEX NO.	<u>652328/2023</u>
	MGK INTERNATIONAL DWC LLC	MOTION DATE	<u>10/26/2023</u>
	Plaintiff,	MOTION SEQ. NO.	<u>001</u>
	- v -		
	PARKWAY IRON AND METAL CO., INC.,	DECISION + ORDER ON	
	Defendant.	MOTION	
	-----X		

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17
 were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

In this action to recover damages arising out of contracts for the purchase of shredded steel scrap, defendant Parkway Iron and Metal Co., Inc. moves pre-answer to dismiss the complaint pursuant to CPLR 3211(a)(1). Plaintiff opposes.

Defendant argues that the motion should be dismissed based upon the arbitration and forum selection clause in the parties' purchase agreements which provide that "[t]he parties hereby agree to settle all discrepancies amicably. If settlement is not reached, the dispute in question shall be submitted in the court at New Jersey State" (see Ex. 2, Contract § 13 [NYSCEF Doc. 5]).

In opposition, plaintiff argues first that the motion is untimely, as indicated in their notice of rejection (NYSCEF Doc. 8). Plaintiff contends that defendant acknowledged that it was served with the summons and complaint on August 15, 2023 (see Request for Judicial Intervention [NYSCEF Doc. 7]) and did not file the instant motion until October 26, 2023 – 42 days after defendant's deadline to respond. Plaintiff further argues that the motion should be

denied as the forum selection clause in the parties' contract was permissive and the contract provided by defendant is unsigned by defendant and, therefore, not fully executed. In reply, defendant asserts for the first time that the summons and complaint was improperly served and that as such, their motion is timely.

To be entitled to dismissal under CPLR § 3211(a)(1), a defendant's documentary evidence must "utterly refute[] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Goshen v Mutual Life Ins. Co. of New York, 98 NY2d 314, 326 [2002]). "[A] contractual forum selection clause is documentary evidence that may provide a proper basis for dismissal pursuant to CPLR 3211(a)(1)" (Landmark Ventures, Inc. v Birger, 147 AD3d 497, 497 [1st Dept 2017]). However, "[s]ince forum clause...defenses do not implicate subject matter jurisdiction, they are subject to waiver and abandonment (CDR Créances S.A.S. v Cohen, 77 AD3d 489, 491 [1st Dept 2010][internal citation omitted]).

As an initial matter, defendant's argument of improper service of the summons and complaint is raised for the first time in their reply and therefore deemed waived (see McGowan v Hoffmeister, 15 AD3d 297, 297 [1st Dept 2005][“However meritorious the affirmative defense might have been, the law is settled that a jurisdictional defense not asserted in the first responsive pleading, whether answer or pre-answer dismissal motion pursuant to CPLR 3211, is waived”]; CPLR 3211 [e]; c.f. Carney v Metro. Transportation Auth., 221 AD3d 447, 448-449 [1st Dept 2023]).

Since defendant's time to respond has expired, its motion to dismiss is untimely. However, given the relatively short delay in defendant's filing of the motion, the lack of prejudice alleged or demonstrated to plaintiff, and the meritorious nature of the defense raised, the Court will consider the motion in the interest of judicial economy (see Magder v Lee, 2016

NY Slip Op. 32440[U], *4-5 [Sup Ct, NY Co. 2016][declining to deny untimely motion to dismiss]; Brown v Noble, Inc., 29 Misc 3d 1230[A], *2-3 [Sup Ct, NY Co. 2010][same]; cf. Cadigan v Liberty Helicopters, Inc., 206 AD3d 523 [1st Dept 2022][denying motion to dismiss where defendant sought to enforce forum selection clause three years into litigation and after engaging in extensive discovery]).

Turning now to the issue of the forum selection clause, it is “well-settled policy of the courts of this State to enforce forum selection clauses” (Sydney Attractions Group Pty Ltd. v Schulman, 74 AD3d 476, 476 [1st Dept 2010]). “[P]arties to a contract may freely select a forum which will resolve any disputes over the interpretation or performance of the contract” (Knigh v New York & Presbyt. Hosp., 42 NY3d 699, 703 [2024][internal citation omitted]). A forum selection clause containing unambiguous language is mandatory and prima facie valid and enforceable unless shown to be unreasonable (see id.; Boss v Am. Express Fin. Advisors, Inc., 6 NY3d 242, 245-246 [2006]; Brooke Group Ltd. v JCH Syndicate 488, 87 NY2d 530, 534 [1996]). Absent a showing that enforcement of a forum selection clause is “unreasonable and unjust or ... 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”, such clauses are not to be set aside (Sterling Natl. Bank v Eastern Shipping Worldwide, Inc., 35 AD3d 222, 222 [1st Dept 2006][internal citations omitted]).

The Court finds that the forum selection clause in the parties’ contract is mandatory and enforceable (see JD2 Realty Mgt. LLC v Evojets LLC, 221 AD3d 407, 408 [1st Dept 2023][clause providing that the venue for any claim ‘shall’ be Miami-Dade County made venue mandatory]; Spirits of St. Louis Basketball Club, L.P. v Denver Nuggets, Inc., 84 AD3d 454,

455-456 [1st Dept 2011], lv denied 17 NY3d 710 [2011][same]; Micro Balanced Products Corp. v Hlavin Indus. Ltd., 238 AD2d 284, 285 [1st Dept 1997]).


Plaintiff fails to rebut the presumption of enforceability by showing that enforcement of the clause would be unreasonable and unjust, or invalid (Arya's Collection, Inc. v Brink's Global Servs., USA, Inc., 67 AD3d 525, 525 [1st Dept 2009]; see also Kravitz v Chicken Soup for the Soul, LLC, 227 AD3d 500, 500 [1st Dept 2024]). To the extent that plaintiff objects to the contract based on defendant's missing signature, such objection is without merit as the terms of purchase contract submitted by defendant plainly provide that "BUYER [plaintiff] sends the contract for signing" and "if seller [defendant] fails to send back the signed contract within 5 working days, this contract shall be deemed and considered accepted" (Contract § 09 [NYSCEF Doc. 5]).

Accordingly, it is hereby

ORDERED that the motion by defendant Parkway Iron and Metal Co., Inc. to dismiss plaintiff's complaint is GRANTED and the case is DISMISSED; and it is further

ORDERED that, within 14 days of entry of this order, defendants shall serve a copy of this order with notice of entry on plaintiff and on the Clerk of the Court, who shall enter judgment accordingly.

This constitutes the decision and order of the Court.

4/15/26 DATE	 ASHLEE CRAWFORD, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE