

ABB, Inc. v Havtech, LLC

2019 NY Slip Op 30095(U)

January 9, 2019

Supreme Court, New York County

Docket Number: 650277/2018

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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ABB, INC.,

Plaintiff,

- v -

HAVTECH, LLC,

Defendant.

INDEX NO. 650277/2018

MOTION DATE 09/04/2018,
09/04/2018

MOTION SEQ. NO. 001 002

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 20, 21, 22, 47

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 35, 36, 37, 38, 39, 42

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Upon the foregoing documents, it is

In this declaratory judgment action, plaintiff/counter-defendant ABB, Inc. (“ABB”) moves to dismiss defendant/counter-plaintiff Havtech, LLC’s (“Havtech”) first, second, and third counterclaims. Havtech opposes the motion. In a separate motion, Havtech moves for summary judgment dismissing the complaint, which ABB opposes.

Background¹

ABB, a Delaware entity with its principal place of business in Wisconsin, manufactures, amongst other things, low-voltage drives for HVAC Systems (“Products”).

¹ Unless otherwise specified, all facts are taken from the pleadings and exhibits annexed to the pleadings. *See Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994); CPLR 3014.

Havtech, a Delaware entity with its principal place of business in Maryland, is a distributor of ABB's Products. In 2011, the parties entered into a distributor agreement ("Agreement") for the sale and distribution of the Products in a designated geographical market area ("Territory"), whereby Havtech agreed to purchase the Products exclusively from ABB and sell them solely within the its Territory.

The Agreement has no fixed term – rather, it is effective from August 22, 2011 until it is terminated pursuant to either Agreement ¶7.2 ("without cause by either Party by giving thirty (30) days written notice to the other Party") or Agreement ¶7.3 (with cause by ABB at any time). Agreement ¶7.1. Additionally, Agreement ¶1.2 provides that the Territory "may be amended by ABB from time to time," and that "ABB reserves the right to appoint additional Distributors in any [Territory] (including, at ABB[']s] discretion, in [Havtech's] Territory) and to sell Products directly and indirectly to any customer within [Havtech's] Territory without compensation to [Havtech]."

On November 8, 2016, ABB sent Havtech a termination notice stating that the Agreement would be terminated effective December 8, 2016; ABB did not allege good cause for termination in this letter. In this action Havtech alleges that, although the Agreement gives the parties the right to terminate the Agreement without good cause, this contractual provision is in contravention and violation of the Maryland Equipment Dealer Contract Act's ("Dealer Act")² prohibition on termination without good cause. On

² Havtech alleges that it negotiated and executed the Agreement in Maryland and that a substantial portion of the Agreement occurred in that state.

November 10, 2016, Havtech informed ABB of this alleged violation and demanded that ABB rescind the termination notice.

On or around November 15, 2016, ABB allegedly authorized Havtech's competitor to sell Products in Havtech's Territory (that competitor had allegedly already been selling in Havtech's Territory with ABB's knowledge for several months). Havtech maintains that this is also a violation of the Dealer Act, which prohibits the changing of a distributor's competitive circumstances.

On November 21, 2016, Havtech filed an action in Maryland seeking a temporary restraining order and preliminary injunction under Maryland law to prevent ABB from terminating the Agreement and to enjoin another distributor from selling the Products in its Territory. This request for initial relief was denied.

In or around November or early December 2016, Havtech discontinued the Maryland action after ABB rescinded its termination notice. Havtech maintains that its willingness to dismiss the Maryland action was in part due to purportedly false assurances by ABB that it did not authorize any other distributors in Havtech's Territory and that ABB would continue to do business with Havtech.

After the dismissal of the Maryland action, Havtech's competitor continued to sell Products in Havtech's Territory, and on January 23, 2017, ABB formally appointed that competitor to Havtech's Territory. In April 2017, ABB amended Havtech's Territory. On January 19, 2018, ABB notified Havtech that it intended to terminate the Agreement without cause.

ABB commenced this action seeking declarations that: (1) pursuant to Agreement ¶12, New York law governs the rights and obligations of the parties and any litigation concerning or growing out of the Agreement must be brought in a New York state or federal court; and (2) pursuant to Agreement ¶7.2, ABB may terminate the Agreement without cause by giving 30 days written notice to Havtech.

Havtech filed its answer and asserted counterclaims seeking, *inter alia*: (1) a declaratory judgment that the Maryland Dealer Act Applies [Md. Code Ann. Comm. Law §19-101(1)] (first counterclaim) ; (2) declaratory judgment that all “without cause” provisions are void as against public policy (second counterclaim); and (3) millions of dollars per year in gross profit on sales of Products and sales lost due to ABB’s violations of the Dealer Act (third counterclaim) (counterclaims one through three will be referred to as the “Maryland Counterclaims”).

ABB now moves to dismiss the Maryland Counterclaims pursuant to CPLR §3211(a)(7). In support of its motion, ABB submits a copy of the complaint with an annexed copy of the Agreement and argues that: (1) Maryland law does not apply because the Agreement contains a New York choice of law provision; and (2) the Dealer Act does not implicate any strong public policy exception that would nullify the Agreement’s choice of law provision.

In opposition, Havtech argues that the choice of law provision is narrow and only applies to the interpretation of the Agreement’s terms, and therefore a New York conflict of law analysis requires the application of Maryland substantive law. Havtech also

argues that the New York choice of law provision should not be enforced because neither the parties nor the transaction have a reasonable relationship to the state, and that the application of the choice of law clause would violate Maryland public policy. In a separate motion, Havtech moves for summary judgment dismissing the complaint; Havtech's arguments in support of this motion are virtually identical to those advanced in its opposition to ABB's motion to dismiss.

Discussion

Motion to Dismiss

On a CPLR 3211 motion to dismiss, “the pleading is to be afforded a liberal construction”; the court must “accept the facts as alleged in the [pleading] as true, accord [the proponent of the pleading] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory.” *Leon* 84 NY2d at 87-88 (internal citations omitted). However, “where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference, and the criteria becomes whether the proponent of the pleading has a cause of action, not whether he has stated one.” *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 (1st Dept 2001) (citations and quotation marks omitted); *Weksler v Weksler*, 81 AD3d 401, 402 (1st Dept 2011). “Moreover, the interpretation of an unambiguous contract is a question of law for the court, and the provisions of the contract delineating the rights of

the parties prevail over the allegations set forth in the [pleading at issue].” *Ark Bryant Park Corp*, 285 AD2d at 150 (citations omitted).

“It is the well-settled policy of the courts of this State to enforce contractual provisions for choice of law,” unless the party seeking to invalidate the provision “show[s] that its enforcement would be unreasonable, unjust, or would contravene public policy, or that the clause is invalid because of fraud or overreaching.” *Boss v Am. Exp. Fin. Advisors, Inc.*, 15 AD3d 306, 307-08 (1st Dept 2005), *affd*, 6 NY3d 242 (2006) (citations and quotation marks omitted).

Here, the disputed choice of law provision is entitled “GOVERNING LAW,” and states that:

This Agreement shall in all respects be construed and interpreted in accordance with the laws of the State of New York, USA, excluding its conflicts of law rules, and both Parties hereby agree that any litigation concerning or growing out of this Agreement shall be conducted only in the state or federal courts functioning in the State of New York and waive the defense of an inconvenient forum in respect to any such litigation.

Agreement ¶12.

This choice of law provision clearly and unambiguously indicates that the parties chose New York substantive law to govern disputes arising out of the Agreement. *See Gab Robins N.A., Inc. v Safety Ins. Co.*, 2009 N.Y. Slip Op. 33162[U] (Sup Ct, NY County 2009) (although omission of “enforcement language is insufficient to demonstrate an intention that New York law govern the arbitration process,” the choice of law clause which states that ““this contract shall be interpreted and construed in accordance with the

laws of the state of New York’ indicates an intent that only substantive New York principles of law apply”).³

While non-contractual, tort claims generally fall outside the scope of contractual choice of law provisions, *see J.A.O. Acquisition Corp. v Stavitsky*, 192 Misc 2d 7, 11 (Sup Ct, NY County 2001), *affd*, 293 AD2d 323 (1st Dept 2002), the Maryland Counterclaims do not sound in tort. Rather, the Maryland Counterclaims are contractual in nature – they arise out of a dispute over the validity of several contracted-for provisions in the Agreement, which Havtech now seeks to void pursuant to the Dealer Act – and fall within the scope of the Agreement’s choice of law provision.⁴

Because the contract is unambiguous and provides that New York substantive law applies here, there is no need to conduct a conflicts of law analysis to determine which state’s substantive law should apply. *IRB-Brasil Resseguros, S.A. v Inepar Investments, S.A.*, 20 NY3d 310, 315-16 (2012); *Ministers and Missionaries Ben. Bd. v Snow*, 26 NY3d 466, 474 (2015).

³ This is further confirmed by Agreement ¶12’s heading, “GOVERNING LAW.” *See Sigmon for Hindin v Goldman Sachs Mtge. Co.*, 2018 WL 1517189, at *4-5 (SDNY 2018) (“The title or headings of a contract may be considered to provide context and inform the meanings of the sections they label.”) (citations omitted); *see generally Universal Am. Corp. v Natl. Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 681 (2015) (relying on heading in agreement for clarification).

⁴ The cases relied on by Havtech are inapposite. *See, e.g., Krock v Lipsay*, 97 F3d 640, 645 (2d Cir 1996) (fraudulent misrepresentation); *Plymack v Copley Pharm., Inc.*, 1995 WL 606272, at *4 (SDNY 1995) (statutory claim similar was to plaintiff’s fraud claim).

Havtech argues that the Agreement's New York choice of law provision should not be enforced because the Agreement has no reasonable relationship to New York.

However, pursuant to N.Y. General Obligations Law § 5-1401(1),

The parties to any contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than two hundred fifty thousand dollars . . . may agree that the law of this state shall govern their rights and duties in whole or in part, *whether or not such contract, agreement or undertaking bears a reasonable relation to this state.*

(emphasis added).

Havtech alleges that it sells approximately three million dollars' worth of Products yearly and is seeking millions of dollars per year in gross profit on sales of Products in damages, which Havtech was able to purchase and distribute pursuant to the Agreement. Therefore, the Agreement satisfies the requirements of General Obligations Law § 5-1401(1) and is not required to have a reasonable relation to New York for the choice of law provision to be enforceable. *See IRB-Brasil Resseguros, S.A.*, 20 NY3d at 315-16 (“The goal of General Obligations Law §5-1401 was to promote and preserve New York's status as a commercial center and to maintain predictability for the parties.”); *see generally Honeywell Intern. Inc. v ARC Energy Services, Inc.*, 152 AD3d 444 (1st Dept 2017) (“services agreement satisfied the requirements of . . . §5-1401”).

Although Havtech argues that the choice of law provision should be voided on public policy grounds, Havtech makes no showing that the application of New York law would violate any important public policy. “The parties' choice of New York law should be enforced, unless the public policy of another jurisdiction has an overriding concern so

strong that it trumps New York's strong public policy in maintaining and fostering its undisputed status as the preeminent commercial and financial nerve center of the world.”

Gottwald v Sebert, 2017 N.Y. Slip Op. 30521[U], 9 (Sup Ct, New York County 2017), *affd*, 2018 N.Y. Slip Op. 03819 (1st Dept 2018) (*citing Marine Midland Bank, N.A. v United Mo. Bank, N.A.*, 223 AD2d 119, 123-124 (1st Dept 1996)).

That the Agreement may implicate Maryland’s Dealer Act is not sufficient grounds to override the parties’ choice of law provision here. “The fact that a statute is a policy choice is not evidence of an interest materially greater than New York’s.” *Gottwald*, 2017 N.Y. Slip Op. 30521[U], 10; *see Finucane v Interior Const. Corp.*, 264 AD2d 618, 620 (1st Dept 1999) (“a mere showing that our law is different from that of a sister State” does not demonstrate an offensive public policy violation sufficient to override choice of law provision) (citations omitted).

“[W]hen parties include a choice-of-law provision in a contract, they intend that the law of the chosen state—and no other state—will be applied.” *Snow*, 26 NY3d at 476; *IRB-Brasil Resseguros, S.A.*, 20 NY3d 310. *See Gottwald v Sebert*, 161 AD3d 679, 680 (1st Dept 2018) (dismissing counterclaim to terminate contract pursuant to California statute because “the unambiguous New York choice-of law provisions contained in the agreements preclude the application of that California statute”) (citation omitted); *Tosapratt, LLC v Sunset Properties, Inc.*, 86 AD3d 768, 770 (3d Dept 2011) (trial court “erred in applying Vermont law to the parties’ dispute in contravention of the New York [General Obligations Law §5-1401(1)] choice of law provision”; provision should be

enforced even if the application of New York law “would violate a fundamental public policy of another, more interested jurisdiction”) (citations omitted).

Consistent with the unambiguous terms of the Agreement, New York substantive law applies to the Agreement and Havtech may not assert the Maryland Counterclaims pursuant to the Dealer Act. I have reviewed Havtech’s remaining arguments and find them to be without merit.

Motion for Summary Judgment

Havtech’s motion for summary judgment – which is largely duplicative of its arguments proffered in opposition to the motion to dismiss – is denied on the same grounds set forth above.

In accordance with the foregoing, it is

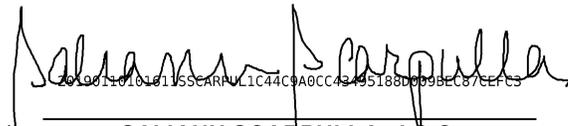
ORDERED that plaintiff ABB. Inc.’s motion to dismiss defendant Havtech, LLC’s first, second, and third counterclaims for violations of the Maryland Dealer act is granted; and it is further

ORDERED that defendant Havtech, LLC's motion for summary judgment dismissing the complaint is denied.

Pursuant to the parties' stipulation they shall appear for a conference on January 16, 2019 at 2:15 p.m.

This constitutes the decision and order of the Court.

1/9/2019
DATE


SALIANN SCARPULLA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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