

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

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MECHOSHADE CORPORATION,		Number <u>21758</u>	2005
Plaintiff,		Motion	
- against -		Date <u>January 18,</u>	2005
DESIGNED PERFORMANCE ASSOCIATES,		Motion	
INC., et al.,		Cal. Number <u>8</u>	
Defendants.			
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The following papers numbered 1 to 17 read on this motion by defendant for an order pursuant to CPLR 3211(a)(4) staying the action on grounds that there is a prior action pending in another forum arising out of the same facts and circumstances; and for an order dismissing the complaint against defendants Larry McLain and Mark McLain in their individual capacity pursuant to CPLR 3211(a)(8) or, in the alternative, staying the action against them.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-6
Affidavits in Opposition - Exhibits.....	7-10
Reply Affidavits - Exhibits.....	11-13
Supplemental Affidavits - Exhibits.....	14-17

Upon the foregoing papers it is ordered that the motion is denied.

Plaintiff Mechoshade Corporation (Mechoshade), with offices located in Long Island City, New York, and defendant Designed Performance Associates, Inc. (DPA), with offices located in Dallas, Texas, entered into a Representative Agreement on February 15, 1989 wherein DPA was to sell Mechoshade goods in the area designated as "N. Texas." The agreement was signed on behalf of DPA by its president, defendant Larry McLain. Defendant Mark McLain was employed by DPA as an agent and sales representative. Defendant Mark McLain allegedly resigned from DPA in August 2005, whereupon DPA

commenced an action for declaratory judgment in the District Court for Dallas County, Texas to invalidate certain restrictive covenants regarding non-disclosure of confidential information and non-competition. On October 5, 2005, plaintiffs commenced the instant action in this court claiming, inter alia, breach of contract, unfair competition, and misappropriation of confidential information and trade secrets. DPA brings the instant motion seeking dismissal, pursuant to CPLR 3211(a)(4), insofar as the Texas action was filed first and involves essentially the same disputed facts and circumstances. Mechoshade subsequently brought a motion to dismiss the Texas action, but then "removed" the motion from the Texas Courts' Calendar in November 2005.

The basis for Mechoshade's opposition to the instant motion, and the basis of its motion to dismiss the Texas action, is that the agreement stated that it "shall be deemed to have been made and entered into in the State of New York and shall be governed and construed under and in accordance with the laws of the State of New York. Any controversy or claims arising out of or relating to this Agreement shall be determined in the State of New York, and the parties consent that New York shall be the forum for the purposes of both venue and jurisdiction * * * and consent and submit to the jurisdiction of the State of New York."

However, DPA contends that the said forum selection clause is invalid based upon a provision of the Texas Business and Commerce Act (TBCA) governing claims for unpaid commissions whereupon a sales representative who claims unpaid commissions for a period of 30 working days can recover treble damages. (Havlir & Assocs. v Tacoa, Inc., 810 F Supp 752 [1993].) However, upon review, neither DPA's petition for declaratory judgment, nor defendant Mark McLain's motion to intervene, clearly articulate a claim under this statute. DPA, in its amended petition, relies heavily on sections 35.85 and 35.86 of the TBCA which render contractual provisions which seek to establish venue "in a state other than this state" void. However, the petition does not articulate a specific claim of unpaid commissions due for a period of 30 working days. Rather, DPA claims that it "believes" that Mechoshade will not honor its agreement to pay commissions that may become due. Insofar as defendants do not plead specific claims for relief under the TBCA, their reliance on the forum selection provisions thereof is without merit.

By comparison, under New York General Obligations Law § 5-1401, the parties may agree that the law of this State shall govern their rights whether or not such contract bears any reasonable relation to this State. Section 5-1402 similarly enforces forum selection clauses in favor of New York law for contracts over \$1 million or "any other contract agreement or undertaking." (General Obligations Law § 5-1402[1] and [2]; and see National Union Fire Ins. Co. v

Worley, 257 AD2d 228 [1999].) Moreover, by agreeing to the forum selection clause in a contract, a party specifically consents to in personam jurisdiction of the New York Courts. (National Union Fire Ins. Co. v Worley, supra.)

It is long established that contractual forum selection clauses are valid, absent a showing that the clause is unjust, in contravention of public policy, the product of fraud or overreaching, or that litigation in such forum would be "gravely difficult." (Fleet Cap. Leasing v Angel Motors, 13 AD3d 535 [2005]; Hunt v Landers, 309 AD2d 900 [2003]; Hirschman v National Textbook Co., 184 AD2d 494 [1992].) Defendants have failed to make such a showing. Insofar as the forum selection and choice of law clauses of the parties' agreement are valid, defendants' arguments for dismissal pursuant to the first-in-time rule of CPLR 3211(a)(4) are without merit. (San Ysidro Corp. v Robinow, 1 AD3d 185 [2003]; Jordan Int'l Trading v Yang, 2 Misc 3d 1010A [2004].) Accordingly, that branch of the motion seeking dismissal, pursuant to CPLR 3211(a)(4), is denied in all respects.

That branch of the motion seeking dismissal, pursuant to CPLR 3211(a)(8), of the claims against defendants Larry McLain and Mark McLain in their personal capacities is also denied. In the complaint in the New York action, Mechoshade alleges that both Larry McLain and Mark McLain accepted engagement and entered into personal contracts with Nysan Shading Systems Limited, a direct competitor of plaintiff in the North Texas region. Mechoshade alleges that the associations and negotiations with this competitor began in September 2005, before the defendants provided any notice of termination of the agreement with Mechoshade. These alleged actions are the basis of Mechoshade's claims. It is axiomatic that an agent has an absolute duty not to disclose or use confidential information acquired in the course of his employment in competition with his principal. (Byrne v Barrett, 268 NY 199 [1935]; 213 NY Jur 2d Agency § 213.) Moreover, in relation to a motion to dismiss, it has long been held that where a corporate employee has acted in his own interests, and not in the best interests of the corporation, the same may be a predicate for personal jurisdiction over him sufficient to deny a motion to dismiss. (Marine Midland Bank, N.A. v Miller, 664 F2d 899 [1981].) Based upon the foregoing, plaintiff has made allegations sufficient to withstand the motion to dismiss.

Dated: April 2, 2006

J.S.C.