

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D35539
Y/ct

_____AD3d_____

Argued - May 29, 2012

PETER B. SKELOS, J.P.
THOMAS A. DICKERSON
JOHN M. LEVENTHAL
SHERI S. ROMAN, JJ.

2011-04850

DECISION & ORDER

Creative Mobile Technologies, LLC, appellant,
v Smart Modular Technologies, Inc., respondent.

(Index No. 700036/11)

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, White Plains, N.Y. (William J. Kelly of counsel), for appellant.

Davis Polk & Wardwell, LLP, New York, N.Y. (Neal A. Potischman and Lawrence Jacobs of counsel), for respondent.

In an action, inter alia, to recover damages for breach of contract, the plaintiff appeals from an order of the Supreme Court, Queens County (Kitzes, J.), dated May 10, 2011, which granted that branch of the defendant's motion which was to dismiss the complaint pursuant to CPLR 3211(a)(1).

ORDERED that the order is affirmed, with costs.

“Although once disfavored by the courts, it is now recognized that parties to a contract may freely select a forum which will resolve any disputes over the interpretation or performance of the contract” (*Brooke Group v JCH Syndicate* 488, 87 NY2d 530, 534). “A contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court” (*LSPA Enter., Inc. v Jani-King of N.Y., Inc.*, 31 AD3d 394, 395; see *Adler v 20/20 Cos.*, 82 AD3d 918, 919; *Bernstein v Wysoki*, 77 AD3d 241, 248-249). Here, the forum selection clause contained in the defendant's standard “Terms and Conditions” was expressly and fully incorporated into the parties’

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settlement agreement, and the plaintiff's general allegations of fraud relating to the settlement agreement are insufficient to render the clause unenforceable for the purpose of this action (*see Harry Casper, Inc. v Pines Assoc., L.P.*, 53 AD3d 764, 765; *LSPA Enter., Inc. v Jani-King of N.Y., Inc.*, 31 AD3d at 395; *Rokeby-Johnson v Kentucky Agric. Energy Corp.*, 108 AD2d 336, 341; *cf. DeSola Group v Coors Brewing Co.*, 199 AD2d 141, 141-142). Accordingly, the Supreme Court properly granted that branch of the defendant's motion which was to dismiss the complaint pursuant to CPLR 3211(a)(1) on the basis that the forum selection clause precluded commencement of the action in New York (*see Lischinskaya v Carnival Corp.*, 56 AD3d 116, 123).

SKELOS, J.P., DICKERSON, LEVENTHAL and ROMAN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court