

**Quantum Corp. Funding, Ltd. v Southwestern
Bell Tel., L.P.**

2007 NY Slip Op 30621(U)

April 4, 2007

Supreme Court, New York County

Docket Number: 0106867/2006

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:

PART 10

Index Number : 106867/2006

QUANTUM CORPORATE FUNDING

vs

SOUTHWESTERN BELL TELEPHONE

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

FILED

APR 10 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 4 2007

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X

Quantum Corporate Funding, Ltd.,
as assignee for
Michaelene Parker d/b/a
M&P Construction

Plaintiff,

-against-

Southwestern Bell Telephone, L.P.,

Defendant.

Decision/Order

Index No.: 106867/06

Seq. No. : 001

Present:

Hon. Judith J. Gische

J.S.C.

-----X

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

	Numbered
Def n/m (§3211) w/KLB affirm, DLF affid, exhs	1
Pltff opp w/SD affirm, exhs	2
Pltff Amended opp w/SD affirm, exhs	3
CB affid w/ exhs (sep back)	4
RC affid w/exhs (sep back)	5

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Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by plaintiff to enforce payments it claims are due pursuant to an assignment of a factoring agreement between itself and M&P Construction ("M&P").

Before the court is defendant's pre-answer motion to dismiss the complaint on the basis that there is no enforceable forum selection clause and therefore the court lacks personal jurisdiction over defendant because it is not doing business within this state.

CPLR 3211 (a). Plaintiff opposes the motion in all respects.

Background

Michaelene Parker d/b/a M&P Construction ("M&P") entered into three factoring agreements with Quantum Corporate Funding, Ltd. ("Quantum"). The subject of this dispute is an account receivable of \$16,410 consisting of two invoices: one dated July 28, 2005; the other July 6, 2005.

Plaintiff contends that M&P notified SWBT that it had assigned its accounts receivables to Quantum by letter dated June 9, 2005. That correspondence provides that "this letter serves as your irrevocable authority to pay the above captioned invoice (s) directly and solely to Quantum Corporate Funding, Ltd . . ." Quantum then sent its own letter to SWBT ("estoppel certificate"). The estoppel certificate dated June 9, 2005 was mailed to SWBT at its corporate office in Texas. Quantum obtained this address through a Dun & Bradstreet Information Report it obtained on SWBT. As per that report, Rachel McClendon is identified as SWBT's manager.

Ms. McClendon then forwarded the document to Jennifer Osborne, who is SWBT's Senior Report Clerk. Ms. McClendon also called SWBT and sent them a copy of the certificate with a note on it indicating the name of the person to whom she had forwarded it to and Ms. Osborne's telephone number. Ms. Osborne then signed the estoppel where indicated on the line for an "authorized signature." She also listed her title as Senior Report Clerk. The estoppel certificate, in relevant part, requires that SWBT make payments directly and solely to Quantum. It also provides that "[t]his estoppel is not subject to modification. New York law, jurisdiction and venue shall apply hereto." That estoppel agreement was for \$42,525.

Subsequently Ms. Osborne signed another estoppel, this one dated July 6, 2005

in the amount of \$16,410, the subject of this lawsuit.

Based upon these facts, plaintiff contends that defendant is subject to the jurisdiction of this court and the laws of this state. It argues further that Ms. Osborne had apparent authority to sign the estoppel certificates on SWBT's behalf and that it made due inquiries before it sent the estoppel certificate. Quantum argues further that because Ms. Osborne signed these certificates on more than one occasion, it had no reason to believe she was authorized to do so.

Defendant contends that Ms. Osborne was not authorized to sign the estoppel certificate on SWBT's behalf and therefore the forum selection clause therein is not enforceable against it. It argues that Quantum had a duty to inquire whether Ms. Osborne was authorized to sign the estoppel. SWBT offers the sworn affidavit of Ms. McClendon who contends that she had "no idea what to do with [the estoppel certificate]" when she received it, and that it was "not within my area of responsibility." She states further that she is not a manager at all, and she has no idea why she has that title in the D&B report. Defendant also offers the affidavit of Chris Bryan who deposes that the D&B report plaintiff relies upon is for the wrong company.

SWBT contends that because it did not sign a binding forum selection clause (e.g. that it is void), and it is not "doing business" within New York (CPLR 302), this case is improperly venued and must be dismissed. For this argument it relies upon a decision by Hon. Ira Gammerman dated July 9, 2004. That unrelated case involved the payment of dividends and Justice Gammerman held that because SWBT is a Delaware Corporation, with its principal place of business in Texas, and it has no employees in New York, it is not "doing business" in this state, and is not, therefore, subject to the

jurisdiction of this court.

Discussion

On a preanswer motion to dismiss, the complaint is to be liberally construed. Moreover, the facts as alleged by plaintiff will be accepted as true, and afforded the benefit of every possible favorable inference (EBC I, Inc v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 [2001]; P.T. Bank Central Asia v ABN AMRO Bank NV, 301 AD2d 373, 375-6 [1st Dept 2003]), unless clearly contradicted by evidence submitted by the moving party in connection with the motion (see Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1st Dept 2006]).

Where the defendant alleges that the court has no personal jurisdiction over it [CPLR 302] plaintiff must show facts that would establish the defendants were "doing business" in New York when the action was commenced. Lancaster v. Colonial Motor Freight Line, Inc., 177 AD2d 152 (1st Dept 1992).

Unlike the case before Justice Gammernan, which dealt with the issue of whether SWBT was "doing business" within the meaning of CPLR § 302, the case at bar involves a forum selection clause designating New York as the forum for the resolution of any dispute arising from the agreement and/or note. Such forum selection clauses are presumed valid and enforceable. Micro Balanced Products Corp. v. Hlaving Industries Ltd, 238 AD2d 284 (1st Dept 1997). In fact, "the 'very point' of forum selection clauses, which render the designated forum convenient as a matter of law, is to avoid litigation over personal jurisdiction, as well as disputes arising over the application of the long-arm statute." Sterling Nat. Bank as Assignee of NorVergence,

Inc. v. Eastern Shipping, 35 A.D.3d 222, 237 (1st Dept 2006) (*internal citations omitted*).

Whether Ms. Osborne had apparent authority to sign the estoppel certificate (as plaintiff contends and defendant disagrees with) presents an inherent factual dispute which cannot be determined on a motion to dismiss. Arol Development v. Whitman & Ransom, 215 AD2d 145 (1st Dept 1995). At this stage of the case, the court must accept plaintiff's facts as true, unless they are clearly contradicted by evidence submitted by the party seeking dismissal. See Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 (1st Dept 2006). The dispute over the D&B reports is not conclusively resolved by the report that defendant relies upon because each report is for "Southwestern Bell Telephone LP."

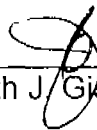
Plaintiff easily defeats SWBT's motion by setting forth facts that support a cause of action against defendant. Whether the forum selection clause is enforceable or not is not for the court to decide at this time. SWBT's motion for the dismissal of this action is denied. SWBT shall serve its answer within Ten (10) Days of service of a copy of this decision with notice of entry. Plaintiff may reply within the time permitted under the CPLR.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
April 4, 2007

So Ordered:


Hon. Judith J. Gische, J.S.C.

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