

**KMK Safety Consulting, LLC v Jeffrey M. Brown
Assoc.**

2009 NY Slip Op 31140(U)

May 4, 2009

Supreme Court, Richmond County

Docket Number: 104223/2008

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:104223/2008
Motion No.:004**

KMK SAFETY CONSULTING, LLC,

Plaintiff

against

**JEFFREY M. BROWN ASSOCIATES, and
TARGET CORPORATION,**

Defendants

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of this motion to dismiss the plaintiff's complaint

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annex ed	1
Answering Affidavits	3
Replying Affidavits	4
Memorandum of Law	2
Exhibits	Attached to Papers

Defendants Jeffrey M. Brown Associates (“JMB”) and Target Corporation (“Target”) move for an order to dismiss the plaintiff’s complaint pursuant to *CPLR* § 3211 (a) (1) on the grounds that documentary evidence shows that JMB and the plaintiff agreed to litigate any dispute relating to their contract at the Court of Common Pleas in Philadelphia County, Pennsylvania. The defendants’ motion is granted.

Facts

The plaintiff, KMK Safety Consulting, LLC (“KMK”), entered into a written agreement with JMB to provide controlled inspections as required for Self Certification and Department of Building sign-offs at the Target/Brooklyn College Project in 2201 Nostrand Avenue, Brooklyn, New York 11210.

Section 10 of the contract agreement contains, in part, the following provisions:

10.2: Any dispute between the parties related to this Contract shall be determined by the Pennsylvania Court of Common Pleas, Philadelphia County, with the exception noted in Paragraph 10.3 below. The Consultant hereby consents to the personal jurisdiction of the Pennsylvania Court of Common Pleas over it and agrees to accept service of process issuing from the Courts of the Commonwealth of Pennsylvania . . .

10.3: If a dispute arising out of or relates to this Contract, or breach thereof, and if the dispute cannot be settled through pre-litigation negotiations, the Contractor and Consultant agree, at the Contractor's sole election, to first subject the dispute to arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules

Discussion

To succeed on a motion to dismiss pursuant to *CPLR* § 3211(a) (1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.¹

The United States Supreme Court and New York Courts have held that forum selection clauses are prima facie valid.² A signatory to a contract or a third-party beneficiary may request the enforcement of a forum selection agreement.³ To set aside a forum selection clause, the challenging party must show that:

enforcement would be unreasonable and unjust or that the clause is

¹ *New York Schools Insurance Reciprocal v. Gugliotti Assocs.*, 305 AD2d 563 [2d Dept 2003].

² *M/S Brennen v. Zapata Off-Shore Co.*, 407 U.S. 1 [1972]; *British West Indies Guar. Trust Co., Ltd. v. Banque Internationale a Luxembourg*, 172 AD 2d 234 [1st Dept 1991].

³ *Freeford Ltd. v. Pendleton*, 53 AD3d 32 [1st Dept].

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.⁴ [emphasis added].

Even when there is the possibility of fraud, unconscionability, or a similar contract defense, New York Courts have held that they should not defeat a forum selection clause unless the allegation goes to the clause itself.⁵ Moreover, the Appellate Division, First Department has held that “unequal bargaining power alone should not suffice to allow a party to escape a forum selection clause.”⁶ Thus, it is well settled that forum selection clauses are vastly favored.

The contract unequivocally selects the Court of Common Pleas in Philadelphia County, Pennsylvania as the forum to litigate or arbitrate a dispute between the contracting parties.⁷ Found in the same agreement is the statement that Target is a beneficiary. The plaintiff contends that the KMK-JMB agreement cannot be enforced in favor of the defendants because it gives JMB the sole power to terminate the contract. The lack of choice in the negotiation process, the plaintiff argues, makes the contract unconscionable and therefore void. By examining the record in the light most favorable to the plaintiff, the court finds that the plaintiff gives no explanation regarding the alleged unreasonableness of the forum selection clause. A close examination of the selection clause does not provide any indication that the clause was formed unconscionably. As such, the forum selection clause may be applicable to the contracting parties and the beneficiary Target.

KMK next argues that holding an arbitration or trial in Pennsylvania would be difficult

⁴ *M/S Brennen v. Zapata Off-Shore Co.*, 407 U.S. 1 [1972], *supra*; *British West Indies Guar. Trust Co., Ltd. v. Banque Internationale a Luxembourg*, 172 AD 2d 234 [1st Dept 1991], *supra*.

⁵ *Id.*

⁶ *Id.*

⁷ Verified Complaint’s exhibit A.

for the plaintiff, whose company employs only one corporate officer that manages the business in New York City. Although a challenge, litigating this matter in a neighboring state is not so gravely difficult and inconvenient that the plaintiff would be deprived of its day in court. The facts of this case differ from *Scarcella v. America Online, Inc.*, where the parties agreed that Virginia would be their forum of dispute.⁸ The Court held that the forum selection clause was unreasonable because a monetary limit in the Virginia Small Claims Court precluded the plaintiff from seeking the full amount of his claim. The plaintiff in the instant case voluntarily agreed to settle any disputes in a court eighty miles away from his place of business and its claim will not be limited by the type of court in the selected forum. The plaintiff has therefore failed to show that the enforcement of the forum selection clause is unreasonable or unjust, depriving its day in court.

Conclusion

Based on documentary evidence, this court concludes that there is no question that the parties agreed to litigate any contractual dispute at the Court of Common Pleas in Philadelphia County, Pennsylvania. Aside from mere allegations, the plaintiff has failed to provide any evidence that the clause was entered under any fraud, deceit, or unconscionability. Hence, the clause is reasonable and the forum selection provision is prima facie valid and enforceable.

⁸ *Scarcella v. America Online, Inc.*, 11 Misc.3d 19 [1st Dept 2005].

Accordingly, it is hereby:

ORDERED, that the defendants' motion to dismiss the action is granted pursuant to *CPLR* § 3211 (a) (1) on the grounds that the contract between the parties designated the Court of Common Pleas in Philadelphia, Pennsylvania as the forum to litigate any contractual dispute.

ENTER,

DATED: May 4, 2009

Joseph J. Maltese
Justice of the Supreme Court