

**CBS Outdoor v Schumacher**

2010 NY Slip Op 31959(U)

July 16, 2010

Supreme Court, New York County

Docket Number: 603889/2009

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: \_\_\_\_\_ J.S.C. \_\_\_\_\_  
*Justice*

PART 10

Index Number : 603889/2009  
CBS OUTDOOR  
VS.  
SCHUMACHER, PAMELA SUE  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

in this motion to/for \_\_\_\_\_

PAPERS NUMBERED

\_\_\_\_\_ Answering Affidavits — Exhibits \_\_\_\_\_

\_\_\_\_\_ Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

**FILED**

JUL 23 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 7/16/10

J. Gis  
HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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  
CBS OUTDOOR, INC., a Delaware Corporation  
formerly known as VIACOME OUTDOOR, INC.,

Plaintiff,

-against-

PAMELA SUE SCHUMACHER, an Individual  
doing business as SCHUMACHER MEDIA GROUP,

Defendant.  
-----X

**Decision/Order**

Index No.: 603889/09  
Seq. No. : 001

**Present:**

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

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

Papers	Numbered
Def's n/m (3211/3212) w/PS affid, exhs .....	1
Pltf's opp w/SFG affirm, exhs .....	2
Def's reply .....	3
Pltf's surreply w/SFG affid .....	4
Def's reply to surreply w/PS affid. ....	5

**FILED**  
JUL 23 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

**Gische, J.:**

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

Defendant, Pamela Sue Schumacher (Schumacher), moves, pursuant to CPLR § 3211 (a) (8), to dismiss the complaint, alleging that the court lacks jurisdiction over her.<sup>1</sup>

Schumacher alleges that she is a resident of the State of Michigan, where she has resided for her entire life. Motion, Exhs. A & D. Schumacher says that, in 2000,

<sup>1</sup>Schumacher entitles this motion as one for summary judgment, but cites to CPLR § 3211 as the basis for the relief sought. It is noted that Schumacher has served an answer to the complaint, but has preserved her rights to challenge personal jurisdiction in that answer.

she formed SMG Media & Marketing, Inc. (SMG), a Michigan corporation, for the purpose of marketing advertising space and media from providers to users. *Id.*, Exh. B. As president of SMG, Schumacher entered into four contracts with a company called Infinity Outdoor, Inc. ("Infinity"), a Delaware corporation, between July 2006 and March 2007, to provide billboard space at various locations in the State of Michigan. *Id.*, Exh. C.

Schumacher avers that all of the four contracts that are the subject of this lawsuit were negotiated and entered into in Michigan, the terms of the contracts were fully executed in Michigan, all advertising space was for companies doing business within the State of Michigan, and all contacts with Infinity were with Heidi Maglicic ("Maglicic"), plaintiff's account executive, who operated out of Infinity's Michigan headquarters. Schumacher further states that all payments received by SMG were within the State of Michigan, and all payments made to Infinity were sent by SMG to Infinity's Michigan headquarters.

The contracts in question bear the imprint "CBS Outdoor" as their headings, and the contracting parties are identified as "Schumacher Media Group" and "Infinity Outdoor, Inc. (Outdoor)."

Paragraph 16 of the contracts state:

This contract becomes effective when accepted by the Company at its office in New York City, and contains the full agreement of the parties, and no prior representation or assurance verbal or written not contained herein, shall affect or alter the obligation of either party.

Paragraph 19 of the contracts state:

In the event of legal action arising out of this Contract, including but not limited to claims for non-payment, New York County, New York shall be the exclusive jurisdiction and venue for said action. This Contract and all claims arising hereunder shall be construed according to the laws of the State of New York.

The contracts are signed by Maglicic for "Outdoor," and by Schumacher for "Schumacher Media Group." The contracts also identify Viacom Outdoor as guaranteeing installation of the displays.

The complaint alleges that Schumacher is an individual doing business as Schumacher Media Group, and seeks \$44,018.81 in damages for alleged breaches of the above-referenced contracts, plus reasonable attorney's fees.

Schumacher states that she was personally served with a summons and complaint in the State of Michigan (Motion, Exh. E), but argues that plaintiff has failed to acquire personal jurisdiction over her because she has performed no purposeful act in the State of New York, as mandated by CPLR § 302. In her reply papers, Schumacher requests, as an alternative to dismissal pursuant to CPLR § 302, that the complaint be dismissed on the ground of forum non conveniens, pursuant to CPLR § 327.

In opposition, plaintiff asserts that the forum selection clause to which Schumacher freely agreed is sufficient to afford the New York courts personal jurisdiction over her, and that Schumacher fails to evidence that defending the action in New York would be a hardship on her. The court notes that Schumacher does not dispute, at least for purposes of this motion, that she entered into the four contracts that are the subject of this litigation in her individual capacity.

## Discussion

CPLR § 3211 (a), governing motions to dismiss a cause of action, states that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(8) the court has not jurisdiction of the person of the defendant . . . .

On a motion to dismiss pursuant to CPLR § 3211, the pleading should be liberally construed, the facts alleged by the plaintiff should be accepted as true, and all inferences should be drawn in the plaintiff’s favor (Leon v Martinez, 84 NY2d 83 [1994]); however, the court must determine whether the alleged facts “fit within any cognizable legal theory.” *Id.* at 87-88. Further, “[a]llegations consisting of bare legal conclusions . . . are not presumed to be true [or] accorded every favorable inference [internal quotation marks and citation omitted].” Biondi v Beekman Hill House Apartment Corp., 257 AD2d 76, 81 (1<sup>st</sup> Dept 1999), *aff’d* 94 NY2d 659 (2000).

CPLR § 313 states:

Service without the state giving personal jurisdiction. A person domiciled in the state or subject to the jurisdiction of the courts of the state under section 301 or 302, . . . may be served with the summons without the state, in the same manner as service is made within the state, by any person authorized to make service within the state . . . or by any person authorized to make service by the laws of the state, . . . or by any duly qualified attorney, solicitor, barrister, or equivalent in such jurisdiction.

CPLR § 302, New York’s long-arm statute, provides for the personal jurisdiction over non-domiciliary defendants who have non-continuous contacts with the State of New York.

Schumacher's motion is denied.

The crux of Schumacher's argument is not that she was not served correctly, but that the pre-requisite for such out-of-state service has not been met because she lacks sufficient contacts with New York to bring her within the purview of CPLR § 302. However, all of the judicial decisions that she cites, including the major one upon which she relies, First National Bank & Trust Co. v Wilson (171 AD2d 616 [1<sup>st</sup> Dept 1991]), are all distinguishable from the case at bar, because in none of them had the parties entered into a contractual relationship with a forum selection clause, as do the contracts that are the subject of this action.

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. Such clauses are prima facie valid and enforceable unless shown by the resisting party to be unreasonable. Forum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes . . . [internal citations omitted].

Brooke Group Ltd. v JCH Syndicate 488, 87 NY2d 530, 534 (1996); Boss v American Express Financial Advisors, Inc., 6 NY3d 242 (2006).

It is axiomatic that the very point of a selection of forum clause is to avoid litigation over personal jurisdiction and disputes over the application of the long-arm statute (CPLR 302 [a]). As this court recently noted, 'it is the policy of the courts of this State to enforce contractual provisions for choice of law and selection of a forum for litigation.' It is settled that a selection of forum clause affords a sound basis for the exercise of personal jurisdiction over a[n out-of-state] defendant and renders the designated forum convenient as a matter of law. Forum selection clauses 'should be enforced absent a showing that they result from fraud or overreaching, that they are unreasonable or unfair or that their enforcement would contravene some strong

public policy of the forum [internal citations omitted].

National Union Fire Ins. Co. of Pittsburgh, Pa. v Williams, 223 AD2d 395, 397-398 (1<sup>st</sup> Dept 1996).

In the instant matter, Schumacher has failed to object to the forum selection clause as resulting from fraud or overreaching, or that it is unreasonable or unfair. In her reply, Schumacher asserts that the clause is ambiguous and, therefore, unenforceable. The court disagrees.

The exact wording of the clause has been previously stated. Schumacher's contention is that the words "court," "venue" and "exclusive" are ambiguous, because they could refer either federal or state court. The court finds this argument totally unpersuasive.

In Ruttenberg v Davidge Data Systems Corp. (215 AD2d 191, 192-193 [1<sup>st</sup> Dept 1995]), the Court said:

Where a contract is straightforward and unambiguous, its interpretation presents a question of law for the court to be made without resort to extrinsic evidence. ... [W]here the intention of the parties may be gathered from the four corners of the instrument, interpretation of the contract is a question of law, and ... no trial is necessary to determine the legal effect of the contract ... . **Mere assertion by one that contract language means something to him, where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract, is not in and of itself enough to raise a triable issue of fact** [internal quotation marks and citations omitted; emphasis added].

This court has no question that the forum selection clause in the contracts that are the subject of this litigation are free from ambiguity and are enforceable, despite

Schumacher's weak and conclusory allegations of ambiguity.

It is a recognized rule of construction that a court should not adopt an interpretation which will operate to leave a provision of a contract ... without force and effect. An interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation [internal quotation marks and citations omitted].

*Id.* at 196.

"[B]y agreeing to the forum selection clause . . . defendant specifically consented to personal jurisdiction over her in the courts of New York and thereby waived any basis to dispute New York's jurisdiction." National Union Fire Ins. Co. of Pittsburgh, Pa. v Worley, 257 AD2d 228, 231 (1<sup>st</sup> Dept 1999). Therefore, the court concludes that it has jurisdiction over Schumacher pursuant to the forum selection clause in the subject contracts.

Having concluded that the forum selection clause confers jurisdiction over Schumacher, the court has thereby also resolved Schumacher's alternative request for dismissal of the complaint based on forum non conveniens. The very point of forum selection clauses is to render the selected forum convenient as a matter of law. Sterling National Bank v Eastern Shipping Worldwide, Inc., 35 AD3d 222 (1<sup>st</sup> Dept 2006); see Zurich Insurance Co. v R. Electric, Inc., 5 AD3d 338 (1<sup>st</sup> Dept 2004); National Union Fire Ins. Co. of Pittsburgh, Pa. v Williams, 223 AD2d 395, *supra*.

## Conclusion

*Based on the foregoing, it is hereby*

**ORDERED** that defendant's motion is denied; and it is further

**ORDERED** that counsel are directed to appear for **preliminary conference** in Room 232, 60 Centre Street, on **September 16, 2010, at 9:30 A.M.**

**ORDERED** that any relief requested but not addressed is hereby expressly denied; and it is further

**ORDERED** that this shall constitute the decision and order of the court.

Dated: New York, New York  
July 16, 2010

So Ordered:

  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.

**FILED**  
JUL 23 2010  
NEW YORK  
COUNTY CLERK'S OFFICE