

CBS Outdoor Inc. v California Surgical Inst., Inc.

2010 NY Slip Op 32644(U)

September 22, 2010

Supreme Court, New York County

Docket Number: 602200/08

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON
Justice

PART 55

CBS OUTDOOR Inc.

INDEX NO. 602200/08

CALIFORNIA Surgical
Institute Inc.

MOTION DATE _____

MOTION SEQ. NO. 1

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 ...

PAPERS NUMBERED

1-3

Answering Affidavits — Exhibits _____

4-5

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the annexed memorandum decision and order*

*NB PC Oct 25 at noon
Set at end.*

FILED

SEP 24 2010

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/22/10

[Signature]

JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 55
-----X

CBS OUTDOOR INC., a Delaware corporation,

Plaintiff,

INDEX NO. 602200/08

-against-

DECISION AND ORDER

CALIFORNIA SURGICAL INSTITUTE, INC.,
a California corporation,

Defendant.

FILED
SEP 24 2010
COUNTY CLERK'S OFFICE
NEW YORK

-----X

JANE S. SOLOMON, J.:

In this action for breach of contract, defendant California Surgical Institute, Inc. (CSI) moves, pursuant to CPLR 327 (a), for an order dismissing the complaint on the ground of forum non conveniens or, in the alternative, for a change of venue.

BACKGROUND

In summer, 2007, CSI and plaintiff CBS Outdoor Inc. (CBS) entered into five contracts (the Contracts), pursuant to which CBS agreed to produce and place outdoor advertisements for four weeks in specified locations in the vicinity of Los Angeles, California. In return, CSI was obligated to pay CBS \$83,000. CBS claims that it fulfilled its obligations but CSI failed to pay it. CSI counterclaimed, alleging that the advertisements were blocked by various obstructions, which CBS failed to remove, and, hence, were not fully visible to the public.

DISCUSSION

"The burden rests on the defendant challenging the forum to demonstrate relevant private or public interest factors, which militate against accepting the litigation" (*Sambee Corp. v Moustafa*, 216 AD2d 196, 198 [1st Dept 1995]).

CSI contends that it is a California corporation, that all negotiations surrounding the Contracts took place in California, and that all evidence and witnesses pertaining to the Contracts are in California. In opposition, CBS relies on the forum selection clause in each contract which provides that:

[i]n the event of legal action arising out of this Contract, including but not limited to claims for non-payments, 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

(see Levine Aff., exhibit 1, Contract # 0386639, § 19).

"[I]t is the well-settled policy of the courts of this State to enforce contractual provisions for choice of law and selection of a forum for litigation" (*Sterling Natl. Bank v Eastern Shipping Worldwide, Inc.*, 35 AD3d 222, 222 [1st Dept 2006] [internal quotation marks and citation omitted]). Contractual forum selection clauses "are prima facie valid and enforceable unless shown by the resisting party to be unreasonable" (*Brooke Group v JCH Syndicate* 488, 87 NY2d 530, 534 [1996]; see also *Boss v American Express Fin. Advisors, Inc.*, 6

NY3d 242, 247 [2006])).

Such clauses can be set aside if their enforcement "would be unreasonable and unjust," or if there is a showing of "fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would ... be deprived of his or her day in court" (*Sterling Natl. Bank*, 35 AD3d at 222 [internal quotation marks and citation omitted]; see also *British W. Indies Guar. Trust Co. v Banque Internationale A Luxembourg*, 172 AD2d 234 [1st Dept 1991]).

CSI has failed to allege any fraud or overreaching by CBS with respect to the forum selection clause here. CSI has also failed to demonstrate that it would be deprived of its day in court if the clause is enforced.

Additionally, "where a party to a contract has agreed to submit to the jurisdiction of a court, that party is precluded from attacking the court's jurisdiction on forum non conveniens grounds" (*Sterling Natl. Bank*, 35 AD3d at 223; see also *National Union Fire Ins. Co. of Pittsburgh, Pa. v Worley*, 257 AD2d 228, 232 [1st Dept 1999]). CSI, a business entity, is charged with awareness of the terms of the Contracts that included performance in California, and its agreement to submit to jurisdiction of the courts in New York County.

Moreover, CSI waited for almost two years from the

commencement of this action to make this motion (see e.g. *National Union Fire Ins. Co. of Pittsburgh, Pa.*, 257 AD2d at 232 [the fact that a defendant invoked the forum non conveniens doctrine 21 months after commencement of an action was "in itself[] ... a reason for denial of such a motion"]; see also *Anagnostou v Stifel*, 204 AD2d 61 [1st Dept 1994]).

CSI refers to the commencement by CBS of another action pertaining to the Contracts, in Arizona, as a waiver of its rights to enforce the forum selection clause. However, CBS explains that the Arizona action was brought to enforce a personal guaranty executed in connection with the Contracts which has a separate forum selection clause, designating Arizona as the exclusive forum (see Levine Aff., exhibit 2, at 2, Continuing Personal Guaranty). Accordingly, that action does not affect the enforceability of the forum selection clause here.

CSI also contends that the forum selection clause is unreasonable, unjust and overreaching because CBS, a nationwide volume dealer of advertising space, has "flooded New York Courts with myriad actions seeking to collect on contracts" from all across the country ("Motion for Order To Show Cause", pg 4). This allegation does not provide a basis for dismissal (see *Sterling Natl. Bank*, 35 AD3d at 222-223; see also *National Union Fire Ins. Co. of Pittsburgh, Pa.*, 257 AD2d at 230-232).

CSI's alternative request for a change of venue lacks

* 6]

merit. A written agreement fixing the place of trial, made before an action is commenced, shall be enforced upon a motion for a change of venue (CPLR 501), unless "there is reason to believe that an impartial trial cannot be had in the proper county" (CPLR 510 [2]). The subject Contracts designate New York County as such venue. CSI does not allege that it cannot have an impartial trial here. Accordingly, venue is proper, and CSI's request is denied.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the motion of defendant California Surgical Institute, Inc. is denied; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 432, 60 Centre Street, on October 25, 2010 at Noon, of which a copy hereof to the parties is notice.

Dated: September 22, 2010

FILED
SEP 24 2010
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:



J.S.C.

JANE S. SOLOMON