

PNC Bank, N.A. v Savvybuyer Inc.

2010 NY Slip Op 33003(U)

October 25, 2010

Sup Ct, Richmond County

Docket Number: 102215/09

Judge: Joseph J. Maltese

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

**Index No.: 102215/09
Motion No.: 001
002**

PNC BANK, N.A.

Plaintiff

DECISION & ORDER

against

HON. JOSEPH J. MALTESE

**SAVVYBUYER INC. T/A DIRECT BUY OF EATONTOWN
and GERALD O. HEMMERLE a/k/a GERALD HEMMERLE**

Defendants

The following items were considered in the review of the following: (1) motion for summary judgment; and (2) cross-motion to dismiss.

<u>Papers</u>	<u>Numbered</u>
Plaintiff Notice of Motion and Affidavits Annexed	1
Defendant Notice of Cross-Motion and Affidavits Annexed	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Plaintiff PNC Bank, N.A.'s ("PNC") motion for summary judgment declaring defendant Savvybuyer Inc. ("Savvybuyer") and Gerald O. Hemmerle ("Hemmerle") to be in breach of contract is denied.

Defendants Savvybuyer and Hemmerle's cross-motion to dismiss PNC's complaint due to forum non conveniens pursuant to CPLR 327 is granted.

FACTS

On December 29, 2005, defendant Savvybuyer, as borrower, executed and delivered to Plaintiff PNC, as lender, a Business Banking Line of Credit (the "Agreement") in the amount of \$100,000 with an interest rate of prime plus one percent. On the same day, defendant Hemmerle guaranteed the Agreement and became liable for any unpaid indebtedness resulting therefrom.

Paragraph 31 of the Agreement is a forum selection clause, which states in part:

“31. GOVERNING LAW AND CONSTRUCTION; JURISDICTION

This Agreement has been delivered to and accepted by us and will be deemed to be made in the State where our [PNC] office indicated on the first page of this Agreement is located. Regardless of the State of your residence, *you agree that this Agreement will be interpreted, and the rights and liabilities of the parties determined, in accordance with the laws of the State where our office indicated on the first page of this Agreement is located, excluding its conflict of laws rules. You irrevocably consent to the exclusive jurisdiction of any state or federal court located for the county or judicial district where our office indicated on the first page of this Agreement is located*, and consent that all service of process may be sent by nationally recognized ownership courier service directed to you at your address set forth on the first page of this Agreement and service so made will be deemed to be completed on the business day after deposit with such courier, provided that nothing contained in this Agreement will prevent us from bringing any action, enforcing any award or judgment or exercising any rights against you individually, against any security or against any of your property within any other county, state or foreign or domestic jurisdiction. *You acknowledge and agree that the venue provided in this paragraph is the most convenient forum for both you and us. You waive any objection to venue and any objection based on a more convenient forum in any action instituted under this Agreement.*”(emphasis added)

PNC’s office, as listed on the first page of the Agreement, is Two Tower Center Boulevard, East Brunswick, New Jersey, 08816.

Savvybuyer allegedly defaulted on the Agreement by failing to make any payments since January 12, 2009. PNC seeks to recover the damages resulting from this alleged breach of contract.

DISCUSSION

Savvybuyer’s Cross-Motion to Dismiss for Forum Non Conveniens

Savvybuyer argues that the forum selection clause in the Agreement clearly grants the courts of New Jersey exclusive jurisdiction over all matters arising under the Agreement. As such, this matter should be dismissed due to forum non conveniens pursuant to CPLR 327.

It 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.”¹ The forum-selection and choice-of-law clause is valid. In order to invalidate the clause, plaintiff must show that its enforcement “would be unreasonable, unjust, or would contravene public policy, or that the clause is invalid because of fraud or overreaching.”² Also, a court should not adopt an interpretation that “would render the forum selection clause meaningless.”³

Here, the Agreement grants exclusive jurisdiction to the courts of the state where PNC’s office is located, as it is listed on the first page of the Agreement. The first page of the Agreement lists PNC’s office as located in East Brunswick, New Jersey. The parties explicitly agreed that New Jersey law and the New Jersey courts would resolve any claim arising from the Agreement. There is no requirement for “a more explicit expression of consent to the jurisdiction of the courts of a particular State.”⁴

As the drafter of the Agreement, PNC has failed to make any argument that the enforcement of the forum selection clause “would be unreasonable, unjust, or would contravene public policy, or that the clause is invalid because of fraud or overreaching.”⁵

Instead, PNC argues that the language of the forum selection clause in no way limits their choice of forum. In particular, PNC points to the following language within the forum selection

¹ *Boss v. Am. Express Fin. Advisors, Inc.*, 15 A.D.3d 306 [1st Dept 2005].

² *Koko Contr. v Continental Env'tl. Asbestos Removal Corp.*, 272 AD2d 585 [2d Dept 2000].

³ *Micro Balanced Prods. Corp. v. Hlavin Indus.*, 238 A.D.2d 284 [1st Dept 1997].

⁴ *KMK Safety Consulting, LLC v Jeffrey M. Brown Assoc., Inc.*, 2010 NY Slip Op 2927 [2d Dept 2010].

⁵ *Koko*, supra.

clause to support their proposition:

“...provided that nothing contained in this Agreement will prevent us from bringing any action, enforcing any award or judgment or exercising any rights against you individually, against any security or against any of your property within any other county, state or foreign or domestic jurisdiction.”

PNC’s reliance on this portion of the forum selection clause is misplaced. The sentence unambiguously reserves PNC’s ability under the doctrine of *lex loci rei sitae* to bring an action against Savvybuyer’s real property or goods where the property is physically located. It does not, however, allow PNC to bring an ordinary breach of contract action in any forum it desires. In addition, to follow PNC’s interpretation of the forum selection clause would result in the clause being rendered meaningless, which is an impossibility.⁶

Given that the unambiguous language of the Agreement’s forum selection clause gives exclusive jurisdiction over matters arising out of the Agreement to the courts of New Jersey, Savvybuyer’s cross-motion to dismiss due to *forum non conveniens* must be granted.

PNC’s Motion for Summary Judgment

Since Savvybuyer’s motion to dismiss this action pursuant to CPLR §327, because New York is an inconvenient forum, is granted. Therefore, PNC’s motion for summary judgment declaring Savvybuyer in breach of contract must be denied. The plaintiff is obviously free to commence an action in New Jersey.

Accordingly, it is hereby:

ORDERED, that the motion by PNC Bank N.A. for summary judgment declaring Savvybuyer, Inc. in breach of contract is denied; and it is further

⁶ *Micro Balanced Prods. Corp.*, supra

ORDERED, that the cross-motion by Savvybuyer, Inc. to dismiss PNC Bank N.A.'s complaint because New York is an improper forum is granted.

ENTER,

DATED: October 25, 2010

Joseph J. Maltese
Justice of the Supreme Court