

**Computer Career Ctr., Inc. v Diamond D, Inc.**

2011 NY Slip Op 31508(U)

May 24, 2011

Sup Ct, Nassau County

Docket Number: 021216/2010

Judge: Ira B. Warshawsky

Republished from New York State Unified Court System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**SHORT FORM ORDER**

**SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. IRA B. WARSHAWSKY,  
Justice.**

**TRIAL/IAS PART 7**

\_\_\_\_\_  
COMPUTER CAREER CENTER, INC., d/b/a  
CAREER INSTITUTE OF HEALTH AND  
TECHNOLOGY,

Plaintiff,

INDEX NO.: 021216/2010  
MOTION DATE: 3/17/11  
SEQUENCE NO.: 01

- against -

DIAMOND D, INC.,

Defendants.

The following documents were read on this motion:

- Defendant's Motion to Dismiss Based on Forum Selection ..... 1.
- Affirmation of Robert J. Cava in Opposition to Motion ..... 2.
- Affidavit of Kenneth Barrett in Opposition to Motion ..... 3.
- Affirmation of Frank J. Livoti in Further Support of Motion ..... 4.

**PRELIMINARY STATEMENT**

Defendants move for an Order pursuant to CPLR § 3211 (a)(1) dismissing the Complaint, together with costs and fees incurred in connection with the motion. The basis for the motion is the claim that Nassau County is an improper forum because the agreement under which plaintiff purchased software from defendants contained a forum selection clause in the License Agreement. Plaintiff argues that the product was never accepted, and thus they were not bound by the License Agreement.

**BACKGROUND**

Plaintiff is a domestic corporation with a principal place of business in Garden City, New York. It provides computer training at three locations in New York, two in Nassau

County, and one in Brooklyn. Defendant is a California corporation, with a principal place of business in Kingsburg, California.

Defendant does business in New York, and actively marketed its products in Nassau County, and elsewhere in New York. On December 8, plaintiff purchased from defendant software to be used in connection with the operation of its educational business. The parties executed an end-user License Agreement which set forth the terms and conditions of the purchase of the software. Paragraph 10 of the License Agreement provides in pertinent part as follows:

This [License Agreement] shall be governed by the laws of the State of California and by the laws of the United States, excluding conflict of law principles . . .

Each of the parties hereto irrevocably consents to jurisdiction of the state and federal courts sitting in the State of California. Each party further agrees to commence any litigation which may arise hereunder in the courts located in County of Fresno, State of California.

Paragraph 10 also comments on the entitlement to recovery of legal fees by the prevailing party in the event of an action to enforce rights under the License Agreement:

If either party employs legal counsel to enforce any rights arising out of or relating to this [License Agreement], the prevailing party shall be entitled to recover its reasonable attorneys' fees in addition to any award, relief or remedy to which that party may be entitled.

Unfortunately, after purchasing the software, and its installation by representatives of defendant, it became clear that it was not useable for the purpose for which it was purchased. This action followed.

#### DISCUSSION

Plaintiff makes two arguments in opposition to the motion: that after reasonable inspection of the product, they rejected it, and therefor never accepted the terms of the License Agreement; and, that it is unreasonable for an institution of its size to be required

to mount litigation in a State 3,000 miles away. They contend that the cost of doing so would very possibly negate any recovery they may obtain as a result of the proceeding. As somewhat of an aside, despite the Affirmation of counsel for defendant in support of assignment to the Commercial Division, the complaint alleges damages in the amount of \$46,175.40, well below the \$100,000 threshold for Nassau County. As a matter of judicial economy, however, the Court will proceed to consider the motion.

It is a well-established principle that contractual forum selection clause is prima facie valid and enforceable unless it is unreasonable, unjust, in contravention of public policy, or that the selected venue would, as a practical matter, deprive a party of their day in court. (*LSPA Enter. Inc. v. Jani-King of N.Y. Inc.* 31 A.D.3d 394, 395 [2d Dept.2006]; *Bernstein v. Wysoki*, 77 A.D.3d 241, 248—249 [2d Dept.2010]).

*LSPA Enter.* involved a franchise agreement between plaintiff and defendant, a Texas Corporation. Under the terms of the agreement, plaintiffs would establish a Jani-King franchise for professional cleaning and maintenance services. The franchise agreement provided that “(j)urisdiction and venue is declared to be exclusively in Dallas County, in the State of Texas”. Plaintiff brought action for fraud in the inducement and breach of contract in Nassau County, New York. In affirming the trial court’s grant of the motion to dismiss, the Court stated that “(a) contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would , for all practical purposes, be deprived of its day in court”. (Internal citations omitted). The fact that a single franchisee was required to litigate in Dallas, Texas was not so gravely difficult as to deprive them of their right to litigate.

In *Bernstein* the Court enforced a forum selection clause in a medical malpractice claim against, among others, the summer camp who provided the initial medical services rendered to the infant plaintiff. The case was somewhat more complex, because it

involved enforcement of the forum selection clause at the behest of the physician, who was not a signatory to the agreement, but claimed to be a sufficiently “close relationship” between the signatories and the non-signatory doctor to reasonably foresee that the doctor defendants would seek to enforce the terms of the contract. Trial court denied the physician defendants motion to dismiss based upon improper venue. On appeal, the Court concluded that defendant Wysocki, an employee of the camp, had a sufficiently close relationship so as to be covered by the forum selection clause; the doctors affiliated with the hospital to whom the child was transported, however, were not foreseeable beneficiaries of the clause, and the motion to dismiss as to them was denied.

As recently as March 15, 2011, the Second Department affirmed the dismissal of an action brought by employees of defendant in Suffolk County where the employment contract conferred exclusive jurisdiction upon any federal or state court located in Dallas or Tarrant County Texas. The Court applied the standard that plaintiff had failed to establish that the clause was unreasonable, unjust, in contravention of public policy, the result of fraud or overreaching, or would make the enforcement of plaintiffs’ rights so gravely difficult as to deprive them of their day in court. (*Adler v. 20/20 Companies*, 82 A.D.3d 918 [2d Dept.2011]).

Plaintiff’s argument that the License Agreement is inapplicable because they were unable to utilize the product and promptly rejected it in accordance with the terms of UCC § 2-206, defining the acceptance of goods as when, after reasonable opportunity to inspect the goods, the purchaser signifies to seller that the goods are conforming or that he will take or retain them despite their non-conformity. The weakness in this argument is that the issue of whether or not the product was non-conforming is precisely the subject of litigation which is required to be brought in Fresno County, California.

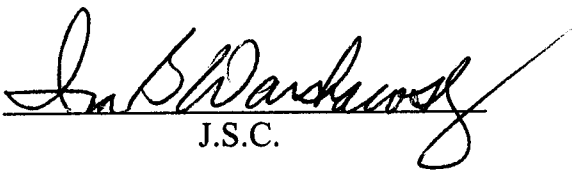
Defendant’s motion to dismiss the complaint based upon improper venue is granted. The Court declines to award defendant the requested legal fees and expenses provided for in paragraph 10 of the License Agreement. While defendants have succeed on

a procedural motion to dismiss based upon improper venue, this does not entitle them to claim to be the “prevailing party”, since the Court interprets this as relating to the merits of the action. A “prevailing party” must actually benefit from the lawsuit. A judicial statement which does not alter the relationship between the parties does not make one party or the other a prevailing party entitled to additional benefits. To so qualify, a party must secure either a judgment on the merits or a court-ordered consent decree. (*Farrar v. Hobby*, 506 U.S. 103, 111—113 [1992]).

Defendant’s request for the award of legal fees and disbursements is denied.

This constitutes the Decision and Order of the Court.

Dated: May 24, 2011

  
J.S.C.

**ENTERED**  
MAY 27 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE