Super PC Sys., Inc. v Tres Agaves, LLC
2016 NY Slip Op 31849(U)
September 30, 2016
Supreme Court, New York County
Docket Number: 652102/2016
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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Super PC Systems, Inc.,

Plaintiff(s),

Index No.
652102/2016

Decision and
Order

- against -

Mot. Seq. 001

Tres Agaves, LLC, and Alfonso Ramos,

Defendant(s).

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HON. EILEEN A. RAKOWER, J.S.C.

This is an action for breach of contract. As alleged in the Complaint, Plaintiff, Super PC Systems, Inc., ("Plaintiff") a domestic corporation with its principal business in New York, Kings County, is "the Seller of a certain combination of hardware and/or software called the 'Point of Sale' of POS." On October 21, 2015, Plaintiff and Defendant Tres Agaves, LLC ("Tres Agaves"), a limited liability company located in Washington State, entered into a contract ("the Contract") "to have POS and merchant services installed and serviced at its location of four (4) years or forty eight (48) months." Defendant, Alfonso Ramos ("Ramos"), is the President of Tres Agaves. Ramos personally guaranteed the Contract. Pursuant to the Contract, Tres Agaves agreed to pay $190 per month to Plaintiff for the installation and service of the POS and merchant services. In December 2015, the POS was installed at "Defendant's location," and training was done "at the Defendant's location" and by telephone. The Complaint further alleges on February 2015, Defendants "unilaterally canceled the POS Contract with the Plaintiff and as a result Plaintiff suffered loss of $9,585." It further alleges that on February 2016, Defendants "unilaterally canceled the merchant services contract with the Plaintiff and as a result Plaintiff suffered loss of $1,800." It alleges, as a result of Defendants' breach, Plaintiff has incurred "certain actual and estimated damages, lost profits, legal fees and court costs and disbursements that cannot be determined at this time but believed to be in excess of fifty thousand dollars ($50,000)."

Paragraph 14.1 of the Contract states:

> This Agreement is construed according with and shall be governed (including with no limitations any matters arising out of this Agreement, relating to this Agreement (including those with may be in the Agreement or not, tort, or otherwise) by the laws of the State of New York, USA and without any consideration of possible conflicts of law. This Agreement shall be considered to be fully executed and delivered in the State of New York, Kings County.

Paragraph 14.2 of the Contract provides, in relevant part:

> Any controversy or claim arising out of relating to this Agreement, or the breach thereof, may be submitted by the Party only to the exclusive jurisdiction of the New York State or Federal court sitting in the County of New York, New York City; and the Parties agree that all claims may be heard and resolved only by the mentioned courts. The award to the winning Party shall include also reasonable attorney fees, court expenses or any other reasonable costs or charges in addition to all damages deemed fair by the courts. It is expressly agreed between the Parties that the procedure outlined herein is the sole and exclusive remedy of each Party, and all the Parties expressly and irrevocably waive any and all other legal remedies in any other court or tribunal in any jurisdiction.

Presently before the Court is Defendants' motion to dismiss Plaintiff's Complaint pursuant to CPLR § 327 (forum non conveniens) and § 3211. Defendants submit the attorney affirmation of George Vallas; the affidavit of Ramos, Tres Agaves' President; Contract; correspondence from Mr. Hayes Gori to Plaintiff, dated April 6, 2016; and the Complaint. Plaintiff opposes. Plaintiff submits the attorney affirmation of Olga Suslova and the affidavit of Andrey Belyaev, Tres Agaves' President.

"[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 Nat'l Bank v. Eastern Shipping Worldwide, Inc.*, 35 A.D. 3d 222, 222 [1st Dept. 2006]). "Forum selection clauses, which are prima facie valid are enforced 'because they provide certainty and predictability in the resolution of the disputes,' and are not to be set aside unless a party demonstrates that the enforcement of such 'would be unreasonable and unjust or that the clause is 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.'" (*Sterling Nat'l Bank*, 35 A.D. 3d at 223). In order to set aside a forum selection clause, a party must show that enforcement would be unreasonable and unjust or that the clause is 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." (*British West Indies Guaranty Trust Co. v. Banque Internationale A Luxembourg*, 172 A.D.2d 234 [1st Dep't 1991]). "Absent a strong showing that it should be set aside, a forum selection agreement will control." (*Horton v. Concerns of Police Survivors, Inc.*, 62 A.D.3d 836, 836, 878 N.Y.S.2d 793 [2009] [quoting *DiRuocco v. Flamingo Beach Hotel & Casino,* 163 A.D.2d 270, 272, 557 N.Y.S.2d 140 [2d Dep't 1990]).

The common-law doctrine of *forum non conveniens*, now codified in CPLR § 327, permits a court to dismiss an action when, "in the interest of substantial justice the action should be heard in another forum." (CPLR § 327[a]). The doctrine, "is based upon 'justice, fairness and convenience.' . . . Among the factors to be considered are the residence of the parties, the location of the various witnesses, where the transaction or event giving rise to the cause of action occurred, the potential hardship to the defendant in litigating the case in New York, and the availability of an alternative forum." (*Grizzle v. Hertz*, 305 AD2d 311 [1st Dept. 2003])(citations omitted). CPLR § 327 further provides that, "[t]he domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action." (CPLR § 327[a]).

The burden rests upon the defendant challenging the forum to demonstrate "relevant private or public interest factors which militate against accepting the litigation. ... No one factor is controlling." (*Islamic Republic of Iran v. Pahlavi, 62* N.Y.2d 474, 479 [1984]). Unless the balance weighs strongly in favor of the defendant, a plaintiff's choice of forum should not be disturbed. *(Id)*. Additionally, the burden of demonstrating that New York is not a proper forum to litigate the action "becomes even more onerous where the plaintiff is a New York resident." (*Highgate Pictures, Inc. v. De Paul*, 153 A.D.2d 126, 129 [1st Dep't 1990]).

Defendants submit the affidavit of Ramos, the President of Tres Agaves who operates Tres Agaves' restaurant in Belfair, Kitsap County, Washington, and signed the Contract on Tres Agaves' behalf. Ramos also signed as a guarantor. As set forth in the affidavit of Ramos, Tres Agaves was formed in January 2015 and "is a small company with only nine employees and has yet to become profitable." Ramos owns

65% of the corporation, and the other 35% is owned by the restaurant's landlord, Belfair Log Plaza LLC.

Defendants argue that this action should be dismissed in the interests of substantial justice, in favor of a new action to be commenced in Washington, because the dispute involves the lease of POS equipment for a restaurant located in Kitsap County, Washington, the Contract was presented for Defendants' signature in Washington, the equipment was delivered to Washington, and "the amount of money in dispute is relatively minor." Defendants further argue Ramos, who "went through the 9th grade in Mexico [has] had no formal education in the United States" and uses English as his "second language," "didn't understand that [he] could be sued in New York City over any dispute related to this agreement." Specifically, Ramos avers:

> On October 21, 2015, I received a visit at our restaurant from Brian Rogers of a company called "cynergydata." Mr. Rogers persuaded me to purchase a Point of Sale system for the Restaurant, and promised to deliver a working system and to provide any training necessary for our staff to use it. This is the POS system that is the subject of this litigation . . . When I was given the contract to sign, Mr. Rogers told me that it was a 'standard contract,' and that I could cancel anytime if we didn't like the system. The contract terms about agreeing to the jurisdiction of New York Courts were not explained to me and I didn't understand that I could be sued in New York Courts were not explained to me and I didn't understand that I could be sued in New York City over any dispute related to this agreement.

Defendants also argue that both Defendants are based in Washington, do not do business in New York, and it would be a hardship for them to defend themselves in New York. In the affidavit of Ramos, Ramos avers, "It would be an extreme hardship for me to defend myself in the New York court system. The travel expenses and the time away from the restaurant would cause financial distress to me and my family." Ramos further avers, "I believe we have legitimate defenses to the allegations made by Super PC Systems, Inc., but I have no idea how I could afford to defend this case in New York City." Defendants also argue that "[a]ll witnesses to the formation and alleged breach of the contract are in Kitsap County, Washington" and "[m]any employees of the LLC would be necessary witnesses, as the LLC has already raised significant factual defenses to the allegations in the litigation. Defendants state that one witness is Brian Rogers, of "cynergy data," who presented the Contract to Ramos for signature. Rogers' business card states he is "serving Bremerton, Seattle, and the Olympic Peninsula."

Plaintiff, in turn, argues that the forum selection clause of the Contract should be enforced. In the affidavit of Plaintiff's President Belyaev, he states, "The terms of the contract were explained by Mr. Rogers," Ramos was given the opportunity to consult with an attorney and his partners, and Ramos signed the contract after he "did his due diligence." Plaintiff also argues that this action "does not require the Defendant to appear in New York" because "[a]ppearance via Skype is acceptable."

Here, Paragraphs 17, 18, and 22 of the parties' Contract clearly state:

> 17. Each of the Parties has to investigate legal issues, pertaining to this Agreement, at its own and sole expense and cannot challenge another Party or rely on the opinion of another Party.
>
> 18. The Party has received a legal advice before executing this Agreement, or intentionally executed this Agreement without a legal advice and with full understanding of all possible consequences.
>
> 22. Each Party has reviewed and fully understood all the text and meaning of this Agreement, which has been prepared in English.

Wherefore it is hereby,

ORDERED that Defendants' motion to dismiss is denied, and Defendants are directed to answer the Complaint within twenty days.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: SEPTEMBER 30, 2016

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Eileen A. Rakower, J.S.C.