

Merchant Cash & Capital, LLC v Blueshyft, Inc.

2017 NY Slip Op 30880(U)

April 5, 2017

Supreme Court, Nassau County

Docket Number: 608968/16

Judge: Thomas Feinman

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

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

Present:

Hon. Thomas Feinman
Justice

MERCHANT CASH & CAPITAL, LLC,
d/b/a BIZFI FUNDING,

Plaintiff,

- against -

BLUESHYFT, INC. d/b/a BLUESHYFT
and TIMOTHY LOUDERMILK,

Defendants.

TRIAL/IAS PART 6
NASSAU COUNTY

INDEX NO. 608968/16

MOTION SUBMISSION
DATE: 2/16/17

MOTION SEQUENCE
NO. 1

The following papers read on this motion:

Notice of Motion and Affidavits.....	<u> X </u>
Affirmation in Opposition.....	<u> X </u>
Reply Affirmation.....	<u> X </u>

The defendants move for an order pursuant to CPLR §510(1) changing the venue of this action to New York County. The defendants submit a Memorandum of Law in support of its motion. The plaintiff submits opposition. The defendants submit a reply affirmation.

The plaintiff initiated this action sounding in breach of contract and guaranty, seeking damages and attorneys fees. The defendants, by way of the instant motion, argue that the defendants reside in Florida, plaintiff resides in New York County, and the forum selection clause contained in the subject contract, §5.6(c), is ineffective. The defendants submit that the forum selection clause is invalid as it “does not fix a place, or county, or trial,” and is a “floating forum selection clause.”

§5.6 (b) and (c), “Governing Law and Consent to Jurisdiction: Service of Process,” provides as follows:

“(b) With respect to this Agreement, any Transaction Document or any controversy, dispute or claim arising from or relating thereto, including all claims sounding in contract or tort, all judicial proceedings brought by Buyer against Seller or any Guarantor may, and all judicial proceedings brought by Seller or any Guarantor against Buyer that are not

otherwise compelled to arbitration proceedings pursuant to Section 5.10 hereof shall be brought in any state court of competent jurisdiction in the **State of New York**, or in any federal court of competent jurisdiction in the **State of New York**, and, by execution and delivery of this Agreement, Seller and Guarantor(s) accept, for themselves and generally and unconditionally, the non-exclusive jurisdiction in the case of a proceeding initiated by Buyer at the exclusive jurisdiction in the case of a proceeding initiated by Seller or any Guarantor, of the aforesaid courts and irrevocably agrees to be bound by any final, non-appealable judgment rendered thereby in connection with this Agreement, any Transaction Document or any controversy, dispute or claim arising from or relating thereto from which no appeal has been taken or is available.

(c) Seller and Guarantor(s) hereby **waive any claim that the action is brought in an inconvenient forum, that the venue of action is improper**, or that this Agreement or the transactions of which this Agreement is a part may not be enforced in or **by any of the above-named courts**. Seller and Guarantor(s) hereby waive any right to remove any action brought by Buyer against Seller or Guarantor(s) related to this Agreement from state court to federal court.” (emphasis added).

It is well settled that forum selection provisions are prima facie valid. (*Brooke Group v. JCH Syndicate*, 87 NY2d 530). In order to set aside a forum selection clause, a party must demonstrate that:

“[E]nforcement would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the forum set in the contract 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.” (*Hunt v. Landers*, 309 AD2d 900, quoting *Hirschman v. National Textbook Co.*, 184 AD2d 495; *Koko Contracting, Inc. v. Continental Environmental Asbestos Removal Corp.*, 272 AD2d 585).

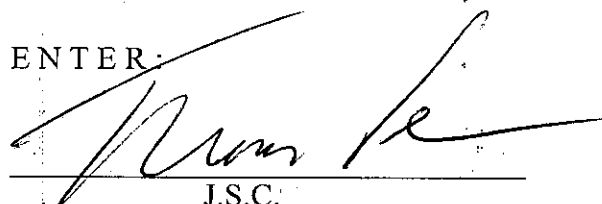
“Forum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes.” (*Brooke Group v. JCH Syndicate*, 87 NY2d 530). When a forum selection clause lacks specificity regarding any particular jurisdiction, and a defendant has no way of knowing what state in the union they would be required to litigate, the forum selection clause has not been enforced. (*Sterling National Bank v. Til-Mar Design, Inc.*, Index No. 59981/2004, Civ.Ct.NY, April 28, 2005). In *Sterling National Bank*, *supra*, the court stated that the forum selection provision, was a “floating forum selection” clause which did not satisfy the purpose of providing certainty and predictability to the parties. In *Sterling National Bank*, *supra*, the agreement provided that the parties agreed to be sued not only in any state where the plaintiff had a principal office, but also in any state where any future unidentified assignee of the agreement had a principal office, and allowed the plaintiff, or a future assignee, to choose to sue in federal or state court. The court further clarified that public policy dictates that the forum selection clause be “clear and specific.” (*Id.*)

Here, the forum selection clause is clear and specific and designates New York courts. The contract contains a forum selection clause which provides that all actions or proceedings arising out of the contract be litigated only in state and/or federal courts in New York, that the parties consent to jurisdiction in any New York or federal court, and that the court shall apply the law of the State of New York. Forum selection clauses have been held to be valid and binding upon the parties. (*D.O.T. Tidedown & Lifting Equipment v. Wright*, 272 AD2d 290; *Koko Contracting, Inc. v. Continental Environmental Asbestos Removal Corp.*, 272 AD2d 585). Such forum selection clauses have been upheld in written agreements which a party expressly consents to the jurisdiction of the New York courts. (*Creative Resources, Inc. v. Rumbellow*, 244 AD2d 383; *Banco Do Comercio E Industria v. Esusa Engenharia E. Construcoes*, 173 AD2d 340).

Accordingly, as the forum selection clause is valid and binding upon the parties, this Court has jurisdiction over the defendants, and venue is proper.

In light of the foregoing, the defendants' motion is denied.

ENTER:



J.S.C.

Dated: April 5, 2017

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