

**Merchant Cash & Capital, LLC v Beachside Home
Care, LLC**

2017 NY Slip Op 31817(U)

August 15, 2017

Supreme Court, Suffolk County

Docket Number: 602245/2017E

Judge: William B. Rebolini

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This opinion is uncorrected and not selected for official publication.

Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Merchant Cash & Capital, LLC,
d/b/a Bizfi Funding,

Plaintiff,

-against-

Beachside Home Care, LLC d/b/a
Beachside Home Care and Chandra Betts,

Defendants.

Motion Sequence No.: 001; MD
Motion Date: 5/18/17
Submitted: 5/24/17

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Clerk of the Court

Upon the following **E-File document list** numbered 1 to 31 read upon this application for a change of venue and dismissal of complaint; it is

ORDERED that this motion by defendants, Beachside Home Care, LLC, doing business as Beachside Home Care and Chandra Betts, for an order changing the venue of this action to New York County on the ground that Suffolk County is an improper venue (*see* CPLR 510 [1]) and for an order pursuant to CPLR 3211 dismissing the complaint is denied.

Plaintiff, Merchant Cash & Capital, LLC, doing business as Bizfi Funding, commenced this action by the filing of a summons and complaint on February 3, 2017 to recover damages and attorneys' fees for breach of contract and breach of guaranty. It is alleged that the parties entered into a written agreement under which plaintiff purchased defendant's future receivables at a discounted price, and that defendants agreed to deposit future revenues into a specified bank account

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through which plaintiff would withdraw daily payments at an agreed percentage of defendant's revenues. It is also alleged in the complaint that plaintiff paid the agreed-upon purchase price and that defendants failed to make the required payments under the agreement. Defendants now move for an order changing the venue of the action from Suffolk County to New York County, and for an order dismissing the complaint for failure to state a cause of action.

Section 5.6(b) of the agreement between the parties states, in pertinent part, as follows:

... [A]ll judicial proceedings ... 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, or in any federal court of competent jurisdiction in the State of New York ...

In addition, the parties agreed in § 5.6(c) of the agreement to "waive any claim that the action is brought in an inconvenient forum, [or] that the venue of the action is improper ..."

The venue of an action is proper in the county in which any of the parties resided at the time of commencement (*see* CPLR 503; *see also Kidd v 22-11 Realty, LLC*, 142 AD3d 488, 489, 35 NYS3d 719 [2d Dept 2016]). "The sole residence of a limited liability company for venue purposes is the county where its principal office is located as designated in its articles of organization" (*Pinos v Clinton Café & Deli, Inc.*, 139 AD3d 1034, 1035, 33 NYS3d 322 [2d Dept 2016], quoting *Dyer v 930 Flushing, LLC*, 118 AD3d 742, 742, 987 NYS2d 206 [2014]). Plaintiff is a foreign corporation licensed to do business in the State of New York with its principal place of business located in New York County (*see Merchant Cash and Capital, LLC v Laulainen*, 55 Misc3d 349, 48 NYS3d 889 [Nassau Sup Ct 2017]).

Parties to a contract may freely select a forum which will resolve any disputes over the interpretation or performance of the contract, and such clauses are valid and enforceable unless shown by the resisting party to be unreasonable (*Brooke Group Ltd. v JCH Syndicate 488*, 87 NY2d 530, 534, 663 NE2d 635, 640 NYS2d 479 [1996]). The words and phrases used by the parties must, as in all cases involving contract interpretation, be given their plain meaning (*Brooke Group Ltd. v JCH Syndicate 488*, *supra* at 87 NY2d 534, citing *Levine v Shell Oil Co.*, 28 NY2d 205, 211). Here, the parties clearly agreed to New York as the forum for their disputes, and they clearly waived any objections to venue (*see Merchant Cash and Capital, LLC v Portland Wholesale Jewelry, LLC*, ___ Misc3d ___, 2017 NY Slip Op 31651 [U]). Accordingly, the application for a change of venue is denied.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must determine, accepting as true the factual averments of the complaint and according the plaintiff the benefit of all favorable inferences, whether the plaintiff can succeed upon any reasonable view of the facts as stated (*Country Pointe at Dix Hills Home Owners Assn., Inc. v Beechwood Organization*, 80 AD3d 643, 649, 915 NYS2d 117 [2d Dept 2011], quoting *Schneider v Hand*, 296 AD2d 454, 744 NYS2d 899 [2002]). The test to be applied is whether the complaint "gives sufficient notice of the transactions,

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occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments” (*JPMorgan Chase v J.H. Electric of N.Y., Inc.*, 69 AD3d 802, 803, 893 NYS2d 237 [2d Dept 2010], quoting *Moore v Johnson*, 147 AD2d 621, 621, 538 NYS2d 28 [1989]).

The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff’s performance pursuant to the contract, the defendant’s breach of its contractual obligations, and damages resulting from the breach (*143 Bergen St, LLC v Ruderman*, 144 AD3d 1002, 1003, 42 NYS3d 252 [2d Dept 2016]). In this case, the complaint sets forth the necessary elements. It alleges that the parties entered into a merchant agreement on or about February 29, 2016, that plaintiff satisfied its obligations under the agreement by paying the purchase price, and that defendants defaulted and breached the agreement by failing to make its payments due on January 12, 2017 and thereafter. The motion to dismiss, therefore, is denied.

Dated: August 15, 2017



HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION _____ X _____ NON-FINAL DISPOSITION