

LG Funding, LLC v Garber
2018 NY Slip Op 32067(U)
August 20, 2018
Supreme Court, Nassau County
Docket Number: 605671/18
Judge: Jeffrey S. Brown
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

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

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

-----X		TRIAL/IAS PART 12
LG FUNDING LLC,		
	Plaintiff,	INDEX # 605671/18
-against-		Mot. Seq. 1
		Mot. Date 7.10.18
		Submit Date 7.10.18
NATHAN GARBER a/k/a NATHAN R. GARBER,		
	Defendant.	
-----X		

=====	
The following papers were read on this motion:	Documents Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	4
Answering Affidavit.....	13
Reply Affidavit.....	18
=====	

The defendant, Nathan Garber, moves seeking transfer of venue from Nassau County to Kings County “as of right” in connection with a breach of contract action. Plaintiff, LG Funding, LLC opposes.

On or about February 18, 2018, plaintiff and defendant entered into an agreement for the purchase and sale of future receivables. The agreement includes a forum selection clause stipulating that any issues which arise from the agreement shall be adjudicated in any court in New York State.¹

¹ (see Rosen Affirmation at Exh. A, ¶4.5 Binding Effect; Governing Law, Venue and Jurisdiction) (stating that “[a]ny suit, action or proceeding arising hereunder, or the interpretation, performance or breach hereof, shall, if LG so elects, be instituted in any court sitting in New York State (the “Acceptable Forums”). The parties agree that the Acceptable Forums are convenient, and submit to the jurisdiction of the Acceptable Forums and waive any and all objections to jurisdiction or venue.”)

In short, defendant allegedly breached the contract. Plaintiff then commenced this action against defendant to recover damages resulting from the breach. Defendant, a Montana resident, then filed the instant motion seeking transfer of venue to Kings County based on plaintiff's maintaining an office there.

The immediate issues before this court are (1) whether a broad forum selection clause, which designates any court in a state, is valid and enforceable and (2) whether the clause waiving any objection as to venue should be given effect. It is the opinion of this court that the forum selection clause is valid under either evaluation.

Pursuant to CPLR 510, the court may grant a motion to transfer venue if (1) the county designated by the plaintiff is improper, (2) an impartial trial may not be had in the proper county, or (3) the convenience of the witnesses and interests of justice are served by the change.

CPLR 503 (a) defines a proper county, stating:

“the place of trial shall be in the county in which one of the parties resided when it was commenced; the county in which a substantial part of the events or omissions giving rise to the claim occurred; or, if none of the parties then resided in the state, in any county designated by the plaintiff.”

Additionally, CPLR 501 allows parties to fix venue through contractual provisions before the commencement of an action subject to the provisions set forth in 510.

“A contractual forum selection clause is prima facie valid and enforceable unless it is (1) shown by the challenging party to be unreasonable, unjust, in contravention of public policy, or invalid due to fraud or overreaching, or (2) 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.” (*Bernstein v. Wysoki*, 77 AD3d 241 [2d Dept. 2010] [clause fixing venue valid]; *Hluch v. Ski Windham Operating Corp.*, 85 AD3d 861 [2d Dept 2011]; *Molino v. Sagamore*, 105 AD3d 922 [2d Dept 2013]; *Puleo v. Shore View Ctr. for Rehab. and Health Care*, 132 AD3d 651 [2d Dept 2015]; see also *Tatko Stone Prods., Inc. v. Davis-Giovinzazzo Constr. Co., Inc.*, 65 AD3d 778 [3d Dept 2009] [holding that the forum selection clause designating venue broadly in the state where the project was located valid and proper]; but see *Merchant Cash and Capital, LLC v. Laulainen* 55 Misc.3d 349 [Sup. Ct. Nassau Cty. 2017] [holding that a forum selection clause designating any court in New York as a proper venue is not enough, plaintiff must additionally show some nexus between the selected venue and the action]. Generally, “[f]orum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes.” (*Brooke Group Ltd. v. JCH Syndicate 488*, 86 NY2d 530 [1996]; accord *LG Funding, LLC v. Advanced Pharma CR, LLC*, 58 Misc.3d 231 [Sup. Ct. Nassau Cty. 2017], *LG Funding v. Four Paw Orlando LLC*, 2017 N.Y. Slip Op. 32391, 2017 WL 5700330 [Sup. Ct. Nassau Cty. 2017]).

Here, defendant asserts that Nassau County is an improper venue as neither party resides and none of the events or omissions occurred in Nassau County. However, the parties chose to fix venue to any county in New York State, thereby essentially overriding the provisions of CPLR 503.

In *LG Funding, LLC v. Advanced Pharma CR, LLC, supra*, the exact clause at issue here was examined by Justice Steinman. Justice Steinman held the forum selection clause invalid, reasoning that if it were enforced, the plaintiff would be able to bring the action anywhere within New York State, with some courts over 440 miles away from others. Justice Steinman further explained that “an intent to deviate from the statutory protections contained in CPLR 503 should be set forth clearly and unambiguously.” As to the agreement to waive venue objections, Justice Steinman found that “[s]uch a waiver, by itself, cannot be enforceable unless the parties agreed to a selected county in which to venue an action in the first instance.”

However, the agreement to use a forum anywhere in New York is not necessarily unreasonable or overly burdensome where, as here, the defendant is an out-of-state resident living in Montana. Even if plaintiff did actually file this action in Chautauqua County in Mayville, New York, the circumstances may not be that different. Plaintiff will still need to travel a far distance from Montana to attend trial of the action. However, we need not pontificate on this situation as these are not the facts of the case. Further, defendant’s request to change venue from Nassau to Kings does not reflect a grave hardship on the part of the defendant but instead shows a mere preference of the defendant.

In another relevant case, *LG Funding v. Four Paw Orlando LLC, supra*, the court again examined the same clause from the same form contract. In *Four Paws*, Justice Feinman reached a different result. His decision cites *Sterling National Bank*,² which holds that the “floating forum selection” clause was invalid as it lacked specificity by overextending venue to any state chosen by future unidentified assignees. Justice Feinman distinguished the instant clause as it clearly and specifically designates New York courts as the place of trial. Further, Justice Feinman explained that since forum selection clauses are presumed valid, and the forum selection clause at hand is not unreasonable, unjust, fraudulent, overreaching, or depriving the defendant of his day in court, there is no reason to decline enforcement of the clause as it was written, agreed to, and finalized. This court agrees with the reasoning advanced by Justice Feinman on this point.

Likewise, in *Merchant Cash and Capital LLC v. Portland Wholesale Jewellery, LLC*, 2017 N.Y. Slip Op. 31651, 2017 WL 3442563 [Sup. Ct. Nassau Cty. 2017]), Justice McCormack, analyzing a similar agreement with a provision waiving any claim that venue is improper found such agreement fully enforceable. Justice McCormack, citing *Trump v. Deutsche Bank Trust Co. Ams*, 65 AD3d 1329 [2d Dept 2009], distinguished *Laulainen*, noting the absence of a waiver of objection to venue in that case.

² *Sterling National Bank v. Til-Mar Design, Inc.*, Index No. 59981/2004, Civ.Ct.NY, April 28, 2005.

Indeed, it is a generally accepted rule in contract law that contracting parties are afforded expansive freedom to contract. (See *New England Mut. Life Ins. Co. v. Caruso*, 73 N.Y.2d at 80, [1989] [affirming and emphasizing that “[f]reedom of contract itself is deeply rooted in public policy . . . and therefore a decision to refrain from enforcing a particular agreement depends upon a balancing of the policy considerations against enforcement and those favoring the encouragement of transactions freely entered into by the parties”].

Here, a plain reading of the forum selection clause clearly illustrates the parties’ intention to preselect possible venues for trial and to waive any objection which may have been otherwise raised. Courts should not interfere with the negotiation process and the subsequent agreements unless unreasonable or fraudulent, which would make the contract void or voidable. Defendant in this action signed a contract agreeing that any county in New York is a proper venue to adjudicate all matters related to the contract at hand. To allow defendant to change venue to Kings County, we would be virtually and unjustifiably rewriting the contract.

Accordingly, it is hereby

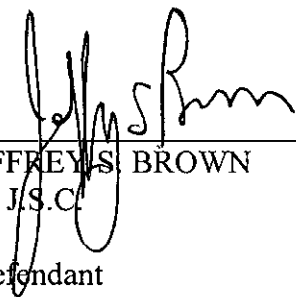
ORDERED, that defendants’ motion to transfer venue from Nassau County to Kings County is **DENIED**; and it is further

ORDERED, that counsel for the parties shall appear at a preliminary conference at the Supreme Courthouse, 100 Supreme Court Drive, Mineola, New York, lower level, on **September 27, 2018, at 9:30 a.m.** No adjournments of this conference will be permitted absent the permission of or order of this court. All parties are forewarned that failure to attend the conference may result in a judgment by default, the dismissal of pleadings (*see* 22 NYCRR 202.27) or monetary sanctions (22 NYCRR 130-2.1 et seq.).

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
August 20, 2018

ENTER :



HON. JEFFREY S. BROWN
J.S.C.

Attorneys for Plaintiff
Gene W. Rosen, Esq.
147-10 7th Avenue
Kew Gardens Hills, NY 11367
718-339-0855
3475788793@fax.nycourts.gov

Attorneys for Defendant
Amos Weinberg, Esq.
49 Somerset Drive South
Great Neck, NY 11020-1821
516-829-3900
5168293915@fax.nycourts.gov

ENTERED
AUG 20 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE