

<b>Geiger v Town Sports Intl., LLC</b>
2019 NY Slip Op 32924(U)
October 2, 2019
Supreme Court, Kings County
Docket Number: 510376/2019
Judge: Loren Baily-Schiffman
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.

At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the *Ind* day of October, 2019.

**PRESENT: HON. LOREN BAILY-SCHIFFMAN**  
JUSTICE

KIRA GEIGER,  
Plaintiff,  
- against -  
TOWN SPORTS INTERNATIONAL, LLC  
Defendant.

Index No.:510376/2019  
Motion Seq. # 1  
DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	<u>PAPERS NUMBERED</u>
Notice of Motion, Affidavits, Affirmation and Exhibits	1
Affirmation in Opposition to Cross-Motion	2
Plaintiff's Reply Affirmation, Affidavit and Exhibits	3

Upon the foregoing papers Defendant, Town Sports International, LLC ("Defendant"), move this Court for an Order pursuant to CPLR §§ 501, 510 and 511(b) changing the place of trial in this action from Kings County to Westchester County.

**Background**

This is a personal injury action arising from alleged injuries Keira Geiger ("Plaintiff") sustained while using fitness equipment at Defendant's fitness club, on November 20, 2017. Plaintiff is a resident of Kings County. On October 5, 2017, Plaintiff entered into membership agreement with Defendant. The agreement contains the following provision that is the subject of this motion:

4.5 **Governing Law; Jurisdiction.** These terms and conditions shall be governed in all respects by the substantive laws of the state in which the cause of action arises, without regard for conflicts of law principles of such state. With respect to personal

KINGS COUNTY CLERK  
FILED  
2019 OCT -4 AM 8:23

jurisdiction, you hereby irrevocably submit to personal jurisdiction in any action brought in any court, federal or state having subject matter jurisdiction arising under this contract within the location set forth below, and you hereby waive, to the fullest extent permitted by law, the defenses of lack of personal jurisdiction, inconvenient forum, and improper venue to the maintenance of any action. You hereby waive your right to a trial by jury.

State of Where Cause of Action Arises                      Venue/Jurisdiction

...	...
New York	County of Westchester, NY

Defendant argues that the above provision constitutes a forum selection clause, and venue is therefore improper in Kings County. Plaintiff argues that the provision in question is *not* a forum selection clause, but rather is a waiver of the right to challenge jurisdiction if Defendant brings an action against plaintiff in Westchester County. Plaintiff thus maintains that venue in Kings County is proper, notwithstanding the above provision.

Discussion

Under **CPLR § 503(a)** “[e]xcept where otherwise prescribed by law, 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.” Additionally, under **CPLR § 501**, a “written agreement fixing place of trial, made before an action is commenced, shall be enforced upon a motion for change of place of trial.” 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. *Molino v Sagamore, 105 AD3d 922, 923 (2<sup>nd</sup>*

**Dept. 2013).** However, in cases of ambiguity, a contractual provision must be construed most strongly against the party who drafted it and favorably to the party who had no say in selecting its language. **67 Wall St. Co. v Franklin Natl. Bank, 37 NY2d 245, 249 (1975); Majer v Schmidt 169 Ad2d 501, 505 (1<sup>st</sup> Dept. 1991).**

In the instant case, the plain meaning of the subject provision is ambiguous, and whether it functions as a forum selection clause is unclear. Adding to the ambiguity is a string of irreconcilable cases from the New York Supreme Court where other fitness club members, who were bound by the same agreement, brought actions against Defendant. For example, **Porat v Town Sports International, LLC (Index No.: 116658/2018 Sup. Ct. New York County, J. Rakower); Delaney v Town Sports International, LLC (Index No.: 150099/2014 Sup. Ct. New York County, J. Edmead); Cashell v Town Sports International, LLC (Index No.: 206090/2010 Sup. Ct. Queens County, J. Weiss)** found this provision to be an enforceable forum selection clause. However, **Naymon v Town Sports International, LLC (Index No.: 504924/2019 Sup. Ct. Kings County, J. Sweeney); Lavon v Town Sports International, LLC (Index No.: 512899/2018 Sup. Ct. Kings County, J. Silber); Villon v Town Sports International, LLC (Index No.: 107201/2011 Sup. Ct. New York County, J. Mills); Stein v Town Sports International, LLC (Index No.: 103910/2010 Sup. Ct. New York County, J. Madden)** found that this provision was either not a forum selection clause, or was ambiguous, and venue was proper in counties other than Westchester. As New York Supreme Court Justices differ over the meaning of this provision, it is obviously ambiguous and will be construed against its drafter, Defendant.

Accordingly, it is HEREBY

ORDERED that Town Sports International, LLC's motion to change the place of trial is denied.

The parties' remaining contentions are without merit.

This is the Decision and Order of the Court.

ENTER,



LOREN BAILY-SCHIFFMAN

JSC

**HON. LOREN BAILY-SCHIFFMAN**

*Handwritten initials*  
2019 OCT -4 AM 8:23  
KINGS COUNTY CLERK  
FILED