

B. Glance Enters. LLC v Family Fin. Ctrs., LLC

2022 NY Slip Op 34217(U)

December 13, 2022

Supreme Court, New York County

Docket Number: Index No. 651746/2020

Judge: Dakota D. Ramseur

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DAKOTA D. RAMSEUR PART 34M

Justice

-----X
 B. GLANCE ENTERPRISES LLC INDEX NO. 651746/2020
 Plaintiff, MOTION DATE N/A
 MOTION SEQ. NO. 001

- v -

FAMILY FINANCIAL CENTERS, LLC, **DECISION + ORDER ON MOTION**
 Defendant.

-----X
 The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32
 were read on this motion to/for DISMISSAL.

In March 2020, plaintiff B. Glance Enterprises LLC commenced the instant action against defendant Family Financial Centers, LLC over defendant’s alleged failure to pay a sum due under an agreement to terminate a franchise contract that the parties had previously entered in 2014. Plaintiff’s causes of action are for breach of contract, breach of the implied covenant of good faith and fair dealing, fraudulent and unfair business practices under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, and punitive damages. In this motion sequence, defendant moves to dismiss the complaint under CPLR 3211 (a) (2), asserting that the Court lacks subject matter jurisdiction over the cause of action, or alternatively, under CPLR 327(a) for forum non-conveniens. (Mot. Seq. 001.) Additionally, defendant moves for dismissal under CPLR 3211 (a) (7) for failure to state a cause of action. Plaintiff opposes each branch of the motion.

BACKGROUND

In October 2014, defendant Family Financial Centers, LLC (hereinafter “Family Financial”)—a Delaware corporation with a place of business in Doylestown, Pennsylvania—entered into a franchise agreement and area agreement with plaintiff B. Glance Enterprises LLC (hereinafter “B. Glance”)—a Florida limited liability company. Under the agreements, Family Financial granted B. Glance the rights to operate a Family Financial Center in Florida in return for a lump-sum payment and a percentage of the franchisee’s revenue. Section 23 of the franchise agreement provides that “all claims arising out of or related to this Agreement and the relationship hereby shall be governed by and construed under the substantive laws of the Commonwealth of Pennsylvania, without regard to conflict of laws principles.” (NYSCEF doc. no. 9, franchise agreement.) The area agreement reaffirms that any dispute shall be governed by Pennsylvania substantive law but also provides, “Franchisor and Representative agree that any action brought under this Agreement shall be exclusively brought in the Buck’s County,

Pennsylvania Court of Common Pleas or the United States District Court for the Eastern District of Pennsylvania. (NYSCEF doc. no. 10 at ¶18, area agreement.)

In 2018, Family Financial and B. Glance mutually agreed to terminate the relationship under both agreements. They executed a termination agreement (NYSCEF doc. no. 11) that required, among other things, (1) Family Financial to pay 25 percent of royalties from a separate Naples, Florida franchise (so long as it remains in business) totaling \$87,000; and (2) Family Financial to pay B. Glance 25 percent of a net franchise fee (up to \$87,000) should it sell another franchise in B. Glance's former territory. (*Id.*) The agreement provides "this agreement is governed by and under the jurisdiction of the laws of the Commonwealth of Pennsylvania. (emphasis added)" (*Id.*) The termination agreement is dated February 21, 2018.

In 2017, Family Financial filed a Uniform Franchise Consent to Service of Process in the State of New York. According to that document, Family Financial appointed the Secretary of State for service of process in "an action or proceeding against it arising out of or in connection with the sale of franchises or a violation of the franchise laws of [the] State, and consents that an action or proceeding against it may be commenced in a court of competent jurisdiction and proper venue within that State." (NYSCEF doc. no. 19, Uniform Franchise Consent.)

B. Glance commenced the instant action in March 2020. It alleges that Family Financial did not make royalty payments as required by the termination agreement despite receiving revenue from the Naples franchise. (NYSCEF doc. no. 1, summons and complaint.) Accordingly, B. Glance asserts causes of action for breach of contract and breach of the covenant of good faith and fair dealing. It also alleges that Family Financial violated Pennsylvania's Unfair Trade Practices and Consumer Protection Law over purportedly false representations that Family Financial made regarding the status of its Naples franchise. (*Id.*)

In the instant motion, Family Financial moves to dismiss under CPLR 3211 (a) (2) for lack of subject matter jurisdiction, or alternatively, CPLR 327 (a) for forum non-conveniens. It contends that the causes of action are unconnected to this forum: B. Glance is a Florida corporation; Family Financial is either a Delaware or Pennsylvania corporation; none of the events giving rise to the action took place in New York; the original agreements and the termination agreement are governed by Pennsylvania law; the area representation agreement has a forum selection clause; and B. Glance alleges a violation of Pennsylvania statute—not New York statute. (NYSCEF doc. no. 12, mem. of law in support.) In opposition, B. Glance argues that the termination agreement—in its view, the only relevant agreement—does not have a genuine forum selection clause, which means that plaintiff may bring suit in this forum; that this forum is not inconvenient given the respective locales are a short distance apart; and that New York has an inherent interest in preventing franchises from committing frauds in its jurisdiction and Family Finance in fact has a franchise in New York. (NYSCEF doc. no. 25, mem. of law in opp.)

DISCUSSION

This Court is a court of original, unlimited, and unqualified jurisdiction (*Fry v Village of Tarrytown*, 89 NY2d 714, 718 [1997]; *Kagen v Kagen*, 21 NY2d 532, 537 [1968]; see NY Const,

art VI, §7) and it is competent to entertain all causes of actions unless its jurisdiction has been specifically proscribed. (*See ABN AMRO Bank, N.V. v MBLA Inc.*, 17 NY3d 208, 223 [2011], citing *Thrasher v United States Liab. Ins. Co.*, 19 NY2d 159, 166 [1967].) Since the court's subject matter jurisdiction is derived from the New York Constitution, neither acts of the Legislature nor contracts entered into by private parties may divest the court of its jurisdiction. (*Lischinskaya v Carnival Corp.*, 56 Ad3d 116, 122-123 [2d Dept 2008] ["it axiomatic that a court cannot be divested of its subject matter jurisdiction by contract"]; *Landmark Ventures, Inc. v Birger*, 147 Ad497 [1st Dept 2017]; *CDR Creances S.A.S v Cohen*, 77 AD3d 489, 491 [1st Dept 2010].)

Contractual forum selection clauses, then, do not implicate the court's subject matter jurisdiction; rather, they are properly considered documentary evidence that may provide a basis for dismissal under CPLR 3211 (a) (1) or under CPLR 327 for forum non-conveniens. (*See Landmark Ventures*, 147 AD3d at 497 ["A contractual forum selection clause is documentary evidence that may provide a proper basis for dismissal pursuant to CPLR 3211 (a) (1)"]; *Lischinskaya*, 56 Ad3d at 123 ["Since the Supreme Court was not without subject matter jurisdiction...it was not foreclosed from considering the availability of granting relief to plaintiff pursuant to CPLR 327"].) Accordingly, rather than analyze Family Financial's motion under CPLR 3211 (a) (2), it will consider its arguments under CPLR 3211 (a) (1) and CPLR 327. (*See Somerset Fine Hom Bldg., Inc. v Simplex Indus., Inc.*, 2018 NY Slip Op 51845 [U] *2 [Sup Ct. Suffolk County 2018].)

Arguments Under CPLR 3211 (a) (1)

Family Financial contends that the Court should consider the original agreements and termination agreement together rather than individually. (NYSCEF doc. no. 12.) As described above, the original agreements contain arguably clearer expressions of the parties' intent to litigate in Pennsylvania: both have a Pennsylvania choice of law provision, and the area representation agreement has a specific forum selection clause that requires an action thereunder to be brought either in Pennsylvania state court or the United States District Court for the Eastern District of Pennsylvania. By contrast, the termination agreement merely provides that "this agreement is governed by and under the jurisdiction of the laws of the Commonwealth of Pennsylvania." (NYSCEF doc. no. 11.) Together, Family Financial asserts that the three agreements establish Pennsylvania as the exclusive forum in which B. Glance must bring its action.

The problem with interpreting the termination agreement alongside the original agreements is that plaintiff's claims arise *only* under the termination agreement, i.e., the termination agreement expressly released the parties from any further obligations under the two original agreements. (*Id.*) Viewed separately, then, the language of the termination agreement—the "governed by and under the jurisdiction" phrase—is ambiguous as to whether the parties intended for Pennsylvania to be the exclusive forum for litigation. (*Compare Global Seafood Inc. v Bantry Bay Mussels Lts.*, 659 F3d 221, 225-226 [2d Cir 2011] [holding that a forum selection clause stating "Agreement is governed by Irish Law and the Irish Courts," without specific language attesting to an intent to make Irish Courts the *only* forum available, does not impart a clear and unambiguous intent by the parties to confer exclusive jurisdiction on Irish Courts]; with

Phillips v Audio Active, Ltd., 494 F3d 378, 386-387 [2d Cir 2007] [holding that the language “any legal proceedings that may arise of [the agreement] are to be brought in England” conferred exclusive jurisdiction in England].) Because the termination agreement does not unambiguously require the action to be brought exclusively in Pennsylvania, Family Financial has not demonstrated entitlement to dismissal under CPLR 3211. (See *John Boutari & Sons, Wines, & Spirits, S.A. v Attiki Imps. & Distribs. Inc.*, 22 F3d 51, 52-53 [2d Cir. 1994].)

Arguments Under CPLR 327

CPLR 327 provides courts with the power to stay or dismiss an action when it finds “that in the interest of substantial justice the action should be heard in another forum.” (CPLR 327; *Sambee Corp. v Mohamed Moustafa*, 216 Ad2d 196, 198 [1st Dept 1995].) The party challenging the chosen forum bears the burden of illustrating which relevant private or public interest factors militate against accepting the litigation. (*Thor Gallery at S. DeKalb, LLC v Reliance Mediaworks (USA) Inc.*, 131 Ad3d 431 [1st Dept 2015].) Courts consider, among other things, (1) the burden on New York courts, (2) the potential hardship to defendants; (3) the availability of an alternative forum for plaintiff to bring the action; (4) the residency of the parties; (5) where the underlying transaction occurred, and (6) the interest of New York in deciding the issues involved in the action. (*Id.* at 432; *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474 [1984].)

As Family Finance has demonstrated, each of these factors weigh against New York as a forum for the instant action. Neither party is a resident of New York: B. Glance is a Florida resident, and Family Finance, with its principal place of business in Pennsylvania, is a Pennsylvania resident. (See CPLR 503 [c].) The underlying transactions or events giving rise to this action did not occur in New York; the original agreements required B. Glance to make payments to Family Finance in return for rights to franchises in a designated area in Florida, while the termination agreement requires Family Finance to make payments based on the revenues it receives from separate franchise in Florida. An alternative forum is available in either Pennsylvania state court or a federal district court for Pennsylvania. Moreover, requiring B. Glance to litigate in Pennsylvania does not offend any notion of fairness given it had previously consented to the forum selection clause in the area representation agreement.

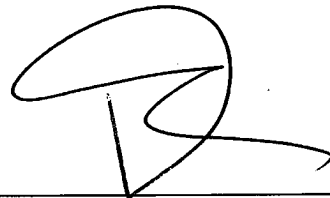
The interest New York has in deciding the substantive issues involved in this case is slight. The only connection between B. Glance’s fraud allegations and New York as forum is through Family Finance’s one franchise in New York. But B. Glance does not assert that the New York franchise is involved or implicated by the allegations in the complaint. Even assuming New York’s Franchise Registration Law signifies that the State has a strong vested interest in ensuring franchises registered in the state do not commit fraud within the state, however, compelling state interests do not mandate retention of a case with only a tenuous connection to New York (*Estate of Kainer v UBS AG*, 37 NY3d 460, 467 [2021]; *Mashreqbank PSC v Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 NY3d 129, 137 [2014] [New York’s compelling interest in protecting the integrity of its banks in the face of a foreign national’s alleged \$150 million fraudulent transaction insufficient to warrant retention of jurisdiction].) In comparison, Pennsylvania undoubtedly has a strong interest in arbitrating alleged violations of its own statutes. Under these circumstances, the court exercises its discretion to dismiss the cause of action on forum non-conveniens grounds.

Accordingly, it is hereby

ORDERED that defendant Family Financial Center LLC's motion to dismiss pursuant to CPLR 327 on forum non-conveniens grounds is granted and the complaint is dismissed; and it is further

ORDERED that counsel for defendant shall serve a copy of this order, along with notice of entry on all parties within ten (10) days.

This constitutes the Decision and Order of the Court.



12/13/2022
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/> REFERENCE
			<input type="checkbox"/>	<input type="checkbox"/> FIDUCIARY APPOINTMENT