

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

LIBERTY CITY CHURCH OF CHRIST, INC.;)
MARY DINISH; KAUIHA SMITH; LARRY)
RUCKS; and ROBERT BURKE, individually)
and on behalf of a class of similarly situated)
persons,)

Plaintiffs,

v.

EPHREN TAYLOR; EPHREN TAYLOR, SR.;)
MESHELLE TAYLOR; CITY CAPITAL)
CORPORATION; ERX ENERGY, LLC;)
EQUITY TRUST COMPANY; ROBERT)
BATT; ALAN LIPINSKI; and DONALD M.)
MACINTYRE; and DOES 1–15,)

Defendants.

Case No. 5:12-CV-04392 EJD

**ORDER GRANTING DEFENDANTS
EQUITY TRUST’S AND ROBERT
BATT’S MOTIONS TO DISMISS**

[Re: Docket Nos. 19, 28]

Presently before the Court are Defendants Equity Trust Company’s (“Equity Trust”) and Robert Batt’s (“Batt”) Motions to Dismiss the Complaint brought by Plaintiffs Liberty Church of Christ, Inc., Mary Dinish, Kauisha Smith, Larry Rucks, and Robert Burke (collectively “Plaintiffs”). The Court has found these matters appropriate for decision without oral argument pursuant to Local Civil Rule 7–1(b), and vacated the corresponding hearing date. The Court has determined that the motions shall be granted for the foregoing reasons.

I. Background

Plaintiffs allege they are victims of a “Ponzi scheme” operated by Defendants Ephren Taylor, Ephren Taylor, Sr., and Meshelle Taylor through Defendants City Capital Corporation, and

1 ERX Energy, LLC. Alan Lipinski and Donald MacIntyre have been named as defendants in their
2 capacity as officers of City Capital and ERX Energy. In the Complaint, Plaintiffs allege that they
3 were fraudulently induced into making investments through self-directed individual retirement
4 accounts (“SDIRAs”). The Complaint states that Equity Trust administered the SDIRAs, and that
5 Batt was an employee of Equity Trust involved in the marketing and solicitation of the SDIRAs.

6 Three of the named Plaintiffs—Dinish, Smith, and Rucks (collectively “the Equity Trust
7 Plaintiffs”)—are customers of Equity Trust and have executed Custodial Account Agreements for
8 their SDIRAs. See Decl. of Jeffery F. Bartlett, Docket Item No. 20, ¶¶ 8–10. The other named
9 Plaintiffs—Liberty Church of Christ and Burke—are not alleged to have been customers of Equity
10 Trust.

11 According to both of the present Motions to Dismiss, each of the Custodial Account
12 Agreements contains the following forum selection clause:

13 Any suit filed against custodian arising out of or in connection with this Agreement
14 shall only be instituted in the county courts of Lorain County, Ohio where custodian
15 maintains its principal office and you agree to submit to such jurisdiction both in
16 connection with any such suit you may file and in connection with any which we
17 may file against you.

18 Bartlett Decl. Exs. A, B, and C § 8.15. The Agreements also contain a choice of Ohio law
19 provision. Id. Equity and Batt also contend that each time Plaintiffs made investments through the
20 SDIRAs they executed Direction of Investment forms containing similar forum selection clauses.

21 On August 21, 2012, Plaintiffs filed their Complaint alleging nineteen causes of action
22 individually and on behalf of a class of similarly situated persons. See Docket Item No. 1. On
23 October 18, 2012, Equity Trust filed its Motion to Dismiss for lack of personal jurisdiction
24 (pursuant to Federal Rule of Civil Procedure 12(b)(2)) and improper venue (pursuant to Rule
25 12(b)(3)). See Docket Item No. 18. Equity Trust has since withdrawn its lack of personal
26 jurisdiction argument. See Docket Item No. 24. On November 14, 2012, Batt filed his Motion to
27 Dismiss for lack of personal jurisdiction and improper venue. See Docket Item No. 28.

1 **II. Legal Standard**

2 Under Federal Rule of Civil Procedure 12(b)(3), a defendant may move to dismiss a
3 complaint for improper venue. Even if venue would otherwise be proper under 28 U.S.C. § 1391, a
4 defendant may move to dismiss under Rule 12(b)(3) on the basis of a forum selection clause. See
5 Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 324 (9th Cir. 1996). When considering a motion to
6 dismiss pursuant to Rule 12(b)(3), a court need not accept the pleadings as true and may consider
7 facts outside of the pleadings. Id. Once the defendant has challenged the propriety of venue in a
8 given court, the plaintiff bears the burden of showing that venue is proper. Piedmont Label Co. v.
9 Sun Garden Packing Co., 598 F.2d 491, 496 (9th Cir.1979). Pursuant to 28 U.S.C. § 1406(a), if the
10 court determines that venue is improper, the court must either dismiss the action or, if it is in the
11 interests of justice, transfer the case to a district or division in which it could have been brought.
12 Whether to dismiss for improper venue, or alternatively to transfer venue to a proper court, is a
13 matter within the sound discretion of the district court. See King v. Russell, 963 F.2d 1301, 1304
14 (9th Cir. 1992). Where federal court jurisdiction is based on diversity, the Ninth Circuit has
15 instructed district courts to apply federal law to interpret the forum selection clause. Manetti-
16 Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509 (9th Cir. 1988).

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18 **III. Discussion**

19 Defendants Equity Trust and Batt seek to enforce the forum selection clause contained in
20 the Custodial Account Agreements. As an initial matter, the Court notes that any claims against
21 Batt relating to activities that occurred within the scope of his employment with Equity Trust are
22 subject to the forum selection clause. See Manetti-Farrow, 858 F.2d at 514 n.5 (“We agree with the
23 district court that the alleged conduct of the non-parties is so closely related to the contractual
24 relationship that the forum selection clause applies to all defendants.”); Comerica Bank v.
25 Whitehall Specialties, Inc., 352 F. Supp. 2d 1077, 1082 n.6 (C.D. Cal. 2004). As such, because
26 Plaintiffs do not appear to bring suit against Batt in his individual capacity but rather as an
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1 employee of Equity Trust, the same analysis vis-à-vis the forum selection clause will apply to
2 Equity Trust as well as Batt.

3 Forum selection clauses are presumptively valid and enforceable; the party seeking to avoid
4 enforcement bears a “heavy burden” to establish grounds for unenforceability. M/S Bremen v.
5 Zapata Off-Shore Co., 407 U.S. 1, 17 (1972); Doe 1 v. AOL LLC, 552 F.3d 1077, 1083 (9th Cir.
6 2009). Courts in the Ninth Circuit set aside forum selection clauses only if:

7 (1) its incorporation into the contract was the result of fraud, undue influence, or
8 overweening bargaining power; (2) the selected forum is so gravely difficult and
9 inconvenient that the complaining party will for all practical purposes be deprived
10 of its day in court; or (3) enforcement of the clause would contravene a strong
11 public policy of the forum in which the suit is brought.

12 Argueta, 87 F.3d at 325 (internal citations and quotation marks omitted).

13 Plaintiffs first argue that the forum selection clause should not be enforced because doing
14 so would “substantially impair[] the substantive rights of class members because Ohio law imposes
15 significant limits on class members’ ability to recover damages.” Pl.’s Opp’n to Def. Equity Trust’s
16 Mot. to Dismiss 12. However, in only pointing to the possibility that damages would be limited if
17 this case were brought in an Ohio state court, Plaintiffs fail to sufficiently show that they would be
18 entirely deprived of their right to pursue their claims if the forum selection clause were enforced.
19 Argueta, 87 F.3d at 325. The Court also notes that Plaintiffs have not shown that Ohio state law
20 would definitely apply if this action were brought in Ohio state court, or as may be the case, that
21 Ohio law would not be applied in the present forum given the Custodial Account Agreement’s
22 choice of law provision.

23 Plaintiffs also argue that enforcement of the forum selection clause would contravene
24 California public policy, which favors class actions. As an illustration of this assertion, Plaintiffs
25 cite language from the California Supreme Court opinion in Vasquez v. Superior Court:

26 Frequently numerous consumers are exposed to the same dubious practice by the same
27 seller so that proof of the prevalence of the practice as to one consumer would provide
28 proof for all. Individual actions by each of the defrauded consumers is often impracticable
because the amount of individual recovery would be insufficient to justify bringing a

1 separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct. A
2 class action by consumers produces several salutary by-products, including a therapeutic
3 effect upon those sellers who indulge in fraudulent practices, aid to legitimate business
4 enterprises by curtailing illegitimate competition, and avoidance to the judicial process of
the burden of multiple litigation involving identical claims. The benefit to the parties and
the courts would, in many circumstances, be substantial.

5 4 Cal. 3d 800, 808 (1971). However, this exact language is cited in numerous Ohio state court
6 opinions in support of the notion that Ohio has a similar policy favoring class action. See, e.g.,
7 Cope v. Metro. Life Ins. Co., 82 Ohio St. 3d 426, 429 (1998); In re Consol. Mortg. Satisfaction
8 Cases, 97 Ohio St. 3d 465, 470 (2002); Ford Motor Credit Co. v. Agrawal, 2011 WL 6317451, at
9 *7 (Ohio App. 8th Dist. Dec. 15, 2011); Pyles v. Johnson, 143 Ohio App. 3d 720, 737 (4th Dist.
10 2001). As such, Plaintiffs have not met their burden of showing that bringing the action in Ohio
11 would contravene California public policy so as to sufficiently counter Defendants' Motions to
12 Dismiss.

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14 **IV. Conclusion and Order**

15 For the aforementioned reasons, Plaintiffs have failed to meet their burden of showing that
16 the forum selection clause should not be enforced. Accordingly, the Court grants the Equity Trust's
17 and Batt's Motions to Dismiss for improper venue. The Court will not address the lack of personal
18 jurisdiction argument in Batt's Motion. The claims asserted in the Complaint against Equity Trust
19 and Batt are thus dismissed without prejudice for improper venue.

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21 **IT IS SO ORDERED.**

22 Dated: February 15, 2013

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24 EDWARD J. DAVILA
25 United States District Judge