Mikhlyn et al v. Bove et al Doc. 198

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May 10, 2006

VIA ECF and FEDERAL EXPRESS
The Honorable Leonard D. Wexler
Long Island Federal Court House
944 Federal Plaza
Central Islip, New York 11722

Re: Cain. v. J.P.T. Automotive, Inc. d/b/a Five Town Toyota Civil Action No. 05-CV-3805

Dear Judge Wexler:

We represent third-party defendants Innovative Aftermarket Systems, Inc. and Innovative Aftermarket Systems, L.P. (collectively "IAS") in the above-captioned matter. Because the third-party action contravenes a clear forum-selection clause in the governing contract, we write pursuant to Your Honor's Rules to request permission to move for dismissal for improper venue. As described below, IAS has strong grounds for such a motion.

The third-party action of defendant and third-party plaintiff J.P.T. Automotive, Inc. d/b/a Five Town Toyota ("JPT") against IAS concerns the paintless dent repair ("PDR") program JPT offered to its customers. A former customer, Anthony Cain, seeks class certification and alleges that JPT's PDR program was undisclosed and unlicensed insurance in violation of the Truth in Lending Act, 15 U.S.C. § 1601, and New York General Business Law § 349.[1]

Claiming that it is entitled to indemnification from IAS for any liability it has to its customers because of the PDR program, JPT relies upon the January 19, 2004 Dealer

1 The premise of Cain's complaint – that the PDR program is insurance, rather than warranty protection – is utterly without merit. However, the merits of the underlying action are not pertinent to the anticipated dismissal motion.

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Agreement ("the Agreement") it entered into with IAS. (Compl. ¶ 12).[2] Yet, the Agreement – which JPT failed to attach to its Complaint – not only sets forth the parties' respective rights and obligations with regard to the PDR program, but clearly provides that "venue for any controversy arising under, related to . . . the Agreement shall be in Travis County, Texas." Accordingly, the Eastern District of New York is not the proper venue for JPT's claims against IAS, all of which relate to the PDR program, and the Complaint must be dismissed pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure or, alternatively pursuant to 28 U.S.C. § 1406(a).

The existence of a forum-selection clause creates a strong presumption in favor of the forum designated by the clause. Vitricon, Inc. v. Midwest Elastometers, Inc., 148 F. Supp.2d 245 (E.D.N.Y. 2001) (Wexler, J.). A party who seeks to avoid enforcement of a forum selection clause bears the heavy burden of overcoming the clause's presumptive validity. Zurich Ins. Co. v. Prime, Inc., 2005 WL 1902774, at *2 (S.D.N.Y. Aug. 9. 2005). To do so, the party must demonstrate that enforcement would be unreasonable and unjust, or that the clause is the result of fraud or overreaching. Id. A forum selection clause will not be found unreasonable or unjust unless "its enforcement will for all practical purposes deprive the complaining party of its day in court due to the grave inconvenience or unfairness of the selected forum, or if the clause contravenes a strong public policy of the forum state." Id. (citations omitted).

JPT cannot possibly meet its heavy burden here where, as a sophisticated business entity, it freely entered into a straightforward, one-page contract with IAS containing a clear forum-selection clause. That JPT is now unhappy with its bargain does not permit it to change the terms of the Agreement after the fact. Nor will JPT suffer any unfair prejudice. In the unlikely event JPT is found liable in the underlying action proceeding before this Court, it will be free to pursue any indemnification claims it believes it has against IAS in Travis County, Texas. Accordingly, there is no reason, let alone a compelling one, to depart from the Second Circuit's strong policy in favor of enforcing forum-selection clauses.

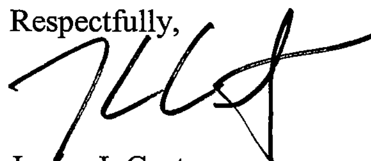
Zurich Ins. Co. v. Prime Inc. 2005 WL 1902774 (S.D.N.Y. 2005), which also involved a third-party claim for indemnification, is particularly instructive. Relying upon a forum-selection clause that designated Missouri, the third-party defendant moved for dismissal for improper venue. As a threshold matter, the court observed that third-party defendants have standing to seek dismissal when they invoke forum selection clauses. Zurich Insurance Co., 2005 WL 1902774, at *1 (citing Glyphics Media, Inc. v. M.V. "CONTI SIGNAPORE", 2003 WL 1484145 (S.D.N.Y. Mar. 21, 2003); Laserdynamics Inc. v. Acer America Corp., 209 F.R.D. 388 (S.D. Tex. 2002)).

The Zurich court then held that the forum selection clause at issue was valid, enforceable and did not violate a strong public policy of the forum state. Accordingly, the court granted the

2 JPT's third-party action also names Enterprise Financial Group, Inc. ("EFG"), because the customer agreement form identified EFG as the party obligated to perform the PDR service. (Compl. ¶ 11).

motion and dismissed the third-party complaint. The same rationale applies here with equal force, and IAS submits that this Court should dismiss JPT's third-party claims against IAS.[3]

Respectfully,



James J. Coster

cc: Warren A. Herland, Esq. (via ECF)
Dennis R. Hirsch, Esq. (via ECF)
Glenn B. Manishin (via ECF)

3 The forum selection clause contained in the Agreement does not contravene the public policy of the state of Texas, which has joined the majority of jurisdictions in recognizing the validity of forum selection clauses. Lafargue v. Union Pacific R.R., 154 F. Supp.2d 1001, 1005-1006 (S.D. Tex 2002) (holding that severance and transfer of third-party claim was appropriate under forum selection clause); Laserdynamics Inc. v. Acer America Corp., 209 F.R.D. 388 (S.D. Tex 2001).