

Leaf Funding, Inc. v Forum Foto Digital, Inc.

2006 NY Slip Op 30732(U)

December 4, 2006

Supreme Court, New York County

Docket Number: 110112/06

Judge: Richard B. Lowe III

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

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LEAF FUNDING, Inc.

Index No: 110112/06

Plaintiff

DECISION AND ORDER

FORUM FOTO DIGITAL, Inc., GEORGE
PAPAKONSTANTINOU and JOANNA
PAPAKONSTANTINOU,

Defendants

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

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RICHARD B. LOWE III, J:

Plaintiff Leaf Funding, Inc. ("Leaf Funding") brings this action against Forum Foto Digital, Inc. ("Forum Foto"), George Papakonstantinou, and Joanna Papakonstantinou (collectively, "the Defendants") for breach of a lease agreement. In the instant motion, the Defendants seek to dismiss Leaf Funding's complaint pursuant to CPLR 327 and CPLR 3211(a)(2) on the grounds of lack of jurisdiction and/or forum non conveniens.

BACKGROUND

Forum Foto is a New York corporation with its offices located in New York, New York. On or about December 31, 2004, it entered into a lease agreement with Afga Financial Group ("Afga"), a German company. The agreement provided that Forum Foto would lease complex

digital photographic developing hardware and software to use in its business. The photographic equipment required periodic maintenance, and the agreement provided that Afga would perform it. At the same time, George Papakonstantinou and Joanna Papakonstantinou entered into and executed a guaranty agreement, whereby they guaranteed Forum Foto's obligations under the lease agreement.

Afga neared insolvency and transferred the agreement to Afga Photo of North America, a Massachusetts company. Afga Photo then began to experience financial difficulties and transferred the agreement's right-to-payment component to Leaf Funding, a corporation organized under the laws of Delaware with its place of business there. The portion of the agreement relating to Afga's obligation to perform maintenance on the equipment was transferred to Integra Corporation, which is located in Texas.

On July 12, 2006, Leaf Funding commenced this action against the Defendants, contending that they were in breach of the lease agreement because they were delinquent in making payments. Previously, Leaf Funding commenced actions in Massachusetts, which were also based on an alleged breach of the lease agreement, against different lessees. On July 31, 2006, a number of these defendants commenced an action against Leaf Funding for failing to honor the agreement's maintenance provision. This potential class action has yet to be certified, and the Defendants are not named plaintiffs.

In the instant motion, the Defendants seek to dismiss the action on the grounds of lack of jurisdiction due to an alleged mandatory forum-selection clause, forum non conveniens, and judicial estoppel.

DISCUSSION

The traditional common-law rule is that “matters of procedure are governed by the laws of the forum.” (*Tanges v Heidelberg North America, Inc*, 93 NYS 2d 48 [1999].) “On the other hand, matters of substantive law fall within the course chartered by choice of law analysis.” (*Id.*) The lease agreement clearly states that “. . .in all respects [it will] be governed by, and construed in accordance with, the laws of the Commonwealth of Massachusetts.” (*Lease Agreement at 2, paragraph 24*) Accordingly, Massachusetts law would govern the substantive issues of this cause of action. However, since the proper-forum issue is procedural in nature, and that controversy is now before the this Court, New York law will guide its decision and order.

“A party may move for judgment dismissing one or more causes of action. . .on the grounds that. . .the court has no jurisdiction.” (*CPLR 3211(a)(2)*) “When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action. . .” (*CPLR 327(a)*) The Defendants aver three grounds for dismissal based on their contention that New York is not the proper forum. Each argument will be discussed in turn.

I. Forum-Selection Clause

The Defendants aver that the lease agreement contains a forum-selection clause that mandates that any action or proceeding arising out of the lease agreement is subject to Massachusetts’ jurisdiction; New York is therefore not the proper forum for this cause of action.

Leaf Funding contends that the forum-selection clause is permissive rather than mandatory, enabling it to select any proper forum to litigate this action.

“It is well-settled policy of the courts of this State to enforce contractual provisions for choice of law and selection of a forum for litigation.” (*Mark J. Boss et al v American Express Financial Advisors, Inc.*, 15 AD 3d 306 [1st Dept 2005].) “The words and phrases used by the parties must, as in all cases involving contract interpretation, be given their plain meaning.” (*Brook Group Ltd v JCH Syndicate*, 87 NYS 2d 530 [1996].) When “the plain meaning of the words used by the parties to [a] contract do not limit jurisdiction to a particular forum”, the forum-selection clause is permissive. (*Id.*)

Here, the agreement’s forum-selection clause provides that

“Lessee hereby consents to the jurisdiction and venue of the courts of the Commonwealth of Massachusetts in connection with any action or proceeding arising out of or related to this Agreement. . .”

(*Lease Agreement at 2, paragraph 24*)

In applying the forum-selection clause’s plain meaning, this Court finds that it is a permissive rather than a mandatory provision for the Massachusetts courts’ jurisdiction. The relevant language states that the Lessee *consents* to Massachusetts’ jurisdiction. The only obligation undertook is if Leaf Funding chose to bring this action in Massachusetts, the Defendants agreed to subject themselves to the Commonwealth’s jurisdiction. Indeed, as discussed *infra*, the Defendants would have to consent to Massachusetts because absent such an agreement, the Defendants have no contacts with Massachusetts other than the fact that Leaf Funding’s predecessor-in-interest did business there. Moreover, there is nothing in the provision that mandates Massachusetts as the only forum to resolve any disputes related to the lease agreement.

Absolute-meaning terms such as “must”, “sole”, or “only” are nowhere to be found in the clause. Accordingly, this Court finds nothing in the forum-selection clause that supports or requires this action’s dismissal from New York.

II. Forum Non Conveniens

The Defendants contend that New York is an improper forum because the lease agreement is substantively governed by Massachusetts law, and it would be proper to have this case litigated there. Leaf Funding avers that the parties transacted much of their business in New York, rendering it a proper forum.

“The burden rests upon the defendant challenging the forum to demonstrate relevant private and public interest factors which militate against accepting litigation.” (*Islamic Republic of Iran v Pahlavi*, 62 NY 2d 474 [Ct App 1984].) “Among the factors to be considered are the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which the plaintiff may bring the suit.” (*Bank Hapoalim Ltd v Banca Intesa*, 26 AD 3d 286 [1st Dept 2006].) “No one factor is controlling since the great advantage of the doctrine of forum non conveniens is its flexibility based on the facts and circumstances of each case.” (*Id.*)

Here, the fact that the Commonwealth’s law governs the agreement’s substantive issues does not require in and of itself that the action is litigated there. Indeed, it is not uncommon for a Court to apply another jurisdiction’s law when mandated. Accordingly, the analysis as to whether New York is a proper forum is not based on the fact that Massachusetts law will govern

the actions' substantive issues; rather it is based on the degree of the parties contacts in New York relative to the Commonwealth.

First, the Defendants will not experience a hardship if the case is litigated in New York. Indeed, Forum Foto is a New York Corporation with its principal place of business in New York, and George and Joanna Papakonstantinou are New York residents. Second, the documents for the lease agreement were signed in New York, and the equipment that is part of this action's subject matter is located in New York. Since the Defendants reside and the equipment is located in New York, there is no burden on the New York courts in hearing this action.

Accordingly, New York has a higher degree of contacts than Massachusetts in connection with the instant action. New York is the forum where a significant portion of the contacts occurred, and this Court finds no merit in the Defendants' argument that it is an inconvenient forum.

III Judicial Economy/Judicial Estoppel

The Defendants aver that because actions commenced by and against Leaf Funding in Massachusetts based on the lease agreement are pending, the doctrine of judicial estoppel is applicable. Alternatively, the Defendants ask this Court to stay the instant action pending the outcome of the Massachusetts' suits. Leaf Funding denies the doctrine's applicability.

"The doctrine of judicial estoppel or doctrine of inconsistent positions precludes [a] party who assumed [a] certain position in [a] prior legal proceeding and who secured [a] judgment in his or her favor from assuming [a] contrary position in another action simply because his or her actions have changed." (*Baje Realty Corp v Cutler*, 32 AD 3d 307 [1st Dept 2006].)

The doctrine is inapplicable in the instant action. First, Leaf Funding has not filed an action or taken a position in a prior case against the Defendants that differs from the present case. There are no other pending actions against *these* Defendants.

Second, the fact that Leaf Funding filed actions against other defendants in Massachusetts is not inconsistent with the present action. Indeed, Massachusetts is *a* proper forum because pursuant to the agreement, the lessees consented to its jurisdiction. But since the forum-selection clause is permissive, Leaf Funding is free to elect *any* forum that *is proper* for the particular parties involved. Indeed, the facts and circumstances of each case differ, including the location of the respective parties's residence/domicile and conduct related to the action. Moreover, Leaf Funding does not aver that Massachusetts is a wholly improper forum; rather it avers that New York is a more convenient forum for the instant action based upon the circumstances. This Court finds nothing inconsistent with Leaf Funding commencing an action in New York when the majority of the contacts occurred here compared to it commencing another action in Massachusetts when the parties to that action agreed to that jurisdiction.

Third, this Court finds that a *potential* class action suit against Leaf Funding, where the Defendants are not named plaintiffs, has no bearing on this instant action. Leaf Funding filed its action first, and therefore should be allowed to proceed with it regardless of an action against it in another jurisdiction. Accordingly, there is no basis to estopp Leaf Funding from filing this action in New York and no basis for staying this action pending the outcome of the Massachusetts litigation. The motion to dismiss and the request to stay the instant action are denied.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the Defendants' motion to dismiss is denied.

This shall constitute the final decision and order of this Court.

Dated: December 4, 2006

ENTER:


RICHARD B. LOWE III

RICHARD B. LOWE, III, J.S.C.

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