SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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MICHAEL DELANEY,

Index No.: 150099/14

Plaintiff,

Motion Seq. No. 001

-against-

TOWN SPORTS INTERNATIONAL, LLC,

Defendant.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for personal injuries, defendant Town Sports International, LLC ("TSI") moves pursuant to CPLR 501, 501 and 511(b) and in accordance with a written agreement between it and plaintiff Michael Delaney ("plaintiff") to change the venue of this action from New York County to Westchester County.

Factual Background

On June 24, 2012, plaintiff, who resides at 203 East 121st Street in Manhattan, became a member of TSI's New York Sports Club fitness center located at 502 Park Avenue in Manhattan (the "Gym") pursuant to a written agreement entered into on that date (the "Agreement"). The Agreement contains the following venue provision:

> **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 . . . With respect to personal 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 . . .

State of Where Cause of Action Arises	Venue/Jurisdiction
.....	
New York	County of Westchester, NY

Thereafter, plaintiff allegedly sustained personal injuries at the Gym on July 22, 2013 as a result of a defective workout machine, and commenced this action on January 7, 2014. On February 10, 2014, TSI answered the complaint and submitted a demand to change venue to Westchester County pursuant to CPLR 501, 510 and 511(b), which included a statement that pursuant to CPLR 511(b), plaintiff's written consent to change venue, if any, must be served within five days. Plaintiff did not submit such written consent. The instant motion was made on February 20, 2014.

Arguments

In the moving papers, TSI argues that CPLR 501 provides that a written agreement fixing the place of trial, made before an action is commenced, shall be enforced upon a motion for change of venue. Plaintiff alleges that he was a member of the Gym and was permitted to work out there pursuant to the Agreement, which requires actions arising in New York State to be venued in Westchester County. Thus, the above contractual forum selection clause is enforceable.

Case law provides that a contractual forum selection clause is *prima facie* valid and enforceable unless the challenging party shows it to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or 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. Here, the forum selection clause in the Agreement is none of these things.

Moreover, in other actions, this court has found the specific contractual forum selection clause involved in this litigation to be binding and enforceable.

No discovery has been conducted to date, including even a preliminary conference or depositions. Thus, as the case is in the early stages of discovery, no prejudice will occur by the change of venue. Also, TSI notes that its motion was timely made within 15 days of its demand to change venue.

In opposition, plaintiff argues that a change of venue would be unfair and improper, as all parties and witnesses, as well as the site of the alleged incident, are located in New York County. Moreover, there was significant inequality of bargaining power between the parties when plaintiff was required to submit to the Agreement's terms. Plaintiff's only choice was to enter into the Agreement with terms over which he had no power to negotiate, or to not have access to the Gym. Thus, plaintiff maintains that the Agreement is a contract of adhesion and therefore that the forum selection clause therein is invalid and unenforceable.

Also, there is the potential of significant hardship to proposed witnesses, such as the fitness center's managers and employees, who are witnesses to the alleged incident and are located in New York County.

Additionally, any third-parties who may be brought into the action by TSI, such as a maintenance company which may be responsible for the subject premises and/or workout machine, are likely located in New York County. Those entities are not in privity to the Agreement and thus are not bound by its forum selection clause. It follows that a third-party to motion to dismiss based on *forum non conveniens* will likely follow and TSI will not be able to enforce the clause as to such third-party defendants, thereby severely disadvantaging all parties.

In reply, TSI argues that it is undisputed that plaintiff executed the Agreement and that the cases relied upon by TSI are directly on point. Contrary to plaintiff's assertions, a party to a contract is presumed to know the contents thereof and to have assented to such terms. There is no evidence (let alone an affidavit from plaintiff) to support the claim that he was forced to sign the agreement or that it and the forum selection clause are unfair in any way. Plaintiff was free to decline to sign the agreement and join another fitness facility if he so desired.

The case cited by plaintiff in opposition as to this point is inapplicable, as the parties therein did not reside in the State of New York; the agreements at issue were not negotiated in New York; they involved business transactions which did not take place in New York; and the defendants would have had to travel 3,000 miles to defend the claim. Here, plaintiff resides in New York; the Gym is in New York; the Agreement was executed in New York; the alleged incident occurred in New York; and TSI's employees would not have to travel far if venue was changed to Westchester County, which is near New York County.

Moreover, the argument that the Agreement is a contract of adhesion (and thus that the forum selection clause is thus unenforceable) is meritless. CPLR 501 provides that such clause is enforceable, and the Agreement did not contain any terms that are unfair or arose from a disparity of bargaining power or oppressive tactics. Thus, plaintiff's case law in this regard is unavailing.

Also, the forum selection clause herein is not unreasonable, unjust, in contravention of public policy, fraudulent, overreaching, and a Westchester County venue would not be "so gravely difficult" that plaintiff would practically be deprived of his day in court. In short, plaintiff should not be heard to complain that the Agreement which he freely and voluntarily entered into is unfair.

As to plaintiff's contentions that the potential exists for significant hardship to TSI's employees, who may have witnessed the alleged incident, TSI avers that they will not experience any hardship by the change of venue. The cases relied on by plaintiff regarding potential hardship to TSI's employees are thus inapposite. Furthermore, plaintiff has not identified or disclosed any potential non-party witnesses or other third-parties who could possibly be inconvenienced in any way if venue is changed to Westchester County. TSI is also unaware of such potential witnesses or third-parties.

Discussion

CPLR 501 provides that, "[s]ubject to the provisions of subdivision two of [CPLR 510], written agreement fixing place of trial, made before an action is commenced, shall be enforced upon a motion for change of place of trial." CPLR 510 provides that "[t]he court, upon motion, may change the place of trial of an action where: (1) the county designated for that purpose is not a proper county; (2) there is reason to believe that an impartial trial cannot be had in the proper county; or (3) the convenience of material witnesses and the ends of justice will be promoted by the change. CPLR 511(b) provides that, "[t]he defendant shall serve a written demand that the action be tried in a county he specifies as proper. Thereafter the defendant may move to change the place of trial within fifteen days after service of the demand, unless within five days after such service plaintiff serves a written consent to change the place of trial to that specified by the defendant."[1] Here, plaintiff served no such written consent, and TSI made the instant motion

[1] However, "since defendant moved to change venue based on the written agreement (see CPLR 501), it was not required to serve a written demand for a change of venue with or prior to its answer before making the motion, and the motion needed only to be made "within a reasonable time after commencement of the action," as it was here (*Medina ex rel. Valentin v. Gold Crest Care Center, Inc.*, --- N.Y.S.2d ----, 2014 WL 2210371 [1st Dept 2014], *citing* CPLR 511[a]; *Hendrickson v. Birchwood Nursing Home Partnership*, 26 A.D.3d 187, 187, 807 N.Y.S.2d 876 [1st Dept 2006]).

within the timeframe specified by 511(b).

Forum selection clauses in contracts are *prima facie* valid and enforceable unless the resisting party demonstrates that enforcement of the clause is unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or that 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 (*see Brooke Group v. JCH Syndicate 488*, 87 N.Y.2d 530, 534 [1996]; *Sterling Nat. Bank as Assignee of NorVergence, Inc. v. Eastern Shipping Worldwide, Inc.*, 35 A.D.3d 222, 826 N.Y.S.2d 235 [1st Dept 2006]). Such clauses are enforced because they provide certainty and predictability in the resolution of disputes (*id.*).

Moreover, a party is presumed to know the contents of an agreement it signed and to have assented to its terms (*see British West Indies Guaranty Trust Co. v. Banque Internationale A Luxembourg*, 172 A.D.2d 234, 567 N.Y.S.2d 731 [1st Dept 1991]).

Here, it is undisputed that plaintiff entered into the Agreement, which contains an unambiguous clause mandating that actions arising in the State of New York shall be venued in Westchester County. Thus, TSI has demonstrated *prima facie* its entitlement to a change of venue.

Plaintiff fails to overcome TSI's showing in opposition. Plaintiff does not allege that the clause was procured by fraud or overreaching. Nor does he allege that an impartial trial cannot be obtained in Westchester County (*see* CPLR 510(2)). Moreover, plaintiff's argument that the Agreement is a "contract of adhesion" is unavailing, as he fails to show that TSI used high pressure tactics or deceptive language in the contract (*see Molino v. Sagamore*, 105 A.D.3d 922, 963 N.Y.S.2d 355 [2d Dept 2013] (the fact that agreement containing forum selection clause was

presented to plaintiffs at registration, and was not the product of negotiation does not render it unenforceable; general principles of forum selection clauses determinative of issue)). Here, like in *Molino*, the Agreement was presented when plaintiff desired to voluntarily join the Gym, and there are no allegations that plaintiff could not walk away if he believed the terms were too onerous (*Turner Const. Co. v. OC Iron Works, Inc.*, 19 A.D.3d 260, 796 N.Y.S.2d 918 [1st Dept 2005] ("There is no showing that the parties had any legal obligation to contract with one another . . . , or that defendant had no right to walk away if it felt the terms were too onerous")).

In response to plaintiff's conclusory claim that proposed witnesses, "such as TSI's managers and employees," who may have witnessed the alleged incident, may suffer hardship if venue is changed, TSI avers that such persons would not in fact be prejudiced. Also, plaintiff does not argue (let alone submit an affidavit) that he would suffer prejudice by a venue change. As such, plaintiff fails to establish that trial in Westchester County would be "so gravely difficult" that he would practically be deprived of his day in court (*see Brooke Group*, *supra*).

Plaintiff's further contention that potential third-parties who could be brought into the action and who would not be bound by the Agreement's forum selection clause would likely lead to a motion to dismiss based on *forum non conveniens* is speculative at best (*see Albanese v. West Nassau Mental Health Ctr.*, 208 A.D.2d 665, 617 N.Y.S.2d 821 [2d Dept 1994] (court declined to consider parties' vague and conclusory allegations of prejudice in deciding motion to change venue)). And, the cases cited by plaintiff in support of his contention involved third parties who were actually named in the action (*see May v. U.S. HIFU, LLC*, 98 A.D.3d 1004, 951 N.Y.S.2d 163 [2d Dept 2012]; *Brenstein v. Wysoki*, 77 A.D.3d 241, 907 N.Y.S.2d 49 [2d Dept 2010]) and no such "third-parties" have been identified, much less been named in the instant

action.

Lastly, the court notes that it has previously deemed the exact clause at issue to be valid and enforceable in the exact situation at bar: a motion by TSI to change venue from New York County to Westchester County where the alleged incident occurred in New York County (*see Porat v. Town Sports International*, Index No. 116658/2010 [Sup Ct New York Cty 2011] (Rakower, J.); *Cedeno v. Town Sports International*, Index No. 101566/11 [Sup Ct New York Cty 2011 (Mills, J.)).

Conclusion

Based on the foregoing, it is hereby

ORDERED that TSI's motion is granted, and venue of this action is changed from this court to Supreme Court, Westchester County. Upon service by TSI of a copy of this order with notice of entry and payment of appropriate fees, if any, the Clerk of this Court is directed to transfer the papers on file in this action to the Clerk of the Supreme Court, Westchester County; and it is further

ORDERED that TSI serve a copy of this order with notice of entry upon all parties and Clerk of this Court within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: June 4, 2014

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD