

**Merchant Cash & Capital, LLC v West Excavation & Grading, Inc.**

2017 NY Slip Op 31087(U)

April 10, 2017

Supreme Court, Nassau County

Docket Number: 609589/16

Judge: Roy S. Mahon

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This opinion is uncorrected and not selected for official publication.

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

Present:

**HON. ROY S. MAHON**

**Justice**

**MERCHANT CASH & CAPITAL, LLC,  
d/b/a BIZFI FUNDING,**

**Plaintiff(s),**

**- against -**

**WEST EXCAVATION and GRADING, INC., d/b/a  
WEST CONSTRUCTION, CP., DAVID HALL  
and YULANDA DO,**

**Defendant(s).**

**TRIAL/IAS PART 3**

**INDEX NO. 609589/16**

**MOTION SEQUENCE  
NO. 1 & 2**

**MOTION SUBMISSION  
DATE: February 9, 2017**

**The following papers read on this motion:**

<b>Notice of Motion</b>	<b>XX</b>
<b>Affidavit</b>	<b>X</b>
<b>Affirmation</b>	<b>X</b>
<b>Reply Affirmation</b>	<b>XX</b>
<b>Memorandum of Law</b>	<b>XX</b>

Upon the foregoing papers, the motion by the defendants for an Order changing the venue of this action, as of right, under CPLR 510(1) to New York County and the motion by the plaintiff for an Order to dismiss all of defendants' affirmative defenses for failure to state a cause of action, upon documentary evidence, and because defendants' defenses are meritless; striking scandalous and irrelevant content from defendants' Answer pursuant to CPLR 3024(b), and dismiss defendants counterclaims for failure to state a cause of action, upon documentary evidence, are both determined as hereinafter provided:

The instant breach of contract action arises out of a certain Merchant Agreement dated October 13, 2016 between the respective parties (see defendants' Exhibit A) whereby the plaintiff purchased certain future sales by the defendants. A review of the respective submission sets forth that the plaintiff is a Delaware limited liability company doing business in New York with a principal place of business in New York County and the defendants are either incorporated or reside in California. The plaintiff has venued the action in Nassau County.

The defendants premise the defendants' application upon the ground that proper venue lies in New York County, the plaintiff's principal place of business. The plaintiff in substance said chance based upon the provisions of §5.6 of the October 13, 2016 agreement, supra, which provided:

"(a) Unless otherwise expressly provided in any Transaction Document, each of the Transaction Documents, this Agreement, and all controversies, disputes and claims arising from or relating thereto, including all claims sounding in contract or tort, shall be governed by and construed in accordance with the laws of the State of New York without reference to conflicts of law rules other than Section 5-1401 of the General Obligations Law of the State of New York. The scope of the foregoing governing law provisions is intended to be all-encompassing and includes any and all controversies, claims and disputes that may be brought in any court or any mediation or arbitration proceeding and that relate to the subject matter of this Agreement or any Transaction Document, including contract claims, tort claims, breach of duty claims and all other common law and statutory claims. The foregoing governing law provision is intended to encompass all issues and disputes related to the enforceability of any provision in the Agreement, including all issues and disputes related to the meaning, construction, validity, scope and/or enforceability of Sections 5.10, 5.11, 5/12, 5/13 and 5.14.

(b) With respect to this Agreement, any Transaction Document or any controversy, dispute or claim arising from or relating thereto, including all claims sounding in contract or tort, all judicial proceedings brought by Buyer against Seller or any Guarantor may, and all judicial proceedings brought by Seller or any Guarantor against Buyer that are not otherwise compelled to arbitration proceedings pursuant to Section 5.10 hereof shall, be brought in any state court of competent jurisdiction in the State of New York, or in any federal court of competent jurisdiction in the State of New York, and by execution and delivery of this Agreement, Seller and Guarantor(s) accept, the themselves and generally and unconditionally, the non-exclusive jurisdiction in the case of a proceeding initiated by Buyer, or the exclusive jurisdiction in the case of a proceeding initiated by Seller or any Guarantor, of the aforesaid courts and irrevocably agrees to be bound by any final, non-appealable judgment rendered thereby in connection with this Agreement, any Transaction Document or any controversy, dispute or claim arising from or relating thereto from which no appeal has been taken or is available.

(c) Seller and Guarantor(s) hereby waive any claim that the action is brought in an inconvenient forum, that the venue of the action is improper, or that this Agreement or the transactions of which this Agreement is a part may not be enforced in or by any of the above-named courts. Seller and Guarantor(s) hereby waive any right to remove any action brought by Buyer against Seller or Guarantor(s) related to this Agreement from state court to federal court.

(d) Seller and Guarantor(s) irrevocably consents to the service of process in the manner provided for Notices in Section 5.2 and agrees that nothing herein will affect the right of any party hereto to serve process in any other manner permitted by applicable law. Seller and Guarantor(s) hereby waive any requirement that process be served upon them by personal service.

**I acknowledge and agree to the terms and conditions stated herein:**

INITIAL ON BEHALF OF SELLER \_\_\_\_\_/s

INITIAL ON BEHALF OF GUARANTOR(S) \_\_\_\_\_/s"

In examining the issue of such a contractual provision, the Court in **Casale v Sheepshead Nursing & Rehabilitation Center**, 131 AD3d 436, 13 NYS3d 904 (Second Dept., 2015) held:

"A contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown 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" (*Stravalle v Land Cargo, Inc.*, 39 AD3d 735, 736, [2007], quoting *LSPA Enter., Inc. v Jani-King of N.Y., Inc.*, 31 AD3d 394, 395 [2006]; see U.S. *Mdse., Inc. v L&R Distribs., Inc.*, 122 AD3d 613, 614 [2014]; *Best Cheese Corp. v All-Ways Forwarding Int'l. Inc.*, 24 AD3d 580, 581 [2005])."

**Casale v Sheepshead Nursing & Rehabilitation Center, supra at 436-437**

In regards to the foregoing holding, the Court is guided by the clear language of §5.6 and in particular subsection c in the October 13, 2016 Merchant Agreement, supra. Based upon this section, the plaintiff's selection of Nassau County is proper. As such, the defendants' application for an Order changing the venue of this action, as of right, under CPLR 510(1) to New York County, is denied.

Contrary to the defendants' affirmative defenses and counterclaim, there is no basis in the October 13, 2016 Merchant Agreement that would substantiate the defendants' contentions. As such, the plaintiff's application for an Order to dismiss all of defendants' affirmative defenses for failure to state a cause of action, upon documentary evidence, and because defendants' defenses are meritless; striking scandalous and irrelevant content from defendants' Answer pursuant to CPLR 3024(b), and dismiss defendants counterclaims for failure to state a cause of action, upon documentary evidence, is granted in its entirety.

SO ORDERED.

DATED: 4/10/2017

..... *Roy S. Walden* .....  
J.S.C.

**ENTERED**

APR 11 2017

NASSAU COUNTY  
COUNTY CLERK'S OFFICE