

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

JUDY KELLY, HARRIETTE OWENS WALDRON, SCOTT SYMONS and MICHAEL PUTNICK, Plaintiffs,	: APRIL TERM, 2001
v.	: No. 2346
BEAR, STEARNS & CO. INC. and DAVID K. BLUME Defendants.	: Commerce Program : Control No. 080832

O R D E R

AND NOW, this 18th day of December 2001, upon consideration of the Preliminary Objections of defendants, Bear Stearns & Co. Inc., (“Bear Stearns”) and David K. Blume, and the opposition of plaintiffs, Judy Kelly, Harriette Owens Waldron, Scott Symons, and Michael Putnick (collectively “plaintiffs”), the respective memoranda, all matters of record and after oral argument, and in accord with the Opinion being filed contemporaneously with this Order, it is hereby **ORDERED and DECREED** that the Preliminary Objection asserting that the proper venue for this case is New York based on a contractual forum selection provision is **Sustained**, and that the case is **Dismissed** without prejudice to refile in New York.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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JUDY KELLY, HARRIETTE OWENS WALDRON, SCOTT SYMONS and MICHAEL PUTNICK, Plaintiffs,	: APRIL TERM, 2001 : No. 2346
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O P I N I O N

Albert W. Sheppard, Jr., J. December 18, 2001

Defendants, Bear Stearns & Co. Inc., (“Bear Stearns”) and David K. Blume, filed these Preliminary Objections to the Complaint of plaintiffs, Judy Kelly, Harriette Owens Waldron, Scott Symons, and Michael Putnick (collectively “plaintiffs”). For the reasons stated, the Preliminary Objection asserting improper venue is sustained and the case is dismissed without prejudice to be refiled in New York.

BACKGROUND

In 1998, plaintiffs' companies, pursuant to two Engagement Letters, retained Bear Stearns in connection with a possible sale or merger of their companies, Kelly/Waldron & Co. and KWS&P/SFA, Inc.

Following a 1999 stock-for-stock merger with McKesson HBOC, Inc., the value of plaintiffs' stock plummeted when McKesson HBOC, Inc. announced that certain accounting violations occurred in a prior merger between McKesson and HBOC.

In April 2001, plaintiffs filed this action alleging, *inter alia*, that during the time defendants Bear Stearns and David Blume had advised plaintiffs on the merger with McKesson HBOC, defendants had failed to disclose information regarding accounting violations they had acquired during their representation of McKesson in connection with the McKesson-HBOC merger.¹ On August 14, 2001, defendants filed these Preliminary Objections.

DISCUSSION

I. The Forum Selection Clause Renders Venue in Philadelphia County Improper.

The defendants argue that New York is the proper venue for this action since the Engagement Letters contain a forum selection clause.² Conversely, plaintiffs claim that since they were not signatories to the Engagement Letters, the forum selection clause does not apply to them. This court finds the forum

¹ Plaintiffs' complaint also contains allegations of fraud, civil conspiracy, violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, breach of fiduciary duty, tortious interference with contract, misrepresentation and omission, negligence, and negligent supervision.

² Defendants also raise Preliminary Objections to all of the Counts contained in the plaintiffs' Complaint. However, since this court sustains the Preliminary Objection asserting improper venue, the remaining Objections have not been addressed in this Opinion.

selection clause to be controlling.

When preliminary objections challenge venue, “the defendant is the moving party and bears the burden of supporting [its] claim” of improper venue. Liggitt v. Liggitt, 253 Pa. Super. 126, 131, 384 A.2d 1261, 1263-64 (1978). See also Gale v. Mercy Catholic Med. Center Eastwick, Inc., Fitzgerald Mercy Div., 698 A.2d 647, 652 (Pa.Super.Ct. 1997) (the moving party has the burden of showing that the original choice of venue is improper).

As a rule, Pennsylvania law holds that where a forum selection clause purports to make an otherwise proper venue improper, “it would be contrary to public policy to allow an agreement made in advance of the dispute to oust said tribunal’s jurisdiction.” Central Contracting Co. v. C.E. Youngdahl & Co., 418 Pa. 122, 132-33, 209 A.2d 810, 815-16 (1965) (citing In Rea’s Appeal, 13 W.N.C. 546 (1883)). See also Healy v. Eastern Bldg. & Loan Ass’n, 17 Pa.Super. 385, 392 (1901) (an agreement to sue only in New York does not prevent plaintiff from bringing action in a Pennsylvania court).

However, this does not mean that an agreement limiting the forum for future dispute resolution is *per se* invalid:

The modern and correct rule is that, while private parties may not by contract prevent a court from asserting its jurisdiction or change the rules of venue, nevertheless, a court in which venue is proper and which has jurisdiction should decline to proceed with the cause when the parties have freely agreed that litigation shall be conducted in another forum and where such agreement is not unreasonable at the time of litigation.

Central Contracting, 418 Pa. at 133, 209 A.2d at 816. See also Morgan Trailer Mfg. Co. v. Hydraroll, Ltd., 759 A.2d 926 (Pa. Super Ct. 2000) (using the test laid out in Central Contracting to determine the

validity of a forum selection clause). An agreement on a particular forum is unreasonable:

[W]here its enforcement would, under all circumstances existing at the time of litigation, seriously impair plaintiff's ability to pursue its cause of action. Mere inconvenience or additional expense is not the test of unreasonableness if the plaintiff received under the contract consideration for its agreement to litigate in a specified forum. **If the agreed upon forum is available to plaintiff and said forum can do substantial justice to the cause of action then plaintiff should be bound by its agreement.**

Churchill Corp. v. Third Century, Inc., 396 Pa. Super. 314, 321-22, 578 A.2d 532, 536 (1990) (citations omitted) (emphasis added). See also Williams v. Gruntal & Co., 447 Pa. Super. 357, 361, 669 A.2d 387, 389 (1995) ("if the agreement to proceed in the alternative forum has the effect of seriously impairing the plaintiff's ability to pursue a cause of action, the court will strike such an agreement as unreasonable").

Here, the proper forum is New York. Defendants claim that the Engagement Letters bind plaintiffs and the forum selection clause should control. Specifically, the defendants direct this court to the express language set forth in ¶ 9 of the Engagement Letters, which states in part, that:

[t]he Company irrevocably submits to the jurisdiction of any court of the State of New York or the United States District Court for the Southern District of New York for the purpose of any suit, action, or other proceeding arising out of this Agreement, or any of the agreements or transactions contemplated hereby, which is brought by or against the Company and (i) hereby irrevocably agrees that all claims in respect of any such suit, action or proceeding may be heard and determined in any such court... (iii) agrees not to commence any action, suit or proceeding relating to this Agreement other than in such court.

Def's Mem. of Law, Exh A at 6; Exh B at 5. This language of the Engagement Letters is certain and unambiguous. Furthermore, plaintiffs have offered no evidence suggesting that substantial justice could not be done in New York or that litigating in New York is unreasonable.

However, our analysis does not end there since plaintiffs argue that as non-signatories to the Engagement Letters, the forum selection clause does not apply to them. This court disagrees. This dispute

is governed by the forum selection clause because the claims asserted clearly arise out of the only possible relationship plaintiffs had with Bear Stearns - the Engagement Letters. The Pennsylvania Supreme Court was faced with a similar issue in Johnson v. Pennsylvania Nat'l Ins. Co., 527 Pa. 504, 594 A.2d 296, 298-99 (1991). There, an injured passenger in a taxicab made a claim for uninsured motorist benefits under a policy to which he was not a signatory, yet the court considered him to be a third-party beneficiary. The court held that, "third party beneficiaries are bound by the same limitations in the contract as the signatories of that contract." Johnson, 527 Pa at 508. Indeed, "the rights of an alleged third party beneficiary may arise no higher than the rights of the parties to the contract and... they are vulnerable to the same limitations which may be asserted between the promisor and the promisee." Id. (quoting Jewelcor Jewelers & Distributors, Inc. v. Corr, 373 Pa.Super. 536, 553 542 A.2d 72, 80 (1988)(citations omitted). Citing to the Restatement (Second) of Contracts, the court held "when there is a contract, the right of a beneficiary is subject to any limitation imposed by the terms of the contract." Id. (citing Restatement (Second) of Contracts ¶ 309 Comment b (1981)).

This court also finds Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 201, (3d Cir. 1988) persuasive.³ In Coastal, the court held that a forum selection clause was enforceable when applied to a third-party beneficiary to a contract. Id. Although not a participant in the original contract, the court found Coastal to be a third-party beneficiary of the contract. Since Coastal did business with an English company who in turn used English manufacturers, the court found that it was "perfectly

³Although decisions of federal courts are not binding upon Pennsylvania state courts, they have persuasive authority. Hutchinson v. Luddy, 763 A.2d 826, 837 n.8 (Pa.Super.Ct. 2000); In re Insurance Stacking Litig., 754 A.2d 702, 705 (Pa.Super.Ct. 2000). See also Moore v. Sims, 442 U.S. 415, 429 (1979) (stating that "[s]tate courts are the principal expositors of state law").

foreseeable” that the plaintiff was to be a third-party beneficiary of an English contract applying English law. Id. at 203. Thus, even though it was a non-signatory to the original contract, the court held that this “third-party beneficiary status does not permit the avoidance of contractual provision otherwise enforceable.” Id.

Plaintiffs artfully plead that their “claims arise from defendants’ independent duty to not act wrongfully toward them. That duty does not arise by contract, but by law.” Pls’ Reply Mem. of Law at 19 (citations omitted). Thus, plaintiffs suggest that since Bear Stearns breached this independent legally cognizable duty, and plaintiffs are not signatories to the Engagement Letters, the forum selection clause does not apply to them. Contrary to plaintiffs’ assertions, there is no evidence to suggest that Bear Stearns, independent of the Engagement Letters, cultivated a separate relationship with the plaintiffs, or even that plaintiffs sought out the advice of Bear Stearns beyond that of the relationship resulting from the Engagement Letters.

The difficulty with plaintiffs’ reasoning is that it ignores the reality that the Engagement Letters, and only the Engagement Letters, constitute the basic source of any duty Bear Stearns owed to the plaintiffs. Although the signatories to the Engagement Letters were plaintiffs’ companies, Kelly/Waldron & Co and KWS&P/SFA, Inc., it would be illusory to consider that plaintiffs were not third party beneficiaries to the Engagement Letters and therefore, vulnerable to the same contractual limitations placed upon their companies. The purpose of the Engagement Letters was clear. Plaintiffs, in hopes of financially benefitting from a potentially lucrative merger, engaged the services of Bear Stearns. It is foreseeable that plaintiffs would also be subjected to the forum selection clause within the same Engagement Letters from which they were to benefit. Therefore, as the court in Coastal held that a forum selection clause applied to a non-signatory third party beneficiary of a contract, likewise, plaintiffs here, as beneficiaries of the Engagement

Letters, should not be permitted to avoid a contractual provision otherwise enforceable. Accordingly, plaintiffs are subject to the forum selection clause.

CONCLUSION

For the reasons stated, the Preliminary Objection of defendants, Bear Stearns and David K. Blume, asserting improper venue is sustained and the case is dismissed without prejudice to be refiled in New York. This court will issue an appropriate contemporaneous Order.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.