

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**TCA GLOBAL CREDIT MASTER FUND, LP,
Plaintiff,**

v.

**Case No. 14-141331-CK
Hon. James M. Alexander**

**WORLD ART AUCTIONS, LLC, ET AL,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants World Art Auctions, Acquisition Strategies, Fine Arts Auctions, and Eugene Schuster's motion for summary disposition. Defendants move for summary disposition on the basis of Florida forum-selection clauses contained in numerous contracts between Plaintiff and these Defendants.

Defendants are in the business of acquiring and selling art. Defendant Eugene Schuster is the managing member of World Art and Fine Arts and President of Acquisition Strategies.

Plaintiff alleges that in October and November 2013, it contracted to extend Defendant World Art a line of credit up to \$3 million. The initial commitment, however, was set at \$1 million. To secure repayment of the debt, World Art gave Plaintiff a security interest and lien on all of its existing and after-acquired assets. World Art was also required to direct all of its accounts receivables into a bank account in Plaintiff's name.

As further security, Defendants Acquisition Strategies and Fine Arts each executed absolute and unconditional Guarantees. And as did World Art, each Guarantor granted a first-

priority security interest in all existing and future assets under separate Security Agreements. Plaintiff perfected its security interest by filing appropriate UCC financing statements in Florida and Michigan.

Finally, Eugene Schuster executed a “Validity Guaranty,” which warranted that all collateral would be appropriately maintained and not subject to any further lien unless Plaintiff first consents in writing.

Plaintiff alleges that World Art subsequently defaulted under the Agreements terms, which caused Plaintiff to demand repayment of the entire debt by May 13, 2014. When World Art and the Guarantors failed to cure the default, Plaintiff filed the present action.

In its Complaint, Plaintiff also named Bright Colors and London Arts as Defendants – despite no written contracts with these entities. Plaintiff alleges that these businesses are owned by Eugene Schuster’s son, Adam. Essentially, Plaintiff alleges that all Defendant entities are effectively controlled by Adam and Eugene Schuster – and they are fraudulently comingling, removing, or selling Plaintiff’s collateral by transferring the same through the various Defendant businesses, thereby diminishing the valuable collateral securing Plaintiff’s loan.

Plaintiff claims that Defendants owe \$842,746.47, plus interest, attorney fees, and costs. In its Complaint, Plaintiff acknowledges that the written agreements contain “a forum selection provision dictating that the claims. . . that form the basis for this action must be brought in Broward County, Florida.” But Plaintiff claims that this Court should ignore the forum-selection clause based on statutory exemptions found in MCL 600.745(3).

And not surprisingly, Defendants now seek summary disposition of Plaintiff’s Complaint under MCR 2.116(C)(7), which considers whether a claim is barred, among other grounds, by “an agreement to . . . litigate in a different forum.”

Indeed, “[i]t is undisputed that Michigan’s public policy favors the enforcement of contractual forum-selection clauses and choice-of-law provisions.” *Turcheck v Amerifund Fin, Inc*, 272 Mich App 341, 345; 725 NW2d 684 (2006).¹

It is also undisputed that the moving Defendants and Plaintiff entered into **seven** separate, written contracts – all of which contain a “MANDATORY FORUM SELECTION” clause that provides (emphasis removed):

Any dispute arising under, relating to, or in connection with the Agreement or related to any matter which is the subject of or incidental to the Agreement (whether or not such claim is based upon breach of contract or tort) shall be subject to the exclusive jurisdiction and venue of the state and/or federal courts located in Broward County, Florida. This provision is intended to be a “mandatory” forum selection clause and governed by and interpreted consistent with Florida Law.²

The Revised Judicature Act, MCL 600.745(3), provides (in relevant part):

If the parties agreed in writing that an action on a controversy shall be brought only in another state and it is brought in a court of this state, the court shall dismiss or stay the action, as appropriate, unless any of the following occur:

...

(b) The plaintiff cannot secure effective relief in the other state for reasons other than delay in bringing the action.

(c) The other state would be a substantially less convenient place for the trial of the action than this state.

...

¹ Florida also enforces forum-selection clauses. *Golden Palm Hospitality, Inc v Stearns Bank Nat’l Ass’n*, 874 So 2d 1231 (Fla Dist Ct App 5th Dist 2004), reasoning:

The Florida courts agree that contracting parties have the right to select and agree on a forum in which to resolve future disputes. . . . Hence, as a general rule, whether the forum selection clause is valid and enforceable is a procedural issue that must be determined in accordance with the law of the forum state rather than the law of the state designated in the agreement. *Id.* at 1234.

² These clauses are found in: (1) Plaintiff’s, World Arts’, Acquisition Strategies’, and Fine Arts’ “Senior Secured Revolving Credit Facility Agreement” at paragraph 13.6; (2) Plaintiff’s and World Arts’ “Security Agreement” at paragraph 5.5; (3) Plaintiff’s and Acquisition Strategies’ “Security Agreement” at paragraph 5.5; (4) Plaintiff’s and Fine Arts’ “Security Agreement” at paragraph 5.5; (5) Plaintiff’s and Acquisition Strategies’ “Guaranty Agreement” at paragraph 9.12; (6) Plaintiff’s and Fine Arts’ “Guaranty Agreement” at paragraph 9/12; and (7) Plaintiff’s and Eugene Schuster’s “Validity Guaranty” at paragraph 10. The language of the forum-selection clause in Mr. Schuster’s Guaranty is slightly expanded to include his personal consent to Florida jurisdiction.

(e) It would for some other reason be unfair or unreasonable to enforce the agreement.

In its Response, Plaintiff argues:

Defendants have failed to put forward a single bit of evidence, admissible or otherwise, that would contradict the allegations in [the] Complaint that a) it cannot secure effective relief in the State of Florida, or b) that Florida is a substantially less convenient forum. Defendants' motion should be denied due to this short-coming alone.

In other words, Plaintiff appears to believe that Defendants carry the burden to enforce the forum-selection clause. Plaintiff, however, is mistaken. The *Turcheck* Court reasoned:

A party seeking to avoid a contractual forum-selection clause bears **a heavy burden** of showing that the clause should not be enforced. Accordingly, the party seeking to avoid the forum-selection clause bears the burden of proving that one of the statutory exceptions of MCL 600.745(3) applies. *Turcheck*, 272 Mich App at 348 (emphasis added), citing *The Bremen v Zapata Off-Shore Co*, 407 US 1, 17-18; 92 S Ct 1907; 32 L Ed 2d 513 (1972).

Plaintiff, as the party seeking to avoid the forum-selection clause, is the party that bears the heavy burden to establish a statutory exception.

Plaintiff argues that the seven forum-selection clauses are unenforceable under MCL 600.745(3)(b), (c), and (e).

Under MCL 600.745(3)(b), Plaintiff argues that the forum-selection clause should be avoided because it cannot secure effective relief in Florida. The Court disagrees. The bulk of Plaintiff's argument on this issue centers on its perceived **difficulty** in litigating the dispute in Florida – and not its **inability** to litigate in Florida. Plaintiff also fails to articulate why it could not enforce a Florida judgment in Michigan under Michigan and federal law.

Further, to the extent that Plaintiff argues that Defendants moved the location of some art from Florida to a Michigan warehouse, and therefore, the forum-selection clause should be avoided, the Court rejects this argument. The November 13, 2013 "Security Agreement"

between Plaintiff and World Art contemplated that the collateral would be located at World Art's principal place of business in Michigan. See Security Agreement at paragraph 3.8. This Agreement contains a mandatory Florida forum-selection clause. In other words, Plaintiff knew that much of the collateral was located in Michigan when it contracted to resolve disputes in Florida. As a result, the Court will not allow Plaintiff to use the collateral's location as a reason to avoid the forum-selection clause.

The Court also rejects Plaintiff's argument that the forum-selection clause should be avoided because Plaintiff chose to include Brightcolors and London Arts in this suit, and Plaintiff presents no compelling authority for such a proposition.

Finally, Plaintiff argues that that the clause should be unenforceable under MCL 600.745(3)(c) because it would be substantially less convenient to litigate this dispute in Florida. As a result, under the cited statute or federal law, specifically 28 USC 1404(a), Plaintiff argues that the forum-selection clause should be ignored.

The Court will note that the United States Supreme Court recently reaffirmed its support for forum selection clauses when considering a 1404(a) motion in *Atlantic Marine Constr Co v United States Dist Court*, ___ US ___; 134 S Ct 568, 582; 187 L Ed 2d 487 (2013). The *Atlantic Marine* Court reasoned "[w]hen parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation." *Id.* at 582.

This is so, as the Court reasoned, because "[w]hatever 'inconvenience' [the parties] would suffer by being forced to litigate in the contractual forum as [they] agreed to do was clearly foreseeable at the time of contracting." *Id.*; quoting *The Bremen v Zapata Off-Shore Co*, 407 US 1, 17-18; 92 S Ct 1907; 32 L Ed 2d 513 (1972).

The *Atlantic Marine* Court concluded:

When parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties' settled expectations. A forum-selection clause, after all, may have figured centrally in the parties' negotiations and may have affected how they set monetary and other contractual terms; it may, in fact, have been a critical factor in their agreement to do business together in the first place. In all but the most unusual cases, therefore, "the interest of justice" is served by holding parties to their bargain. *Id.* at 583

The Supreme Court's reasoning is sound. Plaintiff identifies itself as a "Cayman Islands limited partnership," which maintains offices, in relevant part, in "Hollywood, Florida," which is located in Broward County. The Court is unconvinced that it would be inconvenient for Plaintiff to litigate a dispute in the same jurisdiction where its Florida office is located.

Finally, the parties' Agreements unequivocally states that "[a]ny dispute arising under" the loan and security agreements be brought in Broward County, Florida. As a result, Plaintiff's claims fit squarely within the terms of the forum-selection clause.

To conclude, the Court finds that Plaintiff has failed to carry its "heavy burden" to establish that the contractual Florida forum-selection clause should not be enforced. As a result, Defendants' Motion for Summary Disposition under (C)(7) is GRANTED, and Plaintiff's Complaint as to only Defendants World Art Auctions, Acquisition Strategies, Fine Arts Auctions, and Eugene Schuster is DISMISSED.

The Temporary Restraining Order previously entered is hereby dissolved.

As to the remaining Defendants, Bright Colors and London Arts, this matter is stayed until resolution of the anticipated litigation in Florida.

A status conference is set for Friday, April 10, 2015 at 8:30 am.

IT IS SO ORDERED.

September 29, 2014
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge