

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

SUMMIT DIAMOND BRIDGE LENDERS, LLC,

Plaintiff,

v.

**Case No. 14-143557-CK
Hon. James M. Alexander**

PHILIP R. SEAVER TITLE CO, INC,

Defendant.

_____ /

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant’s motion for summary disposition. In its motion, Defendant argues that Plaintiff’s suit should be dismissed based on a California forum-selection clause contained in the written escrow agreement that forms the basis for Plaintiff’s claim.

In 2010, non-party Diamond Heroes of Southeastern Michigan wished to build a ballpark in Waterford. Non-party Citywide Lending Group offered to provide a \$12 million construction loan so long as Diamond obtained a “Collateral Commitment Deposit” of over \$675,000. Plaintiff was formed for the purpose of providing a “bridge loan” to Diamond Heroes to meet this obligation.

The bridge loan transaction was achieved through a four-party Escrow Agreement dated June 25, 2010, whereby Defendant was the named escrow agent. In its Amended Complaint, Plaintiff claims that, under said Escrow Agreement, Defendant was required to have an

“original” “Stand-By Letter of Credit” in order to release Plaintiff’s bridge loan funds to Citywide. On August 17, 2010, Defendant, however, apparently received a “forgery” Letter of Credit. Despite “recognizing the document was not an original,” Plaintiff claims that Defendant “acted upon the direction of Diamond Heroes and disbursed [Plaintiff’s] \$700,000.00 in ‘bridge loan’ funds to Citywide and a third-party.” This money has never been returned to Plaintiff.

Plaintiff then filed the present suit against Philip R. Seaver Title Company on a claim of Breach of Fiduciary Duty – claiming that Defendant breached its obligations **under the Escrow Agreement**. Despite its Breach of Fiduciary Duty label,¹ Plaintiff’s Complaint appears to allege a Breach of Contract claim. Michigan law is well established that:

Courts are not bound by the labels that parties attach to their claims. Indeed, “[i]t is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim.” *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 691-692; 822 NW2d 254 (2012); citing *Manning v Amerman*, 229 Mich App 608, 613; 582 NW2d 539 (1998); and quoting *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007).

Plaintiff plainly bases its claim on Defendant breaching its duties owed under the Escrow Agreement. As a result, Plaintiff’s claim is properly one for breach of contract.

Plaintiff apparently seeks to draft around a breach of contract claim because the Escrow Agreement contains a California forum-selection clause. And based on said clause, Defendant seeks summary disposition under MCR 2.116(C)(8), which tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

But, as Plaintiff points out, MCR 2.116(C)(7) actually controls when a party argues that a claim is barred, among other grounds, by “an agreement to . . . litigate in a different forum.” This distinction is important because, when considering a (C)(8) motion, the Court considers only the

¹ Ironically, under the Escrow Agreement, Plaintiff agreed that “[Defendant] shall have no duties except those which are expressly set forth [in the Agreement].” [Escrow Agreement, at p 6, paragraph 4(d)].

pleadings. MCR 2.116(G)(5). But when a motion is based on (C)(7), the Court must consider “affidavits, together with the pleadings, deposition, admissions, and documentary evidence.” *Id.* Because Defendant seeks dismissal based on an agreement to litigate in California, Defendant’s motion is one properly considered under (C)(7).

“It 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).

It is also undisputed that paragraph 5(f) of the Escrow Agreement provides:

Governing Law; Disputes. Any dispute arising from or related to this Agreement, shall be governed by, and subject to, the laws of the State of California and shall be handled by the appropriate state or federal court located in California.

In its Response, Plaintiff first claims that no California court is “appropriate” for this case because the parties did not expressly agree to submit to California’s jurisdiction over any dispute. And Plaintiff argues that such an express agreement is required under California law, citing *Global Packaging, Inc v Superior Court*, 196 Cal App 4th 1623, 127 Cal Rptr 3d 813 (2011).

But *Global Packaging* is distinguishable because it involved a venue-selection clause, not a forum-selection clause.² Any discussion of forum-selection clauses in *Global Packaging* appears to be in dicta as that case did not involve such a clause.

Rather, California has a long history of enforcing contractual forum-selection clauses. See *Smith, Valentino & Smith, Inc v Superior Court of Los Angeles County*, 17 Cal 3d 491; 131 Cal Rptr 374; 551 P2d 1206 (1976);³ *CQL Original Products, Inc v National Hockey League*

² The California Court of Appeals – 4th District concluded that “[t]he trial court took a clause referring to ‘venue,’ translated into ‘forum,’ and then extended ‘forum’ to include personal jurisdiction.” This, the Court held, “stretches [the provision] beyond what its actual words can bear.” *Global Packaging*, 196 Cal App 4th at 1635.

³ Holding:

Players' Assn, 39 Cal App 4th 1347; 46 Cal Rptr 2d 412 (1995);⁴ *Cal-State Business Products & Services, Inc v Ricoh*, 12 Cal App 4th 1666; 16 Cal Rptr 2d 417 (1993); and *Galen v Redfin Corp*, 227 Cal App 4th 1525; 174 Cal Rptr 3d 847 (2014).⁵

Based on the foregoing authority, the Court rejects Plaintiff's claim that California does not routinely enforce contractual forum-selection clauses.

Plaintiff next argues that said clause is unenforceable under Michigan law. 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.

(d) The agreement as to the place of the action is obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means.

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

Plaintiff claims that the subsections (b), (c), (d), and (e) all apply.

The *Turcheck* Court reasoned:

No satisfying reason of public policy has been suggested why enforcement should be denied a forum selection clause appearing in a contract entered into freely and voluntarily by parties who have negotiated at arm's length. For the foregoing reasons, we conclude that forum selection clauses are valid and may be given effect, in the court's discretion and in the absence of a showing that enforcement of such a clause would be unreasonable. *Smith, Valentino & Smith, Inc*, 17 Cal 3d at 495-496.

⁴ Reasoning: "Given the significance attached to forum selection clauses, the courts have placed a substantial burden on a plaintiff seeking to defeat such a clause, requiring it to demonstrate enforcement of the clause would be unreasonable under the circumstances of the case." *CQL Original Products*, 39 Cal App 4th at 1354.

⁵ Noting: "contractual forum-selection clauses are usually enforced in California regardless of the inherent additional expense and inconvenience of litigating claims in a distant forum, unless the party challenging enforcement of the clause can show it is unreasonable." *Galen*, 227 Cal App 4th at 1543.

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, citing *The Bremen v Zapata Off-Shore Co*, 407 US 1, 17-18; 92 S Ct 1907; 32 L Ed 2d 513 (1972).

Plaintiff bases its argument that it “cannot secure effective relief” in California on the rejected argument that California would not enforce the contractual forum-selection clause in this case. But, as stated, the Court has already rejected said claim.

Plaintiff next claims that California would be a “substantially less convenient place for trial” under MCL 600.745(3)(c) because neither party has any contacts in California, and both parties and nearly all witnesses are located in Michigan. But such a notion was recently rejected by the United States Supreme Court 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, and Plaintiff otherwise fails to convince the Court that California would be substantially less convenient place for this litigation.

Next, Plaintiff argues that the California forum-selection clause is invalid under MCL 600.745(3)(c) because it was “obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means.” On this issue, Plaintiff offers little argument. Instead, it simply concludes that enforcing the clause would be “unconscionable.” Plaintiff curiously also argues that Citywide would benefit from enforcement of the clause. But Citywide is not even a party to this action, and it is based in California – where, presumably, it would be easier for Plaintiff to reach potential assets in the event that Citywide is added as a party should Plaintiff obtain a judgment in its favor.

Finally, Plaintiff concludes that the clause should be invalid under MCL 600.745(3)(e) because “the entire transaction was a criminal endeavor, [therefore] it would be unfair and unreasonable to require the case be brought in California.” But, again, Plaintiff offers no reasoning to support its conclusion. Michigan law is clear that “[a] party may not merely announce a position and leave it to [the] Court to discover and rationalize the basis for the claim.” *National Waterworks, Inc v International Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007).

The Court also rejects Plaintiff’s argument that it must apply the *Cray* factors under *Lease Acceptance Corp v Adams*, 272 Mich App 209; 724 NW2d 724 (2006). *Lease Acceptance* involved a dispute over MCL 600.745(2), not 600.745(3), as the case here. In such circumstances, the Court need not consider the *Cray* factors. *Hansen Family Trust v FGH Indus, LLC*, 279 Mich App 468, 483; 760 NW2d 526 (2008) (holding “the trial court correctly declined

to consider *Lease Acceptance* when determining the enforceability of the forum-selection clauses under MCL 600.745(3)").

Finally, it is worth noting that this case is between two Michigan entities only because Plaintiff chose to not include an apparently necessary California entity – Citywide. As a result, it is disingenuous for Plaintiff to characterize this dispute as having no connection to California.

To summarize, the Escrow Agreement that serves as the foundation for Plaintiff’s lawsuit provides that “[a]ny dispute arising from or related to this Agreement” be brought in an appropriate California Court. Because Plaintiff alleges that Defendant did not live up to its obligations under said agreement, Plaintiff’s claims fit squarely within the terms of the contractual forum-selection clause.

For all of the foregoing reasons, the Court finds that Plaintiff has failed to carry its “heavy burden” to establish that the contractual California forum-selection clause should not be enforced. As a result, Defendant’s Motion for Summary Disposition is GRANTED under (C)(7), and Plaintiff’s Complaint is DISMISSED in its entirety.

This Order is a Final Order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

February 4, 2015
Date

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