40 Misc.3d 1216(A), 975 N.Y.S.2d 710, 2013 WL 3820543 (N.Y.City Civ.Ct.), 2013 N.Y. Slip Op. 51207(U)
(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 40 Misc.3d 1216(A), 2013 WL 3820543 (N.Y.City Civ.Ct.))

(The decision of the Court is referenced in a table in the New York Supplement.)

Civil Court, City of New York,
New York County.
MBF LEASING, LLC, Plaintiff,
v.
Luann REICKS, Defendant.

No. 15843/11.
July 15, 2013.

Joseph Sussman, New York.

Chittur & Associates, P.C., Ossining, for Defendant.

LYNN R. KOTLER, J.

***1** Recitation, as required by CPLR § 2219[a] of the papers considered in the review of this (these) motion(s):

Paper	**Numbered**
Def's n/m (dismiss), affirm, exhs	1
Ptlf's LK affid in opp, exhs	2
Def's AS reply affirm, exhs	3

This action arises from the defendant's alleged breach of a lease. Defendant now moves to dismiss based upon the following grounds: "[1] want of personal jurisdiction in that since the entire transaction was permeated with fraud, this Court should refuse to enforce the consent of jurisdiction clause in the lease under *Studebaker–Worthington Leasing Corp. v. New Concepts Realty, Inc.*, 25 Misc.3d 1 [NY App Term 2d Dept 2009]; or alternatively [2] *forum non conveniens*, since all material witnesses, including Plaintiff's agents who met with Defendant are beyond the jurisdiction of this Court, and it is otherwise unreasonable to try and litigate this action here." Plaintiff opposes the motion.

For the reasons that follow, the motion is denied.

Based upon the summons and complaint, plaintiff claims that it entered into an Equipment Finance Lease (the "lease") with the defendant for merchant processing equipment for defendant's restaurant, South Bar & Grill. Under the lease, defendant was required to make monthly payments of $25.99 for a term of 48 months via ACH debits to defendant's bank account. For this purpose, defendant allegedly provided a voided check from her bank account to set up the ACH payments. Plaintiff has provided a copy of the voided check.

Defendant claims in an affidavit that her purported signature on the lease is a forgery. She claims that a third-party named Scott Christian made material misrepresentations about the terms of the lease, completed the lease himself on her behalf without her knowledge, and never informed her that he was representing plaintiff. She admits that she initialed Mr. Christian's paperwork in six different places, but differentiates this paperwork from the lease upon which this action is based. She claims she does not recall ever seeing the lease before. She also maintains that she tried to use the machine that Mr. Christian provided to her but "it did not work." Finally, defendant maintains that she returned the credit card machine by U.S. Postal Service to plaintiff, and has provided proof of mailing via a USPS Delivery Confirmation. Lastly, defendant maintains that she was not properly served with the summons and complaint in this action.

Plaintiff explains that it has a written agreement with Scott Christian d/b/a World Electronic Processing ("WEP") whereby it would provide lease financing for WEP's approved customers "from time to time." Otherwise, plaintiff maintains that it is not affiliated with WEP.

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Lina Kravic, plaintiff's Originations Manager, explains in an affidavit that "[a]s part of [plaintiff's] origination process, prior to accepting and funding a lease transaction, the lease may be verified through direct telephonic communication with the signatories on the lease or by o obtaining a signed delivery receipt from the lessee to ensure that the equipment has been delivered to and accepted by the lessee." Plaintiff has provided an audio copy of a "Verification Call" made via telephonic communication with the defendant, as well as a transcript of that call. Ms. Kravic states that the audio recording was made at the time of the call, made and stored pursuant to plaintiff's regularly conducted business activity and is otherwise authentic and correct.

***2** Ms. Kravic states that "[o]n July 7, 2009, at 12:08 pm, Roccio Lawrence ("Rosie") of plaintiff's originations Department received a telephone call from defendant from telephone number 402–746–2869 (the number of defendant's restaurant." In that call, defendant confirmed her identity to Ms. Lawrence by providing identifying information such as the last four digits of her social security number and date of birth. Defendant otherwise acknowledge the terms of the lease, that the lease was "noncancellable", that she was personally guaranteeing payment under the lease and that she had received the leased equipment and it was installed and operating properly. Defendant allegedly asked "[w]hat if I don't go-if I go out of business before the 48 months?"

Plaintiff has also provided proof that it mailed to defendant a "welcome letter" along with a copy of the fully executed lease. Plaintiff maintains that it never received the equipment from the defendant. Finally, plaintiff maintains that defendant was served with the summons and complaint in accordance with the lease terms.

Discussion

Typically, the Court would consider defendant's argument that this Court does not have jurisdiction over her because plaintiff did not effectuate service. However, since there is no dispute that plaintiff served her in accordance with the lease terms, which provides that "lessor may properly serve me with legal process via certified mail to my address below", and plaintiff has provided proof of such service, this argument is really based on the claim that the lease itself is void and/or unenforceable.

There is no dispute that the only basis for the exercise of jurisdiction over the defendant stems from the forum selection clause in the lease. Under New York law, forum-selection clauses are *prima facie* valid (*British West Indies Guar. Trust Co., Ltd. v. Banque Internationale a Luxembourg,* 172 A.D.2d 234 [1st Dept 1991]). CPLR § 501 explicitly authorizes parties to select venue by means of a pre-litigation contractual provision with only one exception to the parties' freedom of choice: where a change of venue is necessary to insure an impartial trial (see CPLR § 510[2]).

While "fraud, undue influence, or overweening bargaining power" might provide a basis for refusing to enforce a forum selection clause, defendant has failed to establish such circumstances (*M/S Bremen v. Zapata Off–Shore Co.,* 407 U.S. 1, 12–13 [1972]; *see also DeSola Group, Inc. v. Coors Brewing Co.,* 199 A.D.2d 141 [1st Dept 1993]). Her claims are based on her own self-serving statements and are otherwise unsubstantiated. Moreover, plaintiff has come forward with a dearth of evidence that contradicts defendant's claims. Therefore, the Court finds that the forum selection clause is "unaffected by fraud [or] undue influence [and] should be given full effect" unless "the party seeking to escape his contract [is able] to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of [her] day in court" (*M/S Bremen v. Zapata Off–Shore Co., supra* at 12–13).

***3** Defendant raises two points on the issue of inconvenience: defendant lives in Nebraska and Mr. Christian is also a necessary witness and he "is beyond this Court's jurisdiction." Neither claim is sufficient to establish that she will be deprived of her day in court. Nebraska is not so far away from New York City that this defendant

cannot possibly defend herself in this litigation. While it is true that the defendant would have to be present in court for trial, by directive of the Administrative Judge of this Court in 2011, out-of-state residents in similar cases are permitted to appear telephonically for conferences and oral argument on motions to minimize the financially burden. Defendant herself is permitted to appear telephonically as well. As for Mr. Christian, defendant may obtain a commission to take an out-of state deposition (*see eg* CPLR 3108). It is otherwise unclear why this Court's inability to exercise jurisdiction over Mr. Christian in this action is of any import.

Accordingly, defendant's motion to set aside the forum selection clause and to dismiss based on *forum non conveniens* is denied. Since the Court finds that the forum selection clause is enforceable, defendant's claim that plaintiff failed to properly serve the summons and complaint is also rejected.

Accordingly, the motion to dismiss is denied in its entirety.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

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