IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

NELSON MEDICAL GROUP, Plaintiff	: DECEMBER TERM, 2001
	: No. 3078
v.	
	:Commerce Case Program
PHOENIX HEALTH CORPORATION, Defendant	:Control No. 020129

ORDER

AND NOW, this 28th day of May 2002, upon consideration of defendant, Phoenix Health Corporation's Preliminary Objections, the plaintiff's response in opposition, the respective memoranda, all other matters of record, and in accord with the contemporaneous Opinion being filed, it is hereby **ORDERED and DECREED** that:

a. The Preliminary Objections asserting improper venue are **Sustained**.

b. The Complaint is **Dismissed** without prejudice to the plaintiff's right to initiate an action in Maryland.

BY THE COURT:

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ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr., J. ..... May 28, 2002

Defendant, Phoenix Health Corporation ("Phoenix"), has filed Preliminary Objections ("Objections") to the Complaint ("Complaint") of plaintiff, Nelson Medical Group ("Nelson"), asserting improper venue. For the reasons set forth, the court is issuing a contemporaneous Order sustaining these Objections to venue.

BACKGROUND

On June 29, 1999, the parties entered into a Sales Contract and Software Licensing Agreement ("Licensing Agreement") and an Annual Software Updates and Software Maintenance Agreement ("Maintenance Agreement") (collectively, "Agreements"). Both Agreements have provisions stating that the plaintiff acknowledges reading and understanding the Agreements' terms and agrees to be bound by them ("Acknowledgment Provisions"). The plaintiff signed each of the Agreements, with the plaintiff's signature appearing on the front side of the License Agreements.

The terms and conditions portion of the License Agreement ("Terms") are set forth on that Agreement's obverse side. Among the Terms is a "Forum Selection Clause" that states, "[t]his AGREEMENT shall be governed by the laws and rules of the State of Maryland, and any action or proceeding to enforce this AGREEMENT or to recover damages hereunder, shall be instituted in the State of Maryland." The Forum Selection Clause is written in the same size font as the other Terms.

In response to the Complaint, Phoenix filed Objections, which, in part, asserted that the Forum Selection Clause barred Nelson from initiating the instant action in Philadelphia. Nelson countered that it was unaware of the Forum Selection Clause when it signed the Agreement and that requiring it to pursue its claims in Maryland would be unreasonable. Because the Objections raised disputed issues of material fact, the Court directed the Parties to engage in limited discovery and to file additional briefs.

DISCUSSION

The crux of this dispute is whether the Forum Selection Clause is enforceable, requiring Nelson to pursue its claims in Maryland. The court submits that Phoenix may enforce the Forum Selection Clause and has sustained the Objections accordingly.

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) (holding that 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 fora 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 (emphasis added). 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). Nelson raises both prongs of this test, asserting that it did not freely agree to the Forum Selection Clause and that forcing it to litigate in Maryland is unreasonable.

I. Regardless of Whether Nelson Was Subjectively Aware of the Forum Selection Clause, It Freely Agreed to the Clause's Requirements

Nelson first contends that it was wholly unaware of the Forum Selection Clause and that it did not freely agree to the restrictions it imposes. This court is not persuaded by this argument.

Pennsylvania law affords no leniency for individuals who do not read the contracts that they execute. According to the Pennsylvania Supreme Court, "in the absence of proof of fraud, failure to read is an unavailing excuse or defense and cannot justify an avoidance, modification or nullification of the contract or any provision thereof." In re Estate of Olson, 447 Pa. 483, 488, 291 A.2d 95, 97 (1972) (citing Orner v. T. W. Phillips Gas & Oil Co., 401 Pa. 195, 199, 163 A.2d 880, 883 (1960), T.W. Phillips Gas & Oil Co. v. Kline, 368 Pa. 516, 518, 84 A.2d 301, 302 (1951), and Montgomery v. Levy, 406 Pa. 547, 550, 177 A.2d 448, 450 (1962)) (quotation marks omitted). See also Mormello v. Mormello, 452 Pa. Super. 590, 599, 682 A.2d 824, 828 (1996) ("Contracting parties are normally bound by their agreements, without regard to whether the terms thereof were read and fully understood."); Germantown Sav. Bank v. Talacki, 441 Pa. Super. 513, 521, 657 A.2d 1285, 1289 (1995) ("[T]he failure to read a contract before signing . . . is considered supine negligence.").

This line of cases is even more persuasive in the instant dispute. Here, a representative of Nelson reviewed the Terms and found them to be reasonable, and the individual who signed the Agreements read at least a portion of the Terms. Def. Sup. Mem. Ex. A 7-10. Moreover, Nelson's signor admits to having read and understood the Acknowledgment Provisions. Id. 20-22. In the face of these facts and admissions, the argument that Nelson did not freely agree to the Forum Selection Clause is unpersuasive. To allow individuals to escape responsibility for their business decisions would be contrary to prevailing law, conventional wisdom and common sense. Rather, it can be said that by entering into the Agreements, Nelson freely agreed to the Terms, which included the Forum Selection Clause.

In short, Nelson was charged with reviewing the obligations imposed by the Agreements. Any failure to do so cannot be used as a shield to bar enforcement of the Terms generally and of the Forum

Selection Clause specifically. Thus, Nelson's first argument is unavailing.

II. Maryland Is Not an Unreasonable Forum

Nelson's second argument is that Maryland is an unreasonable forum in which to prosecute this action. The Court disagrees.

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.").

There exist no grounds for finding Maryland to be an unreasonable forum. Nelson's complaint that the relatively small recovery to be made in this case does not justify the expense of engaging in out-of-state litigation is not persuasive. Maryland, after all is a relatively short distance from Philadelphia. This distance is not as outrageous as the locations chosen in other forum selection clauses this court has refused to enforce. See, e.g., Miltenberg & Samton, Inc. v. Assicurazioni Generali, S.p.A., No. 3633, 2000 WL 33711043 (Oct. 11, 2000) (holding that forcing Philadelphia-based plaintiff to litigate in England would be unreasonable). Cf. Credit America, Inc. v. Intercept Corp., No. 3923, 2001 WL 1807381 (Pa. Com. Pl. Oct. 2, 2001) (enforcing forum selection clause that required suit to be brought in Cass County, North

Dakota).

Thus, the Forum Selection Clause is reasonable and enforceable and the Objections asserting improper venue are sustained.

CONCLUSION

Nelson freely agreed to the Forum Selection Clause, and enforcement of the Forum Selection Clause is reasonable at the time of litigation. Based on these conclusions, the Court is sustaining the Objections asserting improper venue. A contemporaneous Order consistent with this Opinion will be entered.

BY THE COURT:

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ALBERT W. SHEPPARD, JR., J.