

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

CREDIT AMERICA, INC.,	:	February Term, 2001
and	:	
MARYANN SKARBOWSKI and	:	No. 3923
SCOTT SKARBOWSKI	:	
t/a ADVANTAGE PAYROLL SOLUTIONS	:	Commerce Case Program
Plaintiffs	:	
v.	:	Control No. 061887
	:	
INTERCEPT CORPORATION	:	
and	:	
BARRINGTON CORPORATION	:	
Defendants	:	

ORDER

AND NOW, this 2nd day of October , 2001, upon consideration of the Preliminary Objection of Defendants Intercept Corporation (“Intercept”) and Barrington Corporation (“Barrington”) to the Complaint of Plaintiffs Credit America, Inc. (“Credit America”), Maryann Skarbowski and Scott Skarbowski, t/a Advantage Payroll Solutions (collectively “APS”) and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED:

- (1) The Preliminary Objection asserting that the proper venue for this case is North Dakota based on a contractual forum selection provision is SUSTAINED, and
- (2) The case is DISMISSED without prejudice to refile in North Dakota.

BY THE COURT:

JOHN W. HERRON, J.

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	:	
INTERCEPT CORPORATION	:	
and	:	
BARRINGTON CORPORATION	:	
Defendants	:	

MEMORANDUM OPINION

Defendants Intercept Corporation (“Intercept”) and Barrington Corporation (“Barrington”) have filed a Preliminary Objection to the Complaint of Plaintiffs Credit America, Inc. (“Credit America”), Maryann Skarbowski and Scott Skarbowski, t/a Advantage Payroll Solutions (collectively “APS”). For the reasons stated below, the Preliminary Objection asserting the forum selection provision is sustained.

BACKGROUND

In this case, Plaintiffs Credit America and APS have filed suit against Defendants Intercept and Barrington for negligence and breach of contract. Specifically, APS alleges that a significant amount of

money was removed from the account of Credit America as a result of defective, or negligently misrepresented, software purchased from Barrington, and support services which were not properly provided by Intercept. The software and services were intended to arrange for the payment of payroll taxes to the Internal Revenue Service.

On March 2, 2001, Plaintiffs filed suit in this court for negligence and breach of contract. On June 4, 2001, Defendants Intercept and Barrington filed Preliminary Objections asserting that pursuant to the forum selection clause of their contract with Plaintiffs, North Dakota is the appropriate forum for the instant suit.

DISCUSSION

I. Venue is Improper in Philadelphia County Because the Forum Selection Clause is Enforceable

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, 384 A.2d 1261, 1263-64 (Pa. Super.Ct. 1978). See also Gale v. Mercy Catholic Med. Center Eastwick, Inc., Fitzgerald Mercy Div., 698 A.2d 647, 652 (Pa.Super.Ct. 1997), app. denied, 552 Pa 696, 716 A.2d 1249 (1998) (the moving party has the burden of showing that the original choice of venue is improper). Consequently, to prevail, defendants must show that Philadelphia County constitutes improper venue.

Both parties direct this court to Central Contracting v. C.E. Youngdahl & Co, 418 Pa. 122, 209 A.2d 810 (1965). There the Pennsylvania Supreme Court held 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.” Id at 816. The Supreme Court further emphasized that where parties to a contract have “freely agreed that litigation should be conducted in another forum,” this agreement should not be deemed unreasonable unless “its enforcement would under all circumstances existing at the time of litigation, seriously impair plaintiff’s ability to pursue his cause of action.” Id. The court cautioned, moreover, that “[m]ere inconvenience or additional expense is not the test of unreasonableness....” Id.

The reasonableness standard found in Central Contracting should thus be examined in terms of whether the forum selection clause would seriously impair the plaintiffs’ ability to pursue their cause of action. Here, plaintiffs have failed to show that their freely agreed upon forum selection clause should not be enforced because to do so would seriously impair their ability to pursue their claim. The thrust of their argument is that because venue is proper with this court, the forum selection clause should be abrogated. Proper venue, however, would not suffice under the test set forth in Central Contracting to defeat the forum selection clause. Although plaintiffs argue that North Dakota would be an “inconvenient” forum, they fail to set forth any factors other than the location of witnesses to establish how pursuit of litigation in North Dakota would seriously impair their ability to pursue their claims. While the plaintiffs note that the defendants freely elected to do business in Pennsylvania, their complaint acknowledges that both defendants are North Dakota corporations with principal places of business in North Dakota. Complaint, ¶¶ 3 & 4. Moreover, plaintiffs do not dispute that they freely contracted with these two North Dakota companies and specifically agreed to pursue any litigation in North Dakota under North Dakota law. The relevant Master Agreement provides:

Governing Law. This Agreement shall be constructed in accordance with and governed by the laws of the state of North Dakota. Any suit or litigation of any kind against IC shall take place in the state of North Dakota in the county of Cass. See Intercept Corporation Processing Master Agreement, ¶ 22 attached to Defendants' Preliminary Objections (emphasis added).

Therefore, plaintiffs not having shown that the forum selection clause would seriously impair their ability to pursue their cause of actions, the forum selection clause governs. To hold otherwise would do violence to a contract where it is clear that the parties freely agreed upon the contract at arms length and freely negotiated each clause, including forum selection. Thus, the forum selection clause is enforceable.

CONCLUSION

For the reasons set forth in this Opinion, the Preliminary Objection asserting improper venue based on a contractual forum selection provision is SUSTAINED. The case is dismissed without prejudice to refile in North Dakota.

BY THE COURT

JOHN W. HERRON, J.

Date: October 2, 2001