

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

JOHN C. CARDULLO & SONS, INC.	:	AUGUST TERM, 2005
	:	
Plaintiff,	:	No. 03515
	:	
v.	:	COMMERCE PROGRAM
	:	
INTERNATIONAL PROFIT	:	Control No. 121499
ASSOCIATES, INC. and	:	
INTERNATIONAL TAX	:	
ADVISORS, INC.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 7th day of August, 2006, upon consideration of defendants' Preliminary Objections to the Amended Complaint, the response thereto, the evidence submitted by the parties on the choice of forum issue, and all other matters of record, and in accord with the court's contemporaneous findings of fact and conclusions of law, it is hereby **ORDERED** that said Preliminary Objections are **SUSTAINED** in part, and plaintiff's claims are dismissed without prejudice to bring them in the Nineteenth Judicial District of Lake County, Illinois.

BY THE COURT,

HOWLAND W. ABRAMSON, J.

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OPINION

Defendants, International Profit Associates, Inc. (“IPA”) and International Tax Advisors, Inc. (“ITA”), filed Preliminary Objections to the Amended Complaint of plaintiff John C. Cardullo & Sons, Inc. (“Cardullo”). IPA and ITA object to Cardullo’s prosecution of its claims in this court based on a forum selection clause set forth in the parties’ written agreements. Upon consideration of the evidence submitted and the arguments made by the parties, the court makes the following findings of fact and conclusions of law with respect to IPA’s and ITA’s forum objection.

I. Findings of Fact.

1. In its Amended Complaint, Cardullo asserts claims for fraud, breach of contract, and tortious interference with contract against IPA, and for rescission/breach of contract against ITA.

2. In essence, Cardullo claims that it hired IPA and ITA to provide certain financial services, but they failed to provide the promised services, despite receiving payment for those

services from Cardullo. Cardullo demands a refund of the \$31,785.86 it paid to IPA under the Contract and the \$5,711.53 it paid to ITA.

3. Cardullo also claims that IPA agreed not to deposit certain checks that Cardullo gave IPA in payment for its services without first calling Cardullo to make sure that Cardullo had sufficient funds to cover the checks. However, IPA allegedly deposited the checks without such confirmation causing checks written to Cardullo's suppliers to bounce as a result of which those suppliers refused to deal with Cardullo. Cardullo claims lost profits resulting from the change in its relationship with its suppliers caused by the bounced checks.

4. The contract between Cardullo and IPA and the contract between Cardullo and ITA both contain the following concluding paragraph:

It is expressly agreed that this printed document embodies the entire agreement of the parties in relation to the subject matter of Consulting Services to be rendered by [IPA and ITA]; and that no other understanding or agreement, verbal or otherwise, exists between the parties, except as herein expressly set forth. It is agreed that exclusive jurisdiction shall vest in the Nineteenth Judicial District of Lake County, Illinois, Illinois law applying.

(the "Forum Selection Clause").

5. Cardullo is a family owned fuel oil and diesel delivery business with approximately 7 regular employees. Cardullo's counsel anticipates that at least three of those employees will be called as witnesses during the trial of this matter.

6. Pasquale Cardullo is a prospective witness because he is the CEO of Cardullo, he executed the contracts with IPA and ITA, and he has knowledge regarding all aspects of the case.

7. Peter Cardullo is a prospective witness because he is the person with the most knowledge regarding the change in Cardullo's relationships with its suppliers.

8. Barbara Cardullo is a prospective witness because she is Cardullo's bookkeeper, she dealt with the IPA and ITA representatives who came to Cardullo's offices, and she is the person with the most knowledge of Cardullo's financial records.

9. In addition to the three prospective witnesses, Cardullo also employs an additional driver, a part-time assistant bookkeeper, a family member who installs and repairs furnaces, and at least one other person. In the past, Cardullo has employed yet another driver on a seasonal basis. None of these persons are anticipated to be called as witnesses.

10. Pasquale and Peter Cardullo make the deliveries to the larger commercial accounts which constitute at least 60% of Cardullo's business. If both Pasquale and Peter must appear at trial in Illinois at the same time, there is a risk that these commercial deliveries will not be made timely or properly and that Cardullo could lose those accounts. However, it is possible that such deliveries could be made by other drivers, or by either Pasquale or Peter if only one of them has to be present in Illinois at any given time during trial.

11. In addition to the fact witnesses, Cardullo's counsel anticipates calling Cardullo's accountant as an expert witness. The accountant resides in Pennsylvania.

12. IPA and ITA have offices in Lake County, Illinois. They conduct business throughout the United States.

13. The individuals who acted on behalf of IPA and ITA in their dealings with Cardullo, and who may also be called as witnesses at trial, do not reside in Illinois. They are:

- a. Charlotte Halterman, an IPA field representative who came to Cardullo's offices and obtained Cardullo's consent to the initial engagement contract, but who is no longer employed by IPA. She resides in Pennsylvania.

- b. Ken Breeman, an IPA survey analyst who came to Cardullo's offices to conduct the initial analysis and who obtained Cardullo's consent to the IPA contract. He resides in Connecticut.
- c. Robert Bratti, an IPA project manager who came to Cardullo's offices to analyze its books and records, and who obtained Cardullo's consent to the ITA contract. He resides in Ontario, Canada.
- d. David Peffer, an IPA consultant who came to Cardullo's offices to analyze its books and records. He resides in Wisconsin.
- e. Ikenna Ikokwu, an ITA representative who came to Cardullo's offices to collect payment, but who is no longer employed by ITA. He resides in Georgia.

14. Cardullo's books and records are located in Pennsylvania. IPA's and ITA's files relevant to this matter, to the extent that any exist, are apparently located in Illinois. They have already been produced to Cardullo in this action.

II. Conclusions of Law.

- 1. Cardullo has the burden of proving that the Illinois Forum Selection Clause in the IPA and ITA contracts is unreasonable.
- 2. It will be inconvenient and more expensive for Cardullo to prosecute its claims against IPA and ITA in Illinois rather than in Pennsylvania.
- 3. Enforcement of the Illinois Forum Selection Clause will not seriously impair Cardullo's ability to pursue its claims against IPA and ITA.
- 4. The courts in Lake County, Illinois are available to Cardullo, and they can do substantial justice to Cardullo's claims.

5. All of Cardullo's claims arise out of IPA's and ITA's performance of their contracts with Cardullo, so the Illinois Forum Selection Clause applies to all such claims.

III. Legal Analysis.

IPA and ITA object that this court is not the proper venue to hear and decide Cardullo's claims due to the Illinois Forum Selection Clause in the contracts between the parties.

[W]hile 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. Such an agreement is unreasonable only where its enforcement would, under all circumstances existing at the time of litigation, seriously impair plaintiff's ability to pursue his cause of action. Mere inconvenience or additional expense is not the test of unreasonableness since it may be assumed that the plaintiff received under the contract consideration for these things. 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 his agreement. Moreover, the party seeking to obviate the agreement has the burden of proving its unreasonableness.

Central Contracting Co. v. C. E. Youngdahl & Co., 418 Pa. 122, 133-134, 209 A.2d 810, 816 (1965).

Cardullo argues that the Illinois Forum Selection Clause is unreasonable because all of Cardullo's witnesses and documents are here, in Pennsylvania.¹ In addition, none of the IPA/ITA representatives who have first hand knowledge of the parties' transactions reside in Illinois; one of them is in Pennsylvania, but the remainder will be as difficult to produce at a trial in Pennsylvania as in Illinois. Furthermore, Cardullo argues that it is a small company, and its operations will be stretched very thin if several of its principals must attend trial in Illinois together for any considerable number of days.

¹ At the time that Cardullo entered into the contracts containing the Forum Selection Clauses, the location of its employees and records was the same, so Cardullo could have foreseen the difficulty in which it now finds itself and could have tried to prevent it.

These facts support the conclusion that it will be very inconvenient and costly for Cardullo to prosecute its claims in Illinois. However, such inconvenience does not rise to the level of unreasonableness. There is no evidence that a court in Lake County, Illinois cannot do substantial justice to Cardullo's claims,² nor is there any evidence that the court cannot make accommodations with respect to the trial schedule in order to prevent much of the inconvenience that Cardullo anticipates.³

Cardullo also argues that, even if its contract claims must be litigated in Illinois, its tort claims are not subject to the Forum Selection Clause, and they may be litigated in Pennsylvania. Where tort claims arise out of a contract containing a choice of forum clause and they implicate the contract's terms, then the contractual choice of forum clause applies to them. *See Morgan Trailer Mfg. Co. v. Hydraroll, Ltd.*, 759 A.2d 926, 931(Pa. Super. 2000) (finding that misappropriation of trade secrets, tortious interference with employee and customer relations, and unfair competition claims were separate from the parties' contract for the sale of goods.) In this case, Cardullo's fraud claims are based upon the promises made in the parties' contracts; they are so inextricably intertwined with its contract claims that such fraud claims may be subject to dismissal as duplicative under Pennsylvania's gist of the action doctrine. *See Hart v. Arnold*, 884 A.2d 316, 339-340 (Pa. Super. 2005). Cardullo's tortious interference claim is based upon an alleged oral modification or addendum to the parties' contracts regarding the means of payment of the contract price by Cardullo to IPA/ITA. Since Cardullo's tort claims are all derivative of its contract claims, they too are subject to the contracts' Forum Selection Clause and must be litigated in Illinois.

² For instance, there is not, and cannot be, a claim that Illinois law differs so greatly from Pennsylvania law with respect to contract claims and business torts that Cardullo would be left without a remedy in Illinois.

³ Although Cardullo apparently makes diesel deliveries all year round, its fuel oil deliveries are necessarily fewer in the warmer months, so a trial in the summer would be less inconvenient for Cardullo than one in the winter.

CONCLUSION

For all the foregoing reasons, IPA's and ITA's Preliminary Objections to Cardullo's Amended Complaint are sustained, in part, and the Amended Complaint is dismissed.

BY THE COURT,

HOWLAND W. ABRAMSON, J.