

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

Jill Beedle,

Plaintiff,

v.

Matthew L. Kilgus,

Defendant.

SX-17-CV-169

Action for Damages Premises Liability/Tort

MEMORANDUM OPINION

THIS MATTER comes before the Court on Defendant's Motion to Dismiss due to the forum selection clause in a lease agreement. The clause requires that all legal claims arising out of the agreement be litigated in the courts of Hamilton County Ohio. This Court finds that the Plaintiff's claims in this action are not subject to the forum selection clause. Therefore, the Defendant's Motion to Dismiss is DENIED.

Factual Background:

Defendant Matthew L. Kilgus, a resident of the State of Ohio, owns a condominium unit at the Pelican Cove Condominium complex located in St. Croix, U.S. Virgin Islands. Defendant leases the condominium unit on a short-term basis. Plaintiff Jill Beedle is a resident of the State of Washington. Plaintiff and Defendant entered into an agreement for the lease of the condominium unit. It appears from the agreement that the Plaintiff, and a second person were scheduled to occupy the unit from April 10, 2015 to May 2, 2015. There is no indication that the second person was a party to the agreement.

Plaintiff filed a complaint seeking damages for injuries which Plaintiff sustained while on the premises of the condominium. Plaintiff attributes the cause of her injuries to negligence of the Defendant in maintaining a dangerous condition on the premises and Defendant's failure to warn or otherwise advise the Plaintiff of the dangerous condition. The complaint alleges that the Plaintiff arrived on St. Croix on April 10, 2015 to begin occupancy of the unit according to the terms of the agreement. The complaint further alleges that upon the night of Plaintiff's arrival, Plaintiff fell on the steps that separated the living area from the dining area of the condominium unit. It is this feature of the unit's structure that Plaintiff deems to be the dangerous condition.

The Defendant filed a Motion to Dismiss the complaint, asserting that a forum selection clause in the lease agreement requires the Plaintiff to file this action in Ohio. In opposing the Motion to Dismiss, Plaintiff contends that the forum selection clause is inapplicable because of Plaintiff's claims do not arise under the lease agreement.

A. The Legal Standard:

The Supreme Court of the Virgin Islands has not addressed the issue of the enforceability of a forum selection clause, but courts in the Virgin Islands have relied on federal case law when dealing with forum selection clauses. This Court finds federal case law to be persuasive regarding the enforcing a forum selection clause.

Generally, courts treat a motion to dismiss on the basis of a forum selection clause as a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Rules of Civil Procedure¹ or as one for improper venue under Rule 12(b)(3) of the Rules of Civil Procedure. *Neon*

¹ The precedent authorities apply the Federal Rules of Civil Procedure. The Virgin Islands Rules of Civil Procedure have now replaced the Federal Rules in the practice of the Superior Court. V.I.RCP Rule 12 is identical to FRCP Rule 12.

Construction Enters, Inc. v. Int'l Bonding & Construction Services, 2012 V.I. LEXIS 34 (Super. Ct. 2012). Either way, all courts apply a similar substantive analysis when considering whether to enforce a forum selection clause. *Id.* A forum selection clause gives rise to contractual rights and obligations. Therefore, a court considering a forum selection clause applies principles of contractual interpretation. A motion to dismiss an action in order to give effect to a forum selection clause is in practical effect, an application for specific performance of that contractual provision. *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.*, 709 F. 2d 194 (3rd Cir. 1983). Before making a final determination on whether a forum selection clause is enforceable, the court must interpret the clause to determine its applicability. The interpretation of a forum selection clause is an analytically distinct concept from the enforceability of that clause. *Collins v. Mary Kay Cosmetics*, 2017 U.S. App. LEXIS 20465 (3rd Cir. 2017). A court considering the interpretation of a forum selection clause applies principles of contract law to determine the scope of the clause. *John Wyeth & Bros. Ltd. V. CIGNA Int'l Corp*, 119 F. 2d 1070, 1073 (3rd Cir. 1997). The question of the scope of the forum selection clause is one of contract interpretation. In other words, it decides whether the claims and the parties involved in the suit are subject to the clause. *Martinez v. Bloomberg, LP.*, 740 F. 3d 211, 217 (2nd Cir. 2014).

Once the court has determined the applicability of a forum selection clause, the court must determine its enforceability. If a forum selection clause is found to be applicable, it is valid and presumptively enforceable. However, its enforceability must be tested by further inquiry. If a forum selection clause was communicated to the party opposing enforcement, it is mandatory, and covers the claims and parties in the dispute, it is presumptively enforceable. *Philo v. Armstrong*, 2017 V.I. LEXIS 82 (Super. Ct. 2017) citing *Phillips v. Audio Active*, 494 F. 3rd.378, 383 (2nd Cir. 2007). The presumption is rebuttable so applicability does not automatically translate into

enforceability. The right to specific performance of a forum selection clause is not absolute. A court having subject matter jurisdiction must weigh competing considerations in deciding on enforceability of such a clause. *Coastal Steel Corp. v. Tilghman Wheelabrator*; *supra*. at 196. The court must ascertain whether the party resisting enforcement has rebutted the presumption of enforceability by a making sufficiently strong showing that enforcement would be unreasonable or unjust, or that the clause was invalid for reasons such as fraud or overreaching. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

B. Discussion

1. The Applicability of the Forum Selection Clause

Although a forum selection clause gives rise to contractual rights and obligations, the applicability of a forum selection clause to a plaintiff's claims does not turn on the presence of contractual claims but rather on the language in the clause that determines its scope with respect to the agreement of the parties. See *Collins v. Mary Kay Cosmetics*, 2017 U.S. App. LEXIS 20465 (3rd. Cir. 2017). The forum selection clause contained in the lease agreement states the following:

In the event that any legal action shall be commenced by either party arising out of or concerning this lease or any rights or obligation derived there from, the prevailing party shall be entitled to receive attorney's fees as fixed by the court in addition to all relief at law or equity. The parties also agree that Hamilton County Ohio, shall be the venue in which any and all legal proceedings involving the lease shall be brought. No legal proceedings involving this lease shall be brought in any other jurisdiction by either/any party hereto.

Ordinarily, courts engage in a four part analysis when considering whether to enforce a forum selection clause or to dismiss a claim based on such a clause. The first three parts of the analysis examine the applicability of the clause. The first inquiry is whether the clause was reasonably communicated to the party resisting enforcement. The second step requires the classification of the clause as mandatory or permissive, that is, to decide whether the parties are required to bring

any dispute to the designated forum or simply permitted to do so. The third part of the inquiry asks whether the claims and the parties involved in the suit are subject to the forum selection clause. *Philo v. Armstrong*, 2017 V.I. LEXIS 82 (Super. Ct. 2017) citing *Phillips v. Audio Active Ltd.*, 474 F. 3d 378 (2nd. Cir. 2007).

As it relates to the lease in question, the first two elements of the analysis are satisfied. It is clear that the clause was communicated to the plaintiff since the clause is contained in the lease agreement which the Plaintiff signed. In addition, the clause is mandatory requiring legal action to be filed in Hamilton County, Ohio. However, the forum selection clause fails to satisfy the third element of the analysis. The forum selection clause specifies legal action “arising out of or concerning this lease or any right or obligation derived there from”.

In substance, the complaint alleges that the steps between the dining and living area was a dangerous condition because of the way they were constructed and the Defendant failed to warn the Plaintiff of such condition or otherwise made it possible for the Plaintiff to discern or become aware of the condition. This is an action sounding in tort and does not arise out of any right or obligation derived from the lease. Neither does the Plaintiff’s claims arise out of or concern the lease. In essence, this is not an action in which the Plaintiff’s claims are based on liability that stems from the lease or where the duties allegedly breached were created or grounded in the lease agreement. The claims are completely separate and independent of the lease agreement. The duty which the Plaintiff alleges has been breached is a duty socially created by law and is owed to all who may enter upon the premises of the condominium unit. The duty exists regardless of the lease agreement and the Plaintiff’s claims may be adjudicated without consideration of the terms of the lease agreement. Since the forum selection clause specifically refers to legal action which arises

out of or concerning the agreement, the Plaintiff's claims are not subject to the forum selection clause. Consequently, the forum selection clause is inapplicable.

2. The Enforceability of the Forum Selection Clause.

The fourth inquiry of the analysis tests the enforceability of the forum selection clause. If the forum selection clause was reasonably communicated to the party resisting enforcement, is mandatory and covers the claims and parties in the dispute it is presumptively enforceable. *Philo v. Armstrong*, 2017 V.I. LEXIS 82 (Super. Ct. 2017). In such an instance the court must resolve the fourth and final issue as to whether the resisting party has rebutted the presumption of enforceability by showing (1) that the clause is the result of fraud or over reaching; (2) some strong Virgin Islands policy would be violated if the clause is enforced; or (3) the opponent to the enforcement of such a clause would be forced to litigate in a jurisdiction that would be so seriously inconvenient to the opponent that it would be unreasonable. *Citibank N.A. v. Chammah*, 44 V.I. 85, 92 (Terr. Ct. 2001) citing *General Engineering Corp. v. Martin Marietta Alumina*, 783F. 2d 352, 358 (3rd Cir. 1986). See also *Phillips v. Audio Active*; *Neon Constr. Enters. Inc. v. Int'l Bonding & Construction Services*, 2012 V.I. LEXIS 34 (Super. Ct. 2012).

Even though the Court finds the forum selection clause to be inapplicable, the Court will nevertheless examine the requirements of enforceability. The Plaintiff has not claimed over reaching or fraud and has not identified the violation of any Virgin Island public policy. However, there are a number of factors which prove to be obstacles to a fair trial in the selected forum. The incident giving rise to the injury occurred in the Virgin Islands. The situs of the injury is in the Virgin Islands. The majority of witnesses may be located in the Virgin Islands. As a result, there are foreseeable difficulties and costs relating to: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process for the attendance of unwilling witnesses; and (3) the

possibility of a view of the premises, if necessary. Accordingly, the Court finds that in light of the Plaintiff's choice of forum, it would be seriously inconvenient to force the Plaintiff to litigate this matter in Ohio.

Conclusion:

The Plaintiff's claim is not subject to the forum selection clause in the lease agreement.

The Defendant's Motion to Dismiss is **DENIED**.

An Order consistent with this Memorandum Opinion shall follow.

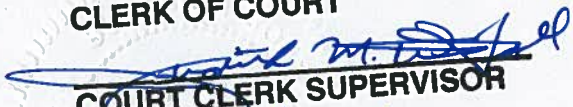
Dated: November 24, 2017



JOMO MEADE
Judge of the Superior Court

ATTEST:

ESTRELLA H. GEORGE
CLERK OF COURT



COURT CLERK SUPERVISOR

DATED: 11/22/17