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INDEX
NO. 11074-00

SUPREME COURT - STATE OF NEW YORK
IAS TERM, PART 25 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN
Justice

XXX

Motion R/D: 9-27-00
Submission Date:
Motion Sequence No.: 001/MOT D

STRATEGIC GROWTH INTERNATIONAL, INC.,

Plaintiff,

- against -

FINANTRA CAPITAL, INC.,

Defendant.

PLAINTIFF'S ATTORNEY
Carl S. Levine & Associates, P.C.
1800 Northern Boulevard
Roslyn, New York 11576

DEFENDANT'S ATTORNEY
Kapson, Ginsburg & Misk, Esqs.
215-48 Jamaica Avenue
Queens Village, New York 11428

Upon the following papers read on Defendant's motion to dismiss:

Notice of Motion;
Affirmation of Gerard Misk and the supporting papers;
Affidavit of Richard Cooper in Opposition and the supporting papers;
Memorandum of Law in Opposition;
Reply Affidavit of Robert Press and supporting papers;
Reply Memorandum of Law.

Defendant Finantra Capital, Inc. seeks an Order dismissing the complaint on the ground that the agreement of the parties contains a forum selection clause which

deprives this Court of jurisdiction. For the reasons herein stated, the motion is **granted.**

BACKGROUND

Defendant Finantra Capital, Inc. ["Finantra"] is a Delaware corporation authorized to do business in the State of Florida. It maintains its principal place of business in Plantation, Florida. Plaintiff, Strategic Growth International, Inc. ["SGI"], is also a Delaware corporation which maintains its principal place of business in Great Neck, New York.

According to its principal, SGI is a corporation which specializes in providing so-called investor relations services to its clients, which include, among other things, "the arrangement of introductory meetings/consultations between clients and financial and investment entities located in the State of New York, including brokerage firms, small cap analysts, institutional buyers and banking firms."

Finantra entered into a letter agreement with SGI dated June 7, 1999, which, significantly, was drafted on SGI letterhead. Pursuant to that agreement, Finantra retained SGI as its investment relations counselor. In addition, SGI was to enhance Finantra's relations with the professional investment community and investor groups by assisting with the arranging and conducting of meetings with such professionals.

As to SGI's compensation for the agreed services, the agreement provides that: (1) SGI was to receive a monthly retainer fee of $7,500; and (2) would be entitled to an

option to purchase 240,000 shares of Finantra's common stock, as governed by the specific terms of the agreement.

Under a provision entitled "TERMS OF AGREEMENT," the parties agreed *inter alia*, that the term of the contract was to extend for 12 months. However, Finantra was afforded the right to "terminate the agreement after six months on December 7, 1999, by providing 30 days prior written notice to SGI". Finally, and at the heart of this motion, the agreement also provides that "[t]his agreement shall be governed by and subject to the jurisdiction of and the law of Broward County, Florida". By letter dated December 7, 1999, Finantra advised SGI that it was terminating the agreement effective as of that date. Finantra stated that the reason for the termination was that SGI failed to perform its obligations under the June 7th letter".

Thereafter, SGI commenced the within action, alleging, among other things, *inter alia*, that Finantra violated the June 7th letter agreement by failing to pay some $45,000 in commissions due and owing and by failing to afford SGI the option to purchase the 240,000 shares of Finantra common stock as provided in the June 7, 1999 letter agreement.

Finantra now moves, prior to the joinder of issue, to dismiss the complaint on the grounds that: (1) pursuant to the June 7th letter, the parties agreed that the courts of Florida would have exclusive jurisdiction over any dispute arising out of their agreement; and (2) this Court lacks personal jurisdiction over it since it maintains no

contacts with the State of New York upon which personal jurisdiction can be predicated.

FORUM SELECTION IN THE AGREEMENT

With respect to the forum selection issue, the Second Department has observed that "[i]t is well settled forum selection clauses are *prima facie* valid". D.O.T. Tiedown & Lifting Equip. v. Wright, 272 A.D. 2d 290, 707 N.Y.S. 2d 893 (2nd Dept. 2000); See also, Brooke Group Ltd. v JCH Syndicate 488, 87 N.Y. 2d 530, 640 N.Y.S. 2d 479 (1986); Koko Contr. Inc. v. Continental Envtl. Asbestos Removal Corp., 272 A.D. 2d 585, 709 N.Y.S. 2d 825 (2nd Dept. 2000); and Shah v. Shah, 215 A.D. 2d 287, 626 N.Y.S. 2d 786 (1st Dept. 1995); Hirschman v. Nat. Textbook Co., 184 A.D. 2d 494, 584 N.Y.S. 2d 199 (2nd Dept. 1992); and Micro Balanced Prods. Corp. v. Hlavin Indust. Ltd., 238 A.D. 2d 284, 667 N.Y.S. 2d 1 (1st Dept. 1997). In New York, public policy strongly supports enforcement of forum selection clauses. CPLR 501. See also, Morris v. Morris, 251 A.D. 2d 637, 676 N.Y.S. 2d 202 (2nd Dept. 1998); Bell Constructors, Inc. v. Evergreen Caissons, Inc., 236 A.D. 2d 859, 654 N.Y.S. 2d 80 (4th Dept. 1997); British W. Indies Guar. Trust Co. v. Banque Internationalle A Luxembourg, 172 A.D. 2d 234, 567 N.Y.S. 2d 731 (1st Dept. 1191); and Brooke Grp. Ltd. v. JCM Syndicate 488, *supra*. In part, this is because they "provide certainty and predictability in the resolution of disputes". Brooke Group Ltd., v. JCH Syndicate 488, *supra*, 87 N.Y. 2d at 534, 640 N.Y.S. 2d at 638.

In order to set aside such a clause, a party must show either that enforcement would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the forum set in the contract would be so gravely difficult and inconvenient that the challenging party, would for all practical purposes, be deprived of his or her day in court. See, Hirschman v. Nat. Textbook Co., *supra*; and Koko Contr. Inc. v. Continental Environmental Asbestos Removal Corp., *supra*.

Contrary to the Plaintiff's contentions, the forum selection clause is clear enough in its import and intended scope. The parties agreed that their contract "**shall be governed by and subject to the jurisdiction of and law of Broward County, Florida.**" (Emphasis added). The phrase "governed by and subject to" refer to both the jurisdiction and law of "Broward County, Florida". The parties' use of the definitive terms "shall" and "governed by," in connection with the issue of forum selection, and agreement's further reference to a specific county or venue in Florida, buttresses the conclusion that the parties anticipated that only the courts of Florida would possess jurisdiction over legal proceedings arising out of the agreement. To construe the relevant language otherwise, would read the choice of forum provision out of the parties' agreement. Micro Balanced Prods. Corp. v. Hlavin Indust. Ltd., *supra*. It bears noting in this respect that the First Department in Micro Balanced Prods. Corp., *supra*, has construed analogous language to be mandatory in its application. Likewise, the Second Department has recently cited the Micro Balanced holding with approval in at

least two cases where it upheld forum selection clauses. D.O.T. Tiedown & Lifting Equip., *supra*; Koko Contr. Inc. v. Continental Environmental Asbestos Removal Corp., *supra*. The Court notes further that the June 7th letter agreement was drafted by SGI – indeed, it is framed on SGI's own letterhead. Therefore, to the extent any purported ambiguity exists, it must be construed against the Plaintiff. See, Jacobson v. Sassower, 66 N.Y. 2d 991, 993, 499 N.Y.S. 2d 381 (1985). Where a document is unambiguous and clear on its face, as in the case at Bar, the intent of the parties is to be found within the four corners of the document. See, Chimart Assoc. v. Paul, 66 N.Y. 2d 570, 498 N.Y.S. 2d 344 (1986); Teitelbaum Holdings v. Gold, 48 N.Y. 2d 51, 56, 421 N.Y.S. 2d 556 (1979); and Harper v. Bard, 147 A.D. 2d 614, 538 N.Y.S. 2d 23 (2nd Dept. 1989). Thus, the Court will not read in language, as suggested by Plaintiff, to cause the forum selection clause in the letter agreement of June 7, 1999, to mean that the Courts of both New York and lorida have jurisdiction. The clause in question was negotiated by independent corporate entities at arm's length and should be enforced. See, AVC Nederland B.V. v. Atrium Inv. Partnership, 740 F. 2d 148 (2d Cir. 1984).

Finally, the Plaintiff's submissions fall short of establishing that the forum selection clause was unjust, unreasonable, or that trial in the State of Florida would be so gravely difficult and inconvenient as to deprive the Plaintiff of its day in court. Koko Contr. Inc. v. Continental Environmental Asbestos Removal Corp., *supra*; D.O.T. Tiedown & Lifting Equip., Inc., *supra*; and Shah v. Shah, *supra*.

In light of the Court's conclusion with respect to the forum selection clause, it is unnecessary to reach the Defendant's alternative assertion concerning the question of *in personam* jurisdiction. Accordingly, it is,

ORDERED, that Defendant's motion to dismiss this action is **granted** on condition that Defendant consents to the jurisdiction of the Court in Broward County, Florida and waives any jurisdiction and statute of limitations defenses.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
January 31, 2001

Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED

FEB 26 2001

NASSAU COUNTY
COUNTY CLERKS OFFICE