IADC Committee Newsletter

FIDELITY AND SURETY

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*This month, Steven Weinberg presents an analysis of **Berkley Regional Insurance Company v. Weir Bros., Inc., et al.**, Case No. 13-cv-03227 (S.D.N.Y. Nov. 6, 2013) and how the intended and desired enforcement of the jurisdiction, venue, choice of law, prima facie proof and the Surety's right to settlement provisions in an indemnity agreement was achieved when defendant indemnitors filed a motion to dismiss for improper venue, a motion to transfer venue and opposed Plaintiff Surety's motion for summary judgment.*

ENFORCEMENT OF JURISDICTION/VENUE PROVISIONS OF INDEMNITY AGREEMENTS



ABOUT THE AUTHOR

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It is well settled that venue provisions in contracts will be enforced. However, that does not stop defendant-indemnitors from filing a motion to dismiss and in the alternative a motion to transfer the indemnity lawsuit to another venue, despite the inclusion of a venue provision in the Agreement of Indemnity the indemnitors signed. The key is proper drafting of the indemnity agreement, providing the Court with a reasonable explanation for the agreement provisions relied upon, and building a solid case justifying summary judgment against the defendants without the need for discovery. [1]

Motion to Dismiss for Improper Venue

In the case of *Berkley Regional Insurance Company v. Weir Bros., Inc.*, *et al.*, Case No. 13-cv-03227 (Nov. 6, 2013), the Surety commenced an indemnity lawsuit in the United States District Court for the Southern District of New York based on a jurisdiction/venue provision in the indemnity agreement. Neither the Plaintiff Surety nor the Defendants had any ties to or business engagements in New York. Plaintiff was a Delaware corporation with its principal place of business in Des Moines, Iowa. Defendants were either corporations with principal places of business in Texas, individuals who resided in Texas or trusts that were established and administered in Texas. Defendants never conducted business in New York.

The jurisdiction/venue provisions provided that Berkley had a right to bring suit in New York or any other jurisdiction. More specifically, it stated:

> "The undersigned agree to be subject to the personal jurisdiction of all courts, both state and federal, operating in the State of New York and hereby consent to the jurisdiction thereof and waives any defense or objections to actions involving this Agreement, a Contract or Bonds being initiated and maintained therein, including any claims of inconvenient or improper venue or forum. Such consent shall not preclude such action by Surety being initiated and maintained in a jurisdiction other than New York."

Berkley selected New York as the jurisdiction to settle disputes because the area of surety law is well-developed in New York. After commencement of the action in the United States District Court for the Southern District of New York, Defendants immediately filed motions to dismiss or alternatively to transfer venue to the Northern District of Texas. The Indemnity Agreement also had a choice of law provision to apply New York law for any disputes under the agreement.

First, Defendants moved to dismiss and/or transfer venue asserting that the Surety did not give them a choice or opportunity to negotiate the terms of the indemnity agreement. Defendants contended that a federal court in Texas could apply New York law, but did not assert any defense that required discovery and issue determination by a Texas court. Without elaborating or showing how they would be deprived of their day in court, Defendants contended that they would face hardship litigating in New York.

Berkley opposed the Defendants' motion on the grounds that the allegations were conclusory and, further, that there were no

[1] The author would like to acknowledge the assistance of Susanna Requets, Esq., an associate with Gottesman, Wolgel, Malamy, Flynn & Weinberg, P.C. in preparing this article.

issues of fact as to any defense asserted by the Defendants. Berkley issued bonds for nine various public construction projects to the Defendant Weir Bros., as principal. In consideration for Berkley's issuance of the bonds, Defendants executed the indemnity agreement.

The *Berkley* Court by Decision and Order dated November 6, 2013 denied Defendants' motion to dismiss because the Surety had a contractual right to commence suit in New York.

Ordinarily a defendant will seek dismissal when Plaintiff brings an action in a forum other than the forum designated in the contract. In those cases, New York courts consider four factors, to determine whether an action should be dismissed because of a forum selection clause:

(1) Whether the clause was reasonably communicated to the party resisting enforcement;
(2) Whether the clause is mandatory or permissive, that is "whether the parties are required to bring any dispute to the designated forum or simply permitted to do so";
(3) Whether the claims and parties involved in the suit are subject to the forum selection clause; and
(4) Whether the resisting party has rebutted the presumption of enforceability by making a sufficiently strong showing that enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching[2].

Concerning factor number 2 above, New York differentiates between mandatory and permissive forum selection clauses. The Second Circuit stated that:

> "A mandatory forum selection clause grants exclusive jurisdiction to a selected forum, while a permissive forum selection clause only reflects the contracting parties' consent to resolve disputes in a certain forum, but does not require that disputes be resolved in that forum…in the situation where only jurisdiction is specified, the clause will generally not be enforced without additional language indicating the intent of the parties to make jurisdiction exclusive."[3]

The forum selection clause in *Macsteel* was mandatory and required the Plaintiff to commence suit in London, but Plaintiff commenced suit in the United States District Court for the Southern District of New York. The forum selection clause in *Berkley* was permissive because it was not exclusively limited to having the Surety bring a lawsuit in New York.

The *Berkley* Court did not consider the *Macsteel* factors because Berkley brought an action in the forum that was in fact designated by the contract, Defendants consented to jurisdiction in the State of New York and waived any objection to venue in New York. The Court denied Weir Bros.' motion to dismiss and upheld the commencement of the indemnity lawsuit in the jurisdiction designated in the Indemnity Agreement. The Court then considered whether to transfer venue.

[2] ***Macsteel Int'l USA Corp. v. M/V Larch Arrow***, 354 Fed. Appx. 537, 539 (2d Cir. 2009).

[3] ***Macsteel International USA Corp. v. M/V Larch Arrow***, 354 Fed. Appx. 537, 539 (2d Cir. 2009) (citations omitted).

Motion to Transfer Venue

Second, Defendants moved to transfer venue to the Northern District of Texas. The Court denied this motion holding that: (i) the failure to negotiate the terms of an agreement did not constitute the fraud, overreaching or unconscionability necessary to void a forum selection clause, (ii) the inconvenience the Defendants now claimed, was foreseeable at the time they executed the indemnity agreement, and (iii) under New York law, the Surety was entitled to prompt indemnification upon proof of payment.

It is the Indemnitors' burden to establish by clear and convincing evidence that the balance of convenience favors a transfer. [4]

The Court noted that courts in the Second Circuit consider motions to transfer venue based on a totality of the circumstances and in consideration of the ten factors enumerated below:

1- Plaintiff's choice of forum
2- The convenience to witnesses
3- The location of relevant documents and ease of access to sources or proof
4- The convenience of parties to the suit
5- The locus of operative facts
6- The availability of process to compel the attendance of unwilling witnesses
7- The relative means of the parties
8- The forum's familiarity with the governing law
9- Trial efficiency, and
10- The interests of justice[5]

In order to prove inconvenience of the witnesses, New York Courts require that defendants specify the names and locations of witnesses that they intend to call, the documents they intend to produce, the hardships they would face in litigating in New York and specified defenses that would have to be decided under local law, not New York law.[6] Defendants' list of witnesses identified those involved in obtaining the bond, not witnesses that would aid their defense concerning liability under the indemnity agreement. According to the Court, with a forum selection clause in place, the convenience of the parties is less significant because it was foreseeable at the time the Defendants executed the indemnity agreement.

The Court recognized that the Surety could have commenced the indemnity lawsuit in the Northern District of Texas, which was Defendants' principal place of business, the location where the events relating at issue took place. However, the Court held that failure to negotiate the forum selection clause did not constitute fraud, overreaching or unconscionability necessary to void the forum selection clause.[7] The Court agreed with Berkley that Defendants failed to establish that they did not have bargaining power and could not obtain the desired services elsewhere, i.e. obtain a bond from a surety

[4] ***National Union Fire Insurance Company of Pittsburg, PA v. Nicolaci***, 1989 U.S. Dist. LEXIS 2562 *9 (S.D.N.Y. No. 88 CIV 7289, March 16, 1989).

[5] ***Recurrent Capital Bridge Fund I, LLC. v. ISR Systems and Sensors Corp.***, 875 F. Supp. 2d 297, 304 (S.D.N.Y. 2012). *See also* ***New York Marine and General Ins. Co. v. Lafarge North America, Inc.***, 599 F.3d 102, 127-28 (2d Cir. 2010); 28 U.S.C. §1404(a).

[6] *See* ***National Union Insurance Company of Pittsburg, PA v. Bundy***, 1989 U.S. Dist. LEXIS 1001 (S.D.N.Y. No. 87 CIV 8733, Feb. 6, 1989); ***National Union Fire Insurance Company of Pittsburg, PA v. Cushman***, 1989 U.S. Dist. LEXIS 8724 (S.D.N.Y. No. 88 CIV 6623, July 28, 1989).

[7] ***National Union Fire Ins. Co. of Pittsburgh, Pa. v. Fanelli***, 1990 WL 134895, at *3 (S.D. N.Y. Nos. 89 CIV 8348, 89 CIV 8400, Sept. 11, 1990).

that did not include jurisdiction/venue provisions selecting New York as the preferred forum.

Berkley contended that additional discovery could not alter the Defendants' duties and responsibilities under the indemnity agreement, which the Defendants admittedly signed. Since an indemnity lawsuit is likely to be adjudicated by a motion for summary judgment in New York, the costs and expenses were determined to be similar for Defendants whether the action was commenced in Texas or in New York. The Defendants did not raise an issue of fact that could defeat summary judgment to warrant discovery of documents in Texas or to require the presentation of witnesses from Texas.

Motion for Summary Judgment

Shortly after Defendants filed their motion to dismiss, Berkley moved for summary judgment. Berkley provided proof of its bond loss payments, recovery of contract balances, and proof of its consultant and attorney fees and expenses. The proof consisted of an affidavit from Berkley's authorized representative, documentary evidence including the Indemnity Agreement and Bonds, invoices for attorney fees and consultant expenses, and an itemized list of performance bond and payment bond losses together with copies of the relevant checks.

The only defense to defeat a motion for summary judgment based on a breach of indemnity agreement under New York law are allegations that the Surety acted in bad faith or fraudulently.[8] While Defendants described their intent to have Berkley testify concerning the investigation and analysis of each payment and performance bond claim, the Defendants failed to recognize that even a failure to investigate a claim does "not impugn" Berkley's good faith in making the payment.[9]

In their answer, Defendants asserted two affirmative defenses, (1) that Berkley failed to mitigate its damages and (2) that Berkley failed to allow all payments, credits and offsets due to the Indemnitors. Neither defense invalidated the indemnity agreement. Berkley exercised its exclusive right to settle all claims after the principal defaulted on multiple projects.[10] Defendants unsuccessfully argued that the principal was owed $607,790.97 by the owner for one of the projects claiming that Berkley did not credit or offset that amount. While Berkley conceded that it waived its right to request said payment, it did so in order to allow the owner to have sufficient funds to pay the completion contractor to finish the project. The principal assigned all of its rights to the contract money to Berkley, and under Texas Govt. Code §2253.071, Berkley would be entitled to the contract proceeds only if a contract balance remained after the cost of completion was paid. However, there was ample proof that no contract funds remained after that project was completed.

The Defendants also argued unsuccessfully that Berkley did not comply with the condition precedent of seeking the principal's permission to approve performance bond payments, or payments of attorney fees or consultant expenses. This argument failed because the indemnity agreement provided that the Surety had the "exclusive right" to

[8] ***Lumbermens Mutual Cas. Ins. Co. v. Darel Group U.S.A. Inc.***, 253 F.Supp.2d 578, 582 (S.D.N.Y. 2003).

[9] ***Peerless Ins. Co. v. Talia Constr. Co., Inc.***, 272 A.D.2d 919 (4th Dept. 2000).

[10] ***United States v. Seaboard Sur. Co.***, 817 F.2d 956 (2d Cir. 1987).

decide whether any claim should be settled, that the Surety's decision concerning any indemnified claim, absent fraud, was final and binding upon the Indemnitors and that any modification to the indemnity agreement had to be in writing by an "authorized Attorney-in-Fact or an authorized officer of Surety". The Defendants never produced such a writing to the Court. The Court agreed with Berkley and held that Defendants' attempt to amend the answer to incorporate an affirmative defense based upon the failure to comply with a condition precedent was futile in light of the evidence presented.

The evidence was insufficient to raise an issue of fact whether Berkley amended the term granting it the exclusive right to settle claims provision of the indemnity agreement pursuant to the amendment provision of the agreement.

Indemnification for Reasonable Attorney Fees and Expenses

Finally, Defendants unsuccessfully argued that Berkley's consultant and attorney fees and expenses were unreasonable based on their conclusory opinions that the rates were too high. Defendants provided no evidence to support their opinion of the "prevailing hourly rate." In response, Berkley provided invoices and showed that the expenses Berkley sustained ($536,978.67 for consultant expenses and $186,715.21 for attorney fees) were reasonable in light of $7.7 million in claims received by Berkley and $3.8 million in recovery obtained by Berkley. The Court further held that Berkley was entitled to indemnification for costs incurred in its enforcement of the indemnity agreement, which included attorneys' fees and other costs.

Therefore, the Court granted Berkley summary judgment finding that Berkley met its burden and established a prima facie case, and that the Defendants' conclusory allegations of bad faith, fraud, or unreasonableness were insufficient to raise an issue of fact. There being no issues of fact and no convenience of witnesses or documents located in Texas to consider, the Court upheld the permissive jurisdiction clause.

The interplay of the venue, jurisdiction and choice of law provisions for New York, as a jurisdiction where well-settled Surety law narrowly defines issues to oppose indemnity actions, will likely permit summary judgment and will then result in the intended and desired enforcement of the indemnity agreement.

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