

DOCKET NO. CV 23-6138080

MR. ADVANCE, LLC : SUPERIOR COURT

v. : JUDICIAL DISTRICT OF NEW HAVEN

BOOGALOU-ATL, LLC, ET AL. : MAY 17, 2024

MEMORANDUM OF DECISION RE:  
DEFENDANTS' MOTION TO DISMISS (#108.00)

The plaintiff in this matter provides loans to businesses in exchange for a pledge of future receivables in repayment of the loan. By Complaint dated November 6, 2023, the plaintiff seeks repayment of a loan from the defendants, all of whom are involved in the operation of a restaurant in Atlanta, Georgia.

By motion dated January 11, 2024, the defendants seek to dismiss this action on the basis that the underlying loan agreement was procured by fraud and that the forum selection clause requiring that suit be brought in Connecticut is unenforceable. A remote hearing was held before the court on March 12, 2024 during which the court heard testimony and admitted documentary evidence. The parties filed supplemental briefs on April 10, 2024.

### Findings of Fact

- 1) The plaintiff is in the business of providing loans to businesses in exchange for a pledge of future receivables.
- 2) The defendants are involved in the operation of a restaurant and lounge in Atlanta, Georgia called Boogalou Restaurant and Lounge (“Boogalou”).
- 3) The plaintiff was under a good faith belief that it entered into a June 23, 2023 agreement (“the agreement”) with the defendants pursuant to which the defendants would receive funds in exchange for a pledge of their future receivables.
- 4) The plaintiff alleges breach of the agreement and seeks recovery of funds due.
- 5) The agreement contains a forum selection clause requiring that all actions related to the agreement be brought in Connecticut.
- 6) The defendants otherwise have no relation to the State of Connecticut and do not possess the minimum contacts necessary to be subject to suit in Connecticut were it not for the forum selection clause in the agreement.
- 7) Defendant Jonathan Burns is a principal in Boogalou. Prior to the execution of the agreement, he engaged a person named Byron Ellis in an unrelated effort to secure financing.

- 8) As part of this effort, Mr. Ellis gained access to financial information about Mr. Burns and the restaurant.
- 9) Mr. Burns used this information to enter into the agreement with the plaintiff without the parties' knowledge. The evidence presented at the hearing was sufficient for the court to find by clear and convincing evidence that the agreement was the product of fraud.<sup>1</sup>
- 10) When the plaintiff wired funds to the restaurant's account. Mr. Ellis indicated that he would take care of it and asked that the funds be forwarded to his attorney's account, which the defendants did.

#### Discussion of Law

The defendants move to dismiss this civil action for lack of personal jurisdiction. The defendants allege that they lack the contacts required by General Statutes § 52-59b for the court to exercise jurisdiction over them. They claim that they have no relation to the State of Connecticut and do not possess the minimum contacts necessary to be subject to suit in Connecticut were it not for the forum selection clause in the agreement and that the

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<sup>1</sup> This finding was based on the evidence presented at a relatively brief hearing and should not be considered the "law of the case" on this issue.

agreement containing the forum selection clause is unenforceable as it was procured through the fraudulent acts of a third party.

Practice Book § 10–30 (b) provides in relevant part: “Any defendant, wishing to contest the court’s jurisdiction, shall do so by filing a motion to dismiss . . . .” “[A] determination of whether sufficient minimum contacts with Connecticut exist is a fact question ... A motion to dismiss may ... raise issues of fact and would, therefore, require a ... hearing [to determine the facts] ... [A]ffidavits are insufficient to determine the facts unless, like the summary judgment, they disclose that no genuine issue as to a material fact exists ... When issues of fact are necessary to the determination of a court's jurisdiction, due process requires that a trial-like hearing be held, in which an opportunity is provided to represent evidence and to cross-examine adverse witnesses.” (Citations omitted; internal quotation marks omitted.) *Standard Tallow Corp. v. Jowdy*, 190 Conn. 48, 54, 459 A.2d 503 (1983). Based on the evidence presented at the hearing, it is abundantly clear to the court that the defendants have no relationship with the State of Connecticut that would confer jurisdiction over them. As a result, the determinative question in deciding this motion to dismiss is whether the forum selection clause contained in the agreement is enforceable.

“[P]arties to a contract may agree in advance to submit to the jurisdiction of a given court . . . . Absent a showing of fraud or overreaching, such forum clauses will be enforced by the courts.” (Citations omitted; internal quotation marks omitted.) *United States Trust Co. v. Bohart*, 197 Conn. 34, 42, 495 A.2d 1034 (1985). Under such circumstances, “the court must decide whether the forum selection clauses in the agreement . . . were procured through fraud or deception.” *Boaz Cap., LLC v. Upcountry Servs. of Sharon, Inc.*, No. LLICV196022828S, 2020 WL 1921968, at \*5 (Conn. Super. Ct. Mar. 10, 2020, Shaban, J.). Under Connecticut law, a finding of fraud must be by clear and convincing evidence, *Verrastro v. Middlesex Insurance Company*, 207 Conn. 179, 182 (1988), which this court so found based on the evidence before it.

There is trial court authority in Connecticut for the proposition that even if the agreement at issue was procured through fraud, that does not necessarily mean that the forum selection clause is unenforceable unless the forum selection clause itself, as opposed to the whole contract, was procured through fraud. See, e.g., *Fid. & Deposit Co. of Maryland v. Czuchra*, No. CV-93-0524337-S, 1995 WL 416277, at \*3 (Conn. Super. Ct. June 27, 1995, Aurigemma, J.): “[I]n order for fraud to invalidate the forum selection clause in a contract, the fraud must be with respect to the inclusion of the clause itself, and not merely with respect to the transaction as a whole.”

However, this court finds such an approach fundamentally inequitable under the circumstances present in this case where the defendants appear not to have agreed, nor even seen, any portion of the agreement at issue. There being no Connecticut appellate authority on this issue, the court hereby adopts the approach used by New York courts under these circumstances: “New York generally applies the severability concept of contract construction to forum selection clauses. This means that where a contract is contested on the grounds of fraud, the fraud must be shown with respect to the clause itself. See *Studebaker-Worthington Leasing v. New Concepts*, 25 Misc.3d 1, 887 N.Y.S.2d 752, 759 (N.Y.App. Term 2009). However, the New York courts have recognized an exception that ‘where a party alleges that a contract is void ab initio, the doctrine of separable contracts is inapplicable,’ such that if the ‘plaintiff’s allegations of fraud pervading the entire Agreement would render the entire Agreement void, the forum selection clause contained therein is unenforceable.’ *Desola Group v. Coors Brewing Co.*, 199 A.D.2d 141, 605 N.Y.S.2d 83 (App.Div.1993) (declining to enforce a Colorado forum selection clause where the plaintiff alleged that the agreement was not intended to constitute a binding contract and the defendant fraudulently misrepresented the sole purpose of the agreement); see also *Armco Inc. v. North Atlantic Ins. Co. Ltd.*, 68 F.Sup.2d 330, 340 (S.D.N.Y.1999) (declining to enforce a forum selection clause where the alleged

fraud predates the sale contract at issue).” *KI, Inc. v. KP Acquisition Partners, LLC*, No. X05CV0960027474S, 2010 WL 4276764, at \*8 (Conn. Super. Ct. Sept. 24, 2010, Blawie, J.).

### Conclusion

Based on the court’s finding that the evidence presented at the hearing on this motion supported the conclusion that the agreement at issue was the product of fraudulent behavior by clear and convincing evidence, the court finds that the forum selection clause contained in the agreement is unenforceable. In view of the fact that the defendants do not otherwise possess the requisite minimum contacts to confer jurisdiction of the Connecticut courts over them, the court is without jurisdiction and this matter is hereby dismissed.

Juris Number 427017  
James W. Abrams, Senior Judge