

15-0098

CJF/klc: 09/22/14

IN THE CIRCUIT COURT OF
MARSHALL COUNTY, WEST VIRGINIA

MITA SENGUPTA, as Personal Representative of the
Estate of Avishek Sengupta,

Plaintiff,

v.

No. 14-C-66-H

TOUGH MUDDER LLC, AIRSQUID VENTURES,
INC. (d.b.a. AMPHIBIOUS MEDICS), TRAVIS
PITTMAN, PEACEMAKER NATIONAL TRAINING
CENTER, LLC, GENERAL MILLS, INC. and
GENERAL MILLS SALES, INC.,

Defendants.

**ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS BASED ON
VENUE AND FORUM NON CONVENIENS**

On the 22nd day of August, 2014, came Plaintiff Mita Sengupta, as Personal Representative of the Estate of Avishek Sengupta, by her attorneys, Robert P. Fitzsimmons and Clayton J. Fitzsimmons of Fitzsimmons Law Firm PLLC and Robert J. Gilbert and Edward J. Denn of Gilbert & Renton LLC, and, as well, came Defendants, Tough Mudder, LLC; Peacemaker National Training Center, LLC; General Mills, Inc.; and General Mills Sales, Inc.; by their attorneys, Samuel D. Madia of Flaherty Sensabaugh & Bonasso PLLC, Robert N. Kelly of Jackson & Campbell, P.C., and Robert O'Brien of Niles, Barton & Wilmer, LLP; and also came Defendant Airsquid Ventures, Inc. (d.b.a. Amphibious Medics) by its attorneys, David L. Shuman and David L. Shuman, Jr., of Shuman, McCuskey & Slicer P.L.L.C; as well as Defendant Travis Pittman, by his attorney, Karen E. Kahle of Steptoe & Johnson, PLLC, for a hearing on *Defendants' Airsquid Ventures, Inc. d.b.a. Amphibious Medics and Travis Pittman, Motion to Stay and Compel Arbitration, Motion to Dismiss for Improper Venue, and*

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Defendants' Tough Mudder, LLC, Peacemaker National Training Center, LLC, General Mills, Inc. and General Mills Sales, Inc.'s Motion to Dismiss for Improper Venue and/or Forum Non Conveniens, or in the Alternative, Motion to Remove; and Motion to Stay this Action and Compel Arbitration. Having fully considered the pleadings, the parties' arguments and authorities, other materials filed by the parties, and the entire record herein, the Court makes the following findings of fact with respect to all motions, and the following conclusions of law and order with respect to Defendants' motions to dismiss based on venue and forum *non conveniens*:

FINDINGS OF FACT

1. This case arises from the death of Avishek Sengupta, who was a participant in the Tough Mudder Mid-Atlantic event in Gerrardstown, Berkley County, West Virginia on April 20, 2013 (hereinafter the "Event"). Mr. Sengupta was a 28-year old man who drowned while attempting to complete an obstacle that was part of the event and known as "Walk-the Plank." Avishek Sengupta was on life support until April 21, 2013, his official date of death.

2. Plaintiff Mita Sengupta is Avi's mother and personal representative of the Estate of Avishek Sengupta. Mrs. Sengupta instituted the instant civil action on April 18, 2014 asserting that Avi's death resulted from Defendants' grossly negligent and reckless failure to follow basic safety precautions or effectuate a minimally competent rescue.

3. Mrs. Sengupta makes claims against six parties whose alleged negligence caused and/or contributed to Avi's death: (1) Tough Mudder, who she alleges to have had primary responsibility for participant safety; (2) Airsquid Ventures, who she alleges to have provided safety personnel and services; (3) Travis Pittman, the rescue diver; (4) Peacemaker National Training Center, who she alleges to have participated in advertising, construction and permitting

of the Obstacle and Event; and (5-6) the two General Mills entities, who she alleges to have partnered with Tough Mudder to promote and sponsor the Obstacle and the Event. As pled in the Complaint, each Defendant caused or contributed in some way to Avi's death.

4. Specifically, her claims include Count I (Wrongful Death), Count II (Declaratory Relief – Unenforceability of Arbitration Clause), and Count III (Declaratory Relief – Unenforceability of Waiver). *See* Complaint, *passim*.

5. Plaintiff's request for a declaratory judgment relates to a provision styled "**Mediation and Arbitration**" found on page 2 of a document styled "Assumption of Risk, Waiver of Liability, and Indemnity Agreement Mid-Atlantic Spring – 2013" (hereinafter the "Agreement").

6. The parties have stipulated for purposes of these motions that the Agreement is a true, accurate and authentic copy of a document purportedly signed and initialed by Avishek Sengupta on April 20, 2013.

7. On the same date that Mrs. Sengupta filed the instant civil action (April 18, 2014), Defendant Tough Mudder LLC filed a competing demand for arbitration before the American Arbitration Association ("AAA"). The demand for arbitration identifies the Respondents as Mrs. Sengupta, her husband (and Avi's father) Bijon Sengupta, and their daughter (and Avi's sister) Priyanka Sengupta. Tough Mudder's original AAA filing was brought only on behalf of itself. Tough Mudder subsequently amended its filing to include Peacemaker and the two General Mills entities as Claimants. Mr. Pittman and Airsquid Ventures are not involved as parties in the AAA matter.

8. Tough Mudder asserts in its arbitration demand that it is not liable for Avi's death or, in the alternative; it is immunized from liability by the doctrine of assumption of risk, by the

contributory negligence of Avishek Sengupta, or by the intervening and superseding acts and omissions of Airsquid Ventures, LLC (dba Amphibious Medics). *See Ex. 2* to Plaintiff's Cross Motion and Brief at ¶ 24 ("Claimants are also immunized from any potential liability to the Senguptas by virtue of ... the intervening, superseding cause arising from the acts and omissions of Amphibious Medics."). However, Tough Mudder did not join Airsquid as a party to the arbitration, nor did Airsquid attempt to join the Maryland arbitration before it was stayed per the prior order of the Court.

9. By letter dated May 9, 2014 to AAA, a copy of which was sent to counsel for Defendant Tough Mudder, Mrs. Sengupta's counsel requested that AAA stay any further arbitration proceedings until this Court or another Court of competent jurisdiction could rule upon the validity of the arbitration clause and the arbitrability of this case.

10. Tough Mudder, by and through their attorneys from Jackson & Campbell, P.C., objected to Mrs. Sengupta's request for a stay, contending that the arbitration provision is valid and, if there is an issue as to arbitrability, it should be decided by the arbitrator.

11. The AAA denied Mrs. Sengupta's request to stay the arbitration proceedings and indicated that "in the absence of an agreement by the parties or a court order staying this matter, the AAA will proceed with the administration of the arbitration."

12. Before arbitration can proceed where (as here) arbitrability is disputed, a court of law must determine the threshold question of arbitrability. *See, e.g., AT&T Technologies, Inc. v. Communications Workers of Amer.*, 475 U.S. 643, 649 (1986) ("a compulsory submission to arbitration cannot precede judicial determination that the . . . agreement does in fact create such a duty") (internal citations and quotations omitted); *Carson v. Giant Food, Inc.*, 175 F.3d 325, 329-331 (4th Cir. 1999) ("determination of the arbitration provision's scope and meaning is for the

court to resolve”) (internal citation and quotation omitted); *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 556, 567 S.E.2d 265, 272 (2002) (“it is for the court where the action is pending to decide in the first instance as a matter of law whether a valid and enforceable arbitration agreement exists between the parties”).

13. The arbitration provision at issue contains no "delegation provision" which might delegate to the arbitrator the authority to resolve any dispute about the enforceability of the arbitration provision.

14. In response to the denial of her request for a stay of the AAA arbitration, Mrs. Sengupta filed in this court a Motion for Temporary Restraining Order seeking to enjoin all parties from proceeding with arbitration and to stay the arbitration proceedings with AAA. By Order dated May 23, 2014, this Court granted the Motion for a Temporary Restraining Order pending a hearing on Mrs. Sengupta's accompanying Motion for a Preliminary Injunction.

15. On June 2, 2014, Tough Mudder and others filed an action in the United States District Court for the Northern District of West Virginia, Martinsburg Division, seeking to stay the proceedings in this Court and to compel arbitration.

16. On June 3, 2014, a hearing on Mrs. Sengupta's Motion for Preliminary Injunction was held and on June 23, 2014, this Honorable Court entered an Order Granting a Preliminary Injunction in favor of Mrs. Sengupta pursuant to W.Va. R. Civ. P. 65, prohibiting Defendants from proceeding with arbitration and staying the AAA proceedings until such further Order of this Court or other court of law of competent jurisdiction or until May 23, 2015.

17. Rather than filing an Answer, Defendants joined issue on Count II of Mrs. Sengupta's Complaint (Declaratory Relief – Unenforceability of Arbitration Clause) by filing motions to enforce the Arbitration Clause based on the four corners of the Agreement.

Defendants also filed a motion to dismiss on various grounds as discussed below. Accordingly, at the hearing on June 3, 2014, Mrs. Sengupta's motion for preliminary injunction, the Court authorized briefing on the issue of arbitrability, based on the four corners of the Agreement without the benefit of formal discovery, to determine if enforceability of the Arbitration Clause can be determined on an expedited basis. At that time, Mrs. Sengupta reserved the right to take discovery relating to enforceability of the Arbitration Clause if the Court could not resolve arbitrability in her favor on the present record.

18. Also at the June 3, 2014 hearing, the Court authorized expedited discovery by all parties on the venue-related motions brought by the Defendants. The Court set a briefing schedule on these motions as well a hearing date of August 22, 2014.

19. On August 22, 2014, the Court heard argument on the pending motions and cross-motion concerning arbitrability as well as the pending motions concerning venue-related issues.

CONCLUSIONS OF LAW CONCERNING VENUE AND FORUM MOTIONS

Venue

20. Whether Marshall County is a proper venue for this case is a procedural question determined by West Virginia state law.

21. With regard to venue, the West Virginia Supreme Court "follows the venue-giving defendant principle, whereby, once venue is proper for one defendant, it is proper for all other defendants . . ." *State ex rel. Kenamond v. Warmuth*, 179 W.Va. 230, 231, 366 S.E.2d 738, 739 (1988) (venue valid for all defendants because single "venue-giving defendant" waived venue).

22. Here, in the "Venue and Jurisdiction" clause of its agreement with Avishek Sengupta, Defendant Tough Mudder consented to venue in any West Virginia court having

subject matter jurisdiction over this case. Thus, Defendants are bound by the terms of their own contract to honor Mrs. Sengupta's selection of Marshall County.

23. The Agreement between Tough Mudder and Avi Sengupta contains an express Venue and Jurisdiction clause providing as follows:

Venue and Jurisdiction: I understand that if legal action is brought, the appropriate state or federal court for the state in which the TM Event is held has the sole and exclusive jurisdiction and that only the substantive laws of the State in which the TM Event is held shall apply.

24. Interpretation of the Agreement, including the Venue and Jurisdiction clause, is a question of state law for decision by the court. *See, e.g., Benwood-McMeehan Water Co. v. City of Wheeling*, 121 W.Va. 373, 4 S.E.2d 300 (1939).

25. Under West Virginia law, forum selection clauses of this nature are presumptively enforceable. *See Caperton v. A.T. Massey Coal Co., Inc.*, 225 W.Va. 128, 142, 690 S.E.2d 322, 336 (2009).

26. West Virginia also follows the rule of *contra proferentem*, requiring that ambiguous language must be interpreted against the drafter. *See, e.g., Lawyer Disciplinary Board v. White*, --- S.E.2d ---, 2014 WL 5032586 (W.Va. Sept. 30, 2014) (citing *Lee v. Lee*, 228 W.Va. 483, 487, 721 S.E.2d 53, 57 (2011) (“[I]n case of doubt, the construction of a written instrument is to be taken strongly against the party preparing it.”)) (quoting *Henson v. Lamb*, 120 W.Va. 552, 558, 199 S.E. 459, 461–62 (1938)).

27. As its title makes clear, the Venue and Jurisdiction clause addresses two important practical issues concerning legal actions arising out of Tough Mudder events: (1) the *place* for the legal action to be brought (*i.e.*, venue) and (2) the *type* of court eligible to consider the action. The first concern is addressed very straightforwardly: the *place* for a lawsuit to be filed is defined

solely as the "state in which the TM event is held." The *type* of court eligible to hear lawsuits is also defined to be any "appropriate state or federal court."

28. In other words, if somebody wishes to bring a legal action involving the April 2013 Tough Mudder event in West Virginia, the place to bring that suit is anywhere in West Virginia (no further geographic restriction being placed upon it), and the type of court in which it may be brought is any state court or any federal court that has appropriate jurisdiction.

29. If Defendant Tough Mudder wanted to limit venue to a specific county, as opposed to statewide, it could have easily done so. Significantly, Tough Mudder did so in a prior on-line agreement purportedly accepted by Avishek Sengupta which was later modified to become the Agreement at issue here. The prior agreement stated as follows:

Venue and Jurisdiction: I understand that if legal action is brought, the appropriate state or federal trial court for the *county of Frederick* in the State of Maryland has the sole and exclusive jurisdiction and that only the substantive laws of the State of Maryland shall apply.

See Affidavit of Lucas Barclay, Exhibit A (emphasis added).

30. In addition, Tough Mudder also utilized similar language in its Confidentiality Agreement with Travis Pittman (the "rescue diver" assigned to the "Walk-the-Plank" obstacle at which Avi drowned), in which it expressly stated the county for suit:

". . . Proceedings to resolve disputes arising in connection with this Agreement shall be resolved solely in the state or federal court(s) of competent subject matter jurisdiction located in the State of New York, *Kings County* and I irrevocably submit to the personal jurisdiction and venue of such courts and waive any objection on any grounds to the same."

See Tough Mudder Medical Staff Confidentiality Agrmt. at ¶ 12, Ex. 27 (attached to Pittman Discovery Response) (emphasis added).

31. The previous agreements clearly demonstrate that Tough Mudder had the knowledge and ability to restrict venue to a specific county if that was its intent. However,

Tough Mudder chose not to restrict venue to any certain county here and instead agreed to statewide venue.

32. No venue restriction can be implied in the agreement. *See Bischoff v. Francesa*, 133 W.Va. 474, 488, 56 S.E.2d 865, 873 (1949) (“well recognized and long established principle of interpretation of written instruments that the express mention of one thing implies the exclusion of another, *expressio unius est exclusio alterius* . . .”). When a forum selection clause is meant to restrict venue to a particular county (as opposed to any county in the selected state), it says so. *See, e.g., Weiss v. Columbia Pictures Television, Inc.*, 801 F. Supp. 1276, 1277 (S.D.N.Y. 1992) (“all actions . . . shall be initiated and maintained only in a state or federal court located in the city and county of Los Angeles . . .”); *Harris v. Comscore, Inc.*, 825 F.Supp.2d 924, 926 (N.D.Ill. 2011) (“sole and exclusive jurisdiction shall reside with the appropriate state court located in Fairfax County, Virginia or federal court located in Alexandria, Virginia”); *Camsoft Data Systems, Inc. v. Southern Electronics Supply, Inc.*, 2010 WL 3199949, *1 (M.D. La. Aug. 12, 2010) (“The state and federal courts of San Mateo County shall have sole and exclusive jurisdiction . . .”), *vacated on other grounds*, 2014 WL 2782227 (5th Cir. June 19, 2014); *Karmaloop, Inc. v. ODW Logistics, Inc.*, 931 F.Supp.2d 288, 290 n.8 (D. Mass. 2013) (“the parties hereby consent to personal jurisdiction of the state and federal courts residing in Franklin County, Ohio as the sole and exclusive jurisdiction and venue . . .”); *ASDC Holdings v. Malouf*, 2011 WL 4552508, *5 (Del. Ch. Sept. 14, 2011) (unpublished) (“Each party hereby [] agrees to the exclusive jurisdiction of any state court within New Castle County, Delaware.”).

33. Furthermore, Tough Mudder, the General Mills defendants, and Peacemaker have admitted in a different court that the Venue and Jurisdiction clause authorizes venue on a state-wide basis, stating to the Federal Court that “West Virginia, as the state in which this particular

Tough Mudder event took place, is the appropriate venue for this controversy.” See Def.’s Federal Petition at 3, ¶ 9, Ex. 2.

34. Defendants take a different position here, now arguing that the Venue and Jurisdiction clause should be interpreted not just as authorizing venue on a state-wide basis in West Virginia but also as incorporating West Virginia’s *procedural* venue rules to further restrict a party’s choice of the place to file suit to particular counties. The Court does not accept that argument, for the following reasons.

35. First, that is not what the Venue and Jurisdiction clause says. By addressing place-of-suit with its reference to "Venue" in the title and then using words whose only geographic requirement is for suit to be filed in "the state in which the TM Event is held," Tough Mudder used language that any reasonable participant would read as authorizing state-wide venue.

36. If Tough Mudder intended to restrict venue, it should have (and easily could have) used different words. For example, rather than stating that "*only the substantive laws*" of the state shall apply, Tough Mudder could have stated that "procedural law (including venue rules) and substantive laws" of the state shall apply. But by expressly stating that "only the substantive laws" of West Virginia shall apply, Tough Mudder reinforced the plain intent that venue shall be available on a state-wide basis, without any need to conduct a procedural venue analysis.

37. Finally, it should be noted that even if Defendants’ interpretation of the Venue and Jurisdiction clause was plausible, that interpretation would simply create an ambiguity which, under West Virginia law, would need to be resolved against Tough Mudder (*i.e.*, the drafter of the language) and those claiming through Tough Mudder. See *Lawyer Disciplinary Board, supra*, 2014 WL 5032586 (citing *Lee*, 228 W.Va. at 487, 721 S.E.2d at 57 (“[I]n case of doubt, the

construction of a written instrument is to be taken strongly against the party preparing it.”). *Contra proferentem* applies fully to ambiguities found in a forum selection clause. *See, e.g., Alliance Health Grp., LLC v. Bridging Health Options, LLC*, 553 F.3d 397, 402 (5th Cir. 2008) (“forum-selection clauses are interpreted *contra proferentem*: when presented with two reasonable, but conflicting, interpretations of a contract provision, we adopt the interpretation less favorable to the drafter”).¹

38. Mrs. Sengupta also argues that venue is proper in Marshall County due to the in-county commercial activities of Tough Mudder and General Mills. *See Kidwell v. Westinghouse Elec. Co.*, 178 W.Va. 161, 163, 358 S.E.2d 420, 422 (1986) (“[W]hether a corporation is subject to venue in a given county in this State under the phrase in W. Va. Code, 56-1-1(b) ‘wherein it does business’ depends on the sufficiency of the corporation’s minimum contacts in such county that demonstrate it is doing business, as that concept is used in W. Va. Code, 31-1-15.”). For the reasons discussed previously herein, the “Venue and Jurisdiction” clause is dispositive of venue and, therefore, the Court need not and does not reach the alternative ground that Defendants’ contacts with Marshall County also support venue.

¹ *See also Tockstein v. Spoeneman*, 2007 WL 3352362, *4 (E.D. Mo. Nov. 7, 2007) (“Here, the forum selection clause is ambiguous and must be construed against the drafter . . .”); *K & V Scientific Co., Inc. v. Bayerische Motoren Werke Aktiengesellschaft (“BMW”)*, 314 F.3d 494, 500 (10th Cir. 2002) (“Even if the clause were deemed to be ambiguous . . . the rule in this circuit and others is that the clause must be construed against the drafter, in this case defendant.”); *Harvard Eye Associates v. Clinitec Int’l, Inc.*, 1998 WL 248916 (E.D. Pa. May 5, 1998) (“to the extent that any ambiguity lurks in the forum selection clause, it should be construed against the drafter”); *Majer v. Schmidt*, 169 A.D.2d 501, 505, 564 N.Y.S.2d 722, 726 (N.Y. App. Div. 1991) (“court did not abuse its discretion in denying the motion . . . to dismiss the complaint on the grounds of improper venue and *forum non conveniens*. . . [where clause] did not designate Zurich, Switzerland, as the sole proper venue of the underlying action, but, rather, contained ambiguous language, which must be construed against the drafter”); *Citro Florida, Inc. v. Citrovale, S.A.*, 760 F.2d 1231, 1232 (11th Cir. 1985) (construing ambiguous forum selection clause against drafter).

Forum Non Conveniens

39. Under West Virginia statute, a plaintiff's choice of venue is accorded "great deference" where, as here, the cause of action arises in West Virginia. *See* W.Va. Code § 56-1-1a.

40. Against this backdrop of great deference to Mrs. Sengupta's decision, Defendants ask this Court first to transfer the case outside West Virginia – even though they rely upon a contract whose Venue and Jurisdiction clause requires the suit to be heard in West Virginia, and even though they have told the Federal Court in Martinsburg that "West Virginia, as the state in which this particular Tough Mudder event took place, is the appropriate venue for this controversy." *See* Def.'s Federal Petition at 3, ¶ 9, Ex. 2.

41. Defendants never explain how Maryland would be more convenient than West Virginia for the various West Virginia witnesses and the multitude of foreign defendants and witnesses from states such as New York, Pennsylvania, Michigan and California.

42. Finally, as the case arises from actions that occurred in West Virginia, a Maryland venue would invite objections to personal jurisdiction by additional non-Maryland defendants who have not yet been identified.

43. Accordingly, Defendants' motion to remove this case to Maryland under the interstate *forum non conveniens* statute, W.Va. Code § 56-1-1a, is hereby denied.

44. The Court also is not persuaded by Defendants' final ground to change venue, premised on the intrastate removal statute, W.Va. Code § 56-9-1.

45. Defendants provide no evidence of prejudice from a Marshall County forum. Further, there is no evidence that Kanawha County or Berkley County would be more convenient, let alone materially so.

46. Plaintiff, all but one Defendant and most witnesses are from out of state, so travel is required no matter the choice of county. Marshall County is convenient to Pittsburgh's airport and is easily reached by parties from New York (Tough Mudder), Michigan (General Mills), and California (Airsquid). Mrs. Sengupta and her family will willingly come to Marshall County, as will other key witnesses, e.g., Avi's teammates. Other out-of-state witnesses are beyond the subpoena power of West Virginia courts and thus are immaterial to this analysis.

47. At bottom, Defendants fail to establish inconvenience, let alone prejudice. Mrs. Sengupta's choice of forum is entitled to legal deference, and there is no cause to reject her choice. Accordingly, Defendants' motions to dismiss or remove this case are denied.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is accordingly

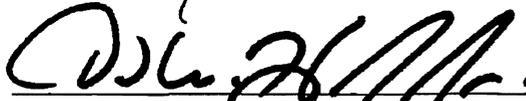
ORDERED that *Defendants' Airsquid Ventures, Inc. d.b.a. Amphibious Medics and Travis Pittman Motion to Dismiss for Improper Venue* is denied as set forth herein. It is further

ORDERED that *Defendants' Tough Mudder, LLC, Peacemaker National Training Center, LLC, General Mills, Inc. and General Mills Sales, Inc.'s Motion to Dismiss for Improper Venue and/or Forum Non Conveniens, or in the Alternative, Motion to Remove; and Motion to Stay this Action and Compel Arbitration* is denied insofar as the venue and forum issues are concerned, as set forth herein. It is further

ORDERED that all exceptions and objections are noted and preserved. It is further

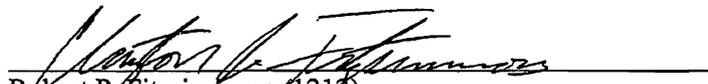
ORDERED that an attested copy of this Order shall be sent to all counsel of record.

ENTERED THIS 9th day of JANUARY, 2015.



DAVID W. HUMMEL, JR.
Judge of the Circuit Court of
Marshall County, West Virginia

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