

Magisterial District of the business headquarters of Firewater Response 365, Inc. or in the Court of Common Pleas of Allegheny County, Pennsylvania. You and we each mutually agree that venue for any dispute shall be solely and exclusively in either such Magisterial District of Court of Common Pleas. (emphasis added) See – Paragraph 9, Pg. 2 of Exhibit A to Plaintiff's Complaint.

7. On that same page, under numbered paragraph 8, the contract states that,

WAIVER: A party's failure to insist on compliance or enforcement of any provision of this Agreement shall not affect the validity or enforceability or constitute a waiver of future enforcement of that provision or of any other provision of this Agreement by the party or any other party. (emphasis added) See – Paragraph 8, Pg 2 of Exhibit A to Plaintiff's Complaint.

CONCLUSIONS OF LAW

8. "The purpose of a motion under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is to test the sufficiency of the complaint." *Cantley v. Lincoln Co. Comm'n*, 221 W.Va. 468, 655 S.E.2d 490 (2007).

9. Rule 12(h) of the West Virginia Rules of Civil Procedure states in relevant part that, "A defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

12. "A motion to dismiss is the proper procedural mechanism for enforcing a forum-selection clause that a party to the agreement has violated in filing suit." *Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration Prod., Inc.*, 234 S.W.3d 679, 687 (Tex.App. 2007).

13. Determining whether to dismiss a claim based on a forum-selection clause involves a four-part analysis. The first inquiry is whether the clause was reasonably communicated to the party resisting enforcement. The second step requires classification of the clause as mandatory or permissive, i.e., whether the parties are required to bring any dispute to the designated forum or are simply permitted to do so. The third query asks whether the claims and parties involved in the suit are subject to the forum-selection clause. If the forum-selection clause was communicated to the resisting party, has mandatory force and covers the claims and parties involved in the dispute, it is presumptively enforceable. The fourth, and final, step is to ascertain whether the resisting party has rebutted the presumption of enforceability by making a sufficiently strong showing that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching. *Caperton v. A.T. Massey Coal Co., Inc.*, 225 W.Va. 128, 690 S.E.2d 322 (2009).

DISCUSSION AND ORDER

Pursuant to Paragraph 9 of the Contract, which was attached as Exhibit A to Firewater's Complaint, the parties in this case "mutually and expressly agreed that any dispute **shall be solely and exclusively resolved**" in either the proper Magisterial

District of Firewater's headquarters, or the Court of Common Pleas of Allegheny County, Pennsylvania. As such, this Court is not the proper forum to resolve the dispute between the parties.

The West Virginia Supreme Court in *Caperton v. A.T. Massey Coal Co., Inc.*, 225 W.Va. 128, 690 S.E.2d 322 (2009), has stated that determining whether to dismiss a claim based on a forum-selection clause involves a four-part analysis. The first inquiry is whether the clause was reasonably communicated to the party resisting enforcement. The second step requires classification of the clause as mandatory or permissive, i.e., whether the parties are required to bring any dispute to the designated forum or are simply permitted to do so. The third query asks whether the claims and parties involved in the suit are subject to the forum-selection clause. If the forum-selection clause was communicated to the resisting party, has mandatory force and covers the claims and parties involved in the dispute, it is presumptively enforceable. The fourth, and final, step is to ascertain whether the resisting party has rebutted the presumption of enforceability by making a sufficiently strong showing that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.

Thus, under the first inquiry, the party resisting enforcement of the contract would be the Plaintiff Firewater. Given that the contract was written by Plaintiff Firewater, or its agent, the Court **FINDS** that Plaintiff Firewater knew or should have known about the forum-selection clause.

Under the second inquiry, the Court must determine whether the forum-selection clause is mandatory or permissive. The specific language of the clause states that each party mutually agrees that any dispute **SHALL BE RESOLVED SOLELY AND EXCLUSIVELY** in either the appropriate Magisterial District court where the Plaintiff's headquarters is located, or in the Court of Common Pleas of Allegheny County. Based upon the specific use of the word "shall," the Court **FINDS** that the forum-selection clause in the contract is mandatory, thus, the second factor is satisfied.

The third inquiry for the Court to consider is whether the forum-selection clause applies to the parties involved in the suit. In the present action, there are only two parties to the suit, and the same two parties are subject to the contract by virtue of being specifically named in the contract and signing it. Thus, there can be no dispute that the parties are subject to the forum selection clause under the third inquiry and the Court is satisfied that the third factor is met.

Finally, the Court must determine whether the resisting party (Firewater in this case) 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 reasons such as fraud or overreaching. Here the Court must consider whether or not the Defendant has waived his right to enforce this provision of the contract by substantially participating in the present litigation. Hence, under the contract, paragraph number 8 is titled "Waiver." Paragraph 8 specifically states that,

WAIVER: A party's failure to insist on compliance or enforcement of any provision of this Agreement shall not affect the validity or enforceability or constitute a waiver of future enforcement of that provision or of any other provision of this Agreement by the party or any other party.

Thus, the Court **FINDS** that based upon the provisions of the contract, provisions drafted by the Plaintiff, Defendant is within his contractual rights to enforce the forum-selection clause of the contract. Therefore, the fourth factor of the inquiry is satisfied.

Wherefore, based upon the four (4) factors required by *Caperton*, the forum-selection clause in this case is a valid and enforceable provision of the contract. Therefore, it is hereby,

ORDERED, ADJUDGED, and DECREED that Defendant's motion to dismiss is **GRANTED** and that this action is **DISMISSED** and is to be **STRICKEN** from the Court's docket.

The Court further **ORDERS** the Ohio County Circuit Clerk to provide attested copies of this Order to all parties and counsel of record.

/s/ Michael J. Olejasz
Circuit Court Judge
1st Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courts.wv.gov/e-file/ for more details.