STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

PASSAGEWAYS TRAVEL SERVICE, INC., a Michigan corporation,

Plaintiff,

v

File No. 09-27364-CK
HON. PHILIP E. RODGERS, JR.

KEVIN F. HAMILTON, an individual, DENNIS P. HAMILTON, an individual, and TAMERA S. HAMILTON, an individual,

Defendants.
/

Patrick E. Heintz (P31443)
David A. Cvengros (P48504)
Attorneys for Plaintiff

Thomas R. Meagher (P32959)
Attorney for Defendant Kevin F. Hamilton

Roy R. Hunsinger (P23022)
Attorney for Defendants Dennis P. Hamilton and Tamera S. Hamilton

DECISION AND ORDER
DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

On August 24, 2009, the Court heard the oral arguments of counsel regarding Defendants' motion for change of venue. The Court granted the motion after noting that the Plaintiff did not have standing to enforce the Non-Competition Agreement that is the subject of this lawsuit because it is not a party to that agreement. The Court entered an Order granting the motion for change of venue on September 3, 2009.

On September 4, 2009, the Plaintiff filed a motion for reconsideration. The Court issued a pre-hearing order, giving any opposing party 7 days from the date of the order to file and serve a response and giving the Plaintiff 14 days from the date of the order to file and serve a reply. By stipulation, the parties extended the dates for filing briefs. The time limits established by the stipulation have now expired.

The Court has reviewed the briefs and supporting documentary evidence submitted by the parties. The Court dispenses with oral argument, pursuant to MCR 2.119(E)(3), and issues this written decision and order. For the reasons stated herein the Plaintiff's motion for reconsideration is denied.

MCR 2.119(F), entitled Motions for Rehearing and Reconsideration, reads in pertinent part, as follows:

> (3) Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

In its complaint, the Plaintiff alleges causes of action for tortuous interference with a contract and advantageous business relationship or expectancy, breach of contract and breach of non-competition agreement. The Plaintiff claims that "venue is proper pursuant to Article 7.4 of the Noncompetition Agreements" which provides:

> 7.4 Jurisdiction; Service of Process. Any action or proceeding seeking to enforce any provision of, or based on any right arising out of, this Agreement may be brought against any of the parties in the courts of the State of Michigan, County of Grand Traverse and each of the parties . . . waives any objection to venue laid therein . . .

Michigan precedent establishes that "contractual provisions establishing venue for potential causes of action that may arise *after* the contract is executed are unenforceable." *Omne Financial, Inc v Shacks, Inc,* 460 Mich 305, 317; 596 NW2d 591 (1999). In *Omne Financial,* the Michigan Supreme Court pointed out that such provisions are in conflict with existing court rules and statutory venue provisions. *Id.* Relying on *Omne*, the Defendants contend that the contractual provision under consideration in this case is unenforceable and should play no role in determining venue.

The Plaintiff contends that *Omne* is distinguishable because its cause of action for breach of the Asset Purchase Agreement, to which the terms of the Non-Competition Agreement were tied, accrued as of June 23, 2003 when the Defendants misrepresented the financial condition of the company. Since its cause of action accrued before the Agreements were signed, the venue provision is binding. The Plaintiff relies upon a distinction that the

Court recognized in *Omne* between cases where a cause of action arises after the contract is executed and contractual venue provisions are not enforceable and cases where there is an existing cause of action and the parties agree to venue where the courts have found the venue agreement enforceable. Examples of the later cases with which the Plaintiff seeks to identify include *Garavaglia v Dep't of Revenue,* 338 Mich 467, 470; 61 NW2d 612 (1953) and *Grand Trunk W R Co v Boyd,* 321 Mich 693, 695; 33 NW2d 120 (1948). As the Court said in *Omne*:

> Like the Court of Appeals, we acknowledge that the 'few cases that touch on this issue at all suggest that, where there is an *existing* cause of action, parties may agree to venue.' 226 Mich App at 401-402; 573 NW2d 641 (citations omitted). Addressing issues of venue and jurisdiction in *Garavaglia,* this Court explained:
>
> > [P]rior to the institution of the suit, the parties, in conference, agreed that, for the convenience of both the department and the taxpayer, the suit should be instituted in Ingham county and that neither party would raise any question as to the jurisdiction of the court. [FN13] [*Id* at 470.]
> >
> > FN13. *Garavaglia* also provided no analysis regarding the propriety of venue selection clauses. Rather, it addressed a separate contract that both parties agreed upon for their mutual convenience that waived venue in anticipation of immediate litigation. *Garavaglia* failed to cite any statute, court rule, or case law to support its conclusion. It merely estopped defendant from asserting improper venue. Unlike *Garavaglia,* this case presents no reason for believing that the parties "negotiated" the venue selection provision.

Likewise, in *Grand Trunk,* the plaintiff signed an agreement in exchange for $50 *after* he suffered his injury. The agreement provided:

> > If my said claim cannot be settled to my satisfaction and should I wish to start suit against said Grand Trunk Western Railroad Company to recover damages for my said injuries, that any such suit shall be commenced within the county or district where I resided at the time my injuries were sustained or in the county or district where my injuries were sustained and not elsewhere. [*Id* at 695.]

Emphasizing that parties are entitled to waive venue, this Court held the agreement binding and enforceable. *Id* at 700; 33 NW2d 120.[FN14]

> > FN14. Relying on *Garavaglia* and *Grand Trunk,* the Court of Appeals concluded that 'agreements that limit to specified courts

> the venue of *existing* causes of action arising under contracts so negotiated between parties' are valid in *Nat'l Equipment Rental [v Miller,* 73 Mich App 421] n 2 at 425; 251 NW2d 611 [(1977)].
>
> Consistent with the analysis of the Court of Appeals, we agree that these cases are distinguishable because they were decided before the Revised Judicature Act. They failed to address whether the venue agreements were proper under existing venue statutes, and failed to expressly hold that such provisions were enforceable. 226 Mich App at 401-402, 407-408; 573 NW2d 641. In addition, each of the cases involved a contractual agreement executed after the cause of action arose. *Id* at 401; 573 NW2d 641. Each addressed an existing action and, therefore, merely constituted a waiver regarding choice of venue. Therefore, the cases are distinguishable and fail to support the conclusion that the contractual provision under consideration is enforceable.

In summary, the venue agreements that Michigan courts have enforced have been those that are negotiated and entered into by the parties *in anticipation of immediate litigation.* This is not the case here.

Even assuming that the Plaintiff's cause of action accrued before the Agreements were executed, the parties did not enter into the Agreements "in anticipation of immediate litigation." Whether a cause of action has accrued is not determinative. What is determinative is whether the parties are aware that there is a cause of action and anticipate immediate litigation when they negotiate the venue agreement.

Since the Plaintiff in the instant case did not know that it had a cause of action before it entered into the Agreements, consistent with *Omne*, the venue provision is not enforceable[1] and venue is controlled by statute.

The statute regarding appropriate venue provides:

> Except for actions provided for in sections 1605, 1611, 1615, and 1629 [none of which is applicable here], venue is determined as follows:
>
> > (a) The county in which a defendant resides, has a place of business, or conducts business, or in which the registered office of a defendant corporation is located, is a proper county in which to commence and try an action.

[1] Perhaps it goes without saying, but if the Plaintiff had known that the Defendants misrepresented the financial condition of the company, it would not have entered into the Agreements. If it had not entered into the Agreements, there could be no breach of those Agreements and there would be no venue provision to discuss. Thus, it is impossible for the Plaintiff to claim that it entered in the Agreements in anticipation of immediate litigation.

(b) If none of the defendants meet 1 or more of the criteria in subdivision (a), the county in which a plaintiff resides or has a place of business, or in which the registered office of a plaintiff corporation is located, is a proper county in which to commence and try an action.

(c) An action against a fiduciary appointed by court order shall be commenced in the county in which the fiduciary was appointed. [MCL 600.1621].

It is evident from the complaint and Plaintiff's response to the Defendants' motion for change of venue that none of the Defendants resides in, has a place of business in or conducts business in Grand Traverse County. Therefore, venue is not proper in Grand Traverse County. MCR 2.223(A)(1) and its statutory counterpart, MCL 600.1651, mandate that the Court order a change of venue on timely motion of a defendant when an action was filed in an improper venue. Therefore, the Court's earlier ruling on the Defendants' motion for change of venue was correct.

The Plaintiff has failed to show that there was palpable error by which the Court and the parties were misled and that a different disposition of the motion must result from correction of the error. MCR 2.119(F)(3). The Plaintiff's motion for reconsideration should be and hereby is denied.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 10/29/09