

**THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
SUPERIOR COURT**

Rockingham Superior Court  
Rockingham Cty Courthouse/PO Box 1258  
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**NOTICE OF DECISION**

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Manchester NH 03101**

Case Name: **Compass Systems and Programming, Inc., et al v EBF Partners, LLC, et al**  
Case Number: **218-2016-CV-00568**

Enclosed please find a copy of the court's order of October 25, 2016 relative to:

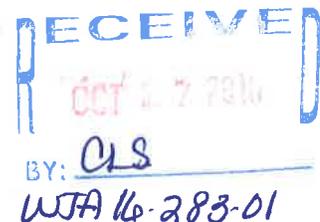
Motions to Dismiss

October 25, 2016

Maureen F. O'Neil  
Clerk of Court

(595)

C: Marc W. McDonald, ESQ; Arnold Rosenblatt, ESQ; Kathleen M Mahan, ESQ



**The State of New Hampshire  
Superior Court**

**Rockingham S.S.**

COMPASS SYSTEMS AND PROGRAMMING, INC. *ET AL.*

V.

EBF PARTNERS, LLC, *ET AL.*

NO. 218-2016-CV-568

**ORDER ON MOTIONS TO DISMISS**

The plaintiffs, Compass Systems and Programming, Inc. ("Compass") and Robert Bigos, initiated an action in this Court against the defendants, EBF Partners, LLC ("EBF") and Platinum Rapid Funding Group Ltd. ("Platinum"), seeking a declaratory judgment on the legality under Florida and New York law (respectively) of "Merchant Cash Advances" made to the plaintiffs by the defendants. Both defendants move to dismiss the action for lack of personal jurisdiction. The plaintiffs object.

**Background**

Compass is a New Hampshire corporation with its principal place of business in Exeter, New Hampshire. Compl. ¶ 7. Bigos is a principal of Compass, Compl. ¶ 15, and a guarantor on some or all of Compass' financial obligations to EBF and Platinum. Compl. ¶ 2. EBF is a Florida LLC with its principal place of business in Florida. Compl. ¶ 9. The plaintiffs acknowledge that EBF is "neither registered to do business in New Hampshire nor maintains a registered agent for service of process in New Hampshire."

Id. Similarly, the plaintiffs acknowledge the Platinum is a New York business entity with its principal place of business in New York with neither any registration to do business in New Hampshire nor a registered agent in New Hampshire. Compl. ¶ 10. In their complaint, the plaintiffs only state that jurisdiction in New Hampshire is proper “under N.H. R.S.A. § 498:1 as this is a petition for equitable relief as well as for damages in an amount within the jurisdictional limits of the Court.” Compl. ¶ 11.

The plaintiffs’ action centers on a series of “Merchant Cash Advance” (“MCA”) agreements between Compass and the two separate defendants. Compl. ¶¶ 21-23. In 2012, Compass needed capital after its existing lender closed its line of credit. Compl. ¶¶ 17-18. The plaintiffs allege that both EBF and Platinum are actually lenders but style themselves as purchasers of future receivables in order to avoid regulation. Compl. ¶ 23. The MCA agreements between Compass and both EBF and Platinum were executed between November 14, 2014 and March 9, 2016. Compl. ¶¶ 24, 62, 68, 71. Daily payments on the agreements with both EBF and Platinum were “swept out” of Compass’ New Hampshire-based checking account by Automatic Clearing House (“ACH”) transfers. Compl. ¶¶ 43, 77. To secure the payments, both EBF and Platinum took security interests in all of Compass’ assets, Compl. ¶¶ 44, 68, took interests in Compass’ leasehold on its offices in New Hampshire, Compl. ¶¶ 46, 81, took Powers of Attorney on Compass’ credit accounts, Compl. ¶¶ 52, 79, and required Bigos to guarantee the future receivables,<sup>1</sup> Compl. ¶¶ 48, 80.

EBF and Platinum both argue, in separate motions, that New Hampshire courts do not have personal jurisdiction over them. They contend that even if New Hampshire

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<sup>1</sup> Under the agreements, Bigos had to serve as the Guarantor or all of Seller’s “representations, warranties and covenants,” which the plaintiffs note is unclear about guarantee of payment under the agreements. Compl. ¶ 49. The Court does not reach this issue here.

did have personal jurisdiction, the agreements with the plaintiffs include valid choice of law and forum selection clauses that make Florida (for EBF) and New York (for Platinum) the exclusive forums for any actions related to those agreements. The plaintiffs disagree, arguing both that jurisdiction is proper and that the forum selection clauses are invalid.

### **Analysis**

A trial court may grant a motion to dismiss for the plaintiff failing to meet their burden only if “it determines, after considering the evidence and construing all inferences therefrom most favorably to the non-moving party, that no rational juror could conclude that the non-moving party is entitled to any relief.” Dillman v. N.H. College, 150 N.H. 431, 434 (2003). In other words, if the plaintiff has not made allegations in the complaint that are “reasonably susceptible of a construction that would permit recovery,” the moving party is entitled to dismissal of the claims against them. Hobin v. Coldwell Banker Residential Affiliates, Inc., 144 N.H. 626, 628 (2000). The threshold inquiry involves testing the facts alleged in the pleadings against the applicable law. See Williams v. O'Brien, 140 N.H. 595, 598 (1995). In rendering such a determination, the Court “assume[s] the truth of all well-pleaded facts alleged by the plaintiff and construe[s] all inferences ‘in the light most favorable to the plaintiff.’” Bohan v. Ritzo, 141 N.H. 210, 212 (1996). The Court may also consider “documents attached to the pleadings . . . documents the authenticity of which are not disputed by the parties . . . official public records . . . or documents referred to in the complaint.” Beane v. Dana S. Beane & Co., 160 N.H. 708, 711 (2010) (citation and internal quotation omitted). Dismissal is appropriate if the facts pled “do not constitute a basis for legal relief.” Id.

“The plaintiff need make only a prima facie showing of jurisdictional facts to defeat a defendant’s motion to dismiss.” Lyme Timber Co. v. DSF Investors LLC, 150 N.H. 557, 559 (2004). The Court’s personal jurisdiction over a party in a declaratory judgment action is determined in the same way as any other action. See, e.g. Skillsoft Corp. v. Harcourt Gen., Inc., 146 N.H. 305, 307-09 (2001); See also RSA 491:22 (granting the Superior Court jurisdiction over declaratory judgments). However, the Court “need not accept allegations . . . that are merely conclusions of law.” Lyme Timber, 150 N.H. at 559.

EBF makes three arguments in support of its Motion to Dismiss. First, it argues that the respective forum selection clauses are valid and enforceable. Second, it asserts that the plaintiffs have alleged insufficient facts in their complaint to have made even a prima facie showing of jurisdictional facts. Third, it contends that if the forum selection clauses are invalid, the New Hampshire courts still do not have personal jurisdiction over them. Platinum also makes the first and third arguments in support of its Motion to Dismiss. The Court considers the arguments in that order because, if the forum selection clauses are valid and enforceable, the jurisdictional analysis is not necessary.

### **Forum Selection Clauses**

Forum selection clauses “are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.” The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972). “[M]odern courts look to the language of the clause as evidence of the intent of the parties when they entered the agreement.” Hansa Consult of N. Am. v. Hansaconsult

Ingenieurgesellschaft, 163 N.H. 46, 52 (2011). The Court should look specifically to the language of the forum selection clause in each particular agreement. “[D]rawing analogy to other cases is useful only to the extent those other cases address contract language that is the same or substantially similar to that at issue.” Id. New Hampshire has codified its law regarding the enforceability of forum selection clauses and the few exceptions when a forum selection clause does not have to be enforced.

If the parties have agreed in writing that an action on a controversy shall be brought only in another state and it is brought in a court of this state, the court will dismiss or stay the action, as appropriate, unless:

- I. The court is required by statute to entertain the action;
- II. The plaintiff cannot secure effective relief in the other state, for reasons other than delay in bringing the action;
- III. The other state would be a substantially less convenient place for the trial of the action than this state;
- IV. The agreement as to the place of the action was obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; or
- V. It would for some other reason be unfair or unreasonable to enforce the agreement.

RSA 508-A:3. Forum selection clauses are not required to contain specific language to be valid and enforceable; the purpose of RSA 508-A:3 is to

enforce forum selection clauses that are bargained for by contracting parties, provided that they confer exclusive jurisdiction. Beyond mandating exclusivity, the statute does not dictate the precise wording necessary for forum selection clauses to withstand judicial scrutiny, and we will not read the statute as requiring specific “magic words.” The statute mandates that enforceable forum selection clauses identify and make exclusive whatever jurisdiction is selected to resolve disputes. If a reasonable and fair reading of such a clause would not confer exclusive jurisdiction, it will not be enforced. It is the intent of the parties that the statute seeks to exalt, not particular word choices.

Strafford Tech. v. Camcar Div. of Textron, 147 N.H. 174, 177 (2001) (internal citation omitted). The Court must therefore look to the language of the forum selection clauses in the agreements between Compass and each defendant to determine if the clause grants exclusive jurisdiction to the courts of another state.

### **The EBF Forum Selection Clause**

Here, the forum selection clause in the agreements between Compass and EBF reads as follows:

This Agreement shall be governed by and construed in accordance with the laws of the State of Florida, without regards to any applicable principals of conflicts of law. Any suit, action, or proceeding arising hereunder, or the interpretation, performance or breach of this agreement shall, if EBF so selects, be instituted in any court sitting in Florida (the "Acceptable Forums"). Seller agrees that the Acceptable Forums are convenient to it, and submits to the jurisdiction of the Acceptable Forums and waives any and all objections to jurisdiction or venue. Should such proceeding be initiated in any other forum, Seller waives any right to oppose any motion or application made by EBF to transfer such proceeding to an Acceptable Forum.

Compl., Ex. A (Sept. 22, 2015 Agreement) § 4.5, Ex. B (Jan. 21, 2016 Agreement) § 4.5. The plaintiffs argue that the above clause does not grant exclusive jurisdiction to Florida, but only allows Florida to exercise jurisdiction. The Court disagrees. The second sentence explicitly allows EBF to select Florida as the forum for any action it initiates but also, when read with the last sentence, sets the scope of any "such proceeding" that can be moved to Florida at EBF's selection. The last sentence waives any right to oppose transfer of any "such proceeding" to Florida, with "such proceeding" logically referring to "any suit, action, or proceedings arising hereunder, or the

interpretation, performance or breach of this agreement.” As a result, the clause becomes exclusive – no suit filed outside of Florida can remain if EBF so selects.

The plaintiffs argue that the last sentence only applies to a strict reading of “transfer” that includes only actual transfers of cases between courts in the same system, *e.g.* between federal districts. Pl. Memo. of Law in Supp. of Obj. to EBF’s Mot. to Dis., 11. The Court reads “transfer” more broadly to include dismissal of a case filed in New Hampshire when another action has already been filed in Florida, as has been done here. EBF’s Resp. to Pl. Obj. to EBF’s Mot. to Dis., ¶ 9. As noted, the forum selection clause requires any action to be initiated in Florida at EBF’s election. This sentence is not limited to lawsuits brought by EBF. Rather, the language of the clause is worded broadly so that if EBF chooses, any lawsuit—even a lawsuit initiated by the plaintiffs—must be brought in Florida. The effect is the same as a transfer, the case that was filed here will be heard in Florida, even though the procedural mechanics are not identical. The intent of the parties was to have all actions related to the MCA agreement to be heard in Florida and reading “transfer” narrowly defeats that intent.

While the first sentence is a choice-of-law clause and does not speak directly to the language of the forum selection clause, the Court finds it instructive. “While not conclusive, a choice of law provision militates in favor of finding jurisdiction in the State whose laws govern the contract.” Staffing Network, Inc. v. Pietropaolo, 145 N.H. 456, 459 (2000). The parties unequivocally and clearly agreed that the applicable law to any dispute would be the law of the State of Florida. In fact, the plaintiffs acknowledge that the laws of Florida provide greater protection for them than the laws of New Hampshire.

Compl., fn 1. This bolsters the conclusion that the parties intended disputes to be heard in Florida, as it would be the state most expert in interpreting its own laws.

The third sentence also points to an exclusive choice of Florida as the forum for any action under the agreements. By agreeing to these terms, the plaintiffs agreed that Florida would be a convenient forum and that they would submit to Florida's jurisdiction. They also agreed to waive any and all objections to jurisdiction. Therefore, the plaintiffs have waived any objection to Florida having jurisdiction. EBF has not done the same with regards to New Hampshire jurisdiction.

The plaintiffs also argue that even if the clause is exclusive, it fits into one of the statutory exceptions to mandatory enforcement, *i.e.* "(IV) The agreement as to the place of the action was obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; or (V) It would for some other reason be unfair or unreasonable to enforce the agreement." RSA 508-A:3. The Court disagrees. The plaintiffs have not presented sufficient facts to support an argument that the agreement to the forum selection clause was obtained unconscionably. They allege no fraud or misrepresentation in the signing of the agreement, and while the disparity in size between the two entities, EBF and Compass, is likely great, it does not appear that Compass was unable to simply walk away if it was unhappy with the terms. Before the agreements were signed, EBF and Compass had no relationship and Compass was not compelled to agree to these terms. Compass has presented no evidence that it attempted to negotiate the terms or suggest alternate terms. The presence of two MCA-granting entities in this action alone suggests there are other companies engaged in the same business to which Compass could have turned if it disliked the selection of

Florida as forum for disputes. Finally, the plaintiffs have presented no evidence that “it would for some other reason be unfair or unreasonable to enforce the agreement” under RSA 508-A:3, V.

The Court finds that the EBF forum selection clause is exclusive, valid, and enforceable and the Court is required by statute enforcing the clause granting exclusive jurisdiction over this dispute to the State of Florida and dismiss this action.

The forum selection clauses in the agreements between Compass and Platinum are identical to the clauses in the EBF agreements, except “FUNDER” (referring to Platinum is substituted for EBF and New York is substituted for Florida in all parts. For that reason, the same conclusion about the language can be reached. The forum selection clause is exclusive, valid, and enforceable.

**Conclusion**

For the foregoing reasons, both EBF’s and Platinum’s Motions to Dismiss are GRANTED.

SO ORDERED.

10/25/2016  
DATE

  
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N. William Delker  
Presiding Justice