

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

THE LAW OFFICES OF R. JACK AYERS §
Vs. § CIVIL ACTION NO. 2:04-CV-295
NORVERGENCE, INC., ET AL. §

ORDER

The plaintiff's motion for leave to file supplemental evidence (#11) is granted.

The plaintiff's second motion for leave to file supplemental evidence (#25) is granted.

Popular Leasing U.S.A.'s motion to transfer venue to the Eastern District of Missouri (#4) is denied for the reasons expressed in this order.

The basis for the motion to transfer is a "floating" forum selection clause found in the Equipment Rental Lease between Norvergence and the plaintiff. The clause provides:

This agreement shall be governed by, construed and enforced in accordance with the laws of the State in which Rentor's principal offices are located, or if this Lease is assigned by Rentor, the State in which the assignee's principal offices are located, without regard to such State's choice of law considerations and all legal actions relating to this Lease shall be venued exclusively in a state or federal court located within that State, such court to be chosen at Rentor or Rentor's assignee's sole option.

On the basis of this clause, Popular Leasing U.S.A., the assignee of the Lease, has moved to transfer venue to the Eastern District of Missouri, the location of its principal place of business.

The plaintiff lodges numerous objections to the transfer of this case. Among them is the contention that the clause is unenforceable because it does not give fair notice of the venue selected

when the party enforcing the clause is an assignee of the contract. Several courts have refused to enforce similar clauses, citing the uncertainty inherent in enforcing a forum selection clause which actually selects no specific forum. See *IFC Credit Corp. v. Aliano Bros. General Contractors, Inc.*, 2005 WL 643288 (N.D. Ill. 2005); *IFC Credit Corp. v. Eastcom, Inc.*, 2005 WL 43159 (N.D. Ill. 2005). These courts looked to the forum state's law to determine whether this type of clause would offend any state policy. This court will do the same.

Although this court has not located any Texas decision directly on point, the court in *CMS Partners, Ltd. v. Plumrose USA, Inc.*, 101 S.W.3d 730 (Tex. App.—Texarkana 2003), suggested that a forum selection clause should select a particular forum and should provide the contracting parties with fair notice of the selected forum. In that case, the clause selected venue in “the County and State of the defendant.” The court construed the clause to refer to the principal place of business of the party to the contract who was defending a claim. *Id.* at 733 (construing clause so that the term “defendant” . . . “clearly refers to either CMS or Plumrose.”). Under this construction of the contract, the court held that the clause provided the contracting parties fair notice of the particular forum selected and enforced the clause. The court rejected the argument that the clause could be ambiguous when considered in the context of assignees who were not parties to the contract because no assignment was at issue in the case. *Id.* at 733. The parties to the suit were also the parties to the contract.

The court's analysis of the issue in *CMS* suggests that a Texas court would require a forum selection clause to be more specific than the one at issue in this case. It must be remembered that *CMS* enforced the clause only after the court concluded that it gave fair notice to the contracting parties that the forum selected would be one of their own principal places of business. Moreover,

in its decision, the *CMS* court also considered the application of New Jersey law. The court noted that New Jersey would not enforce such a clause if an assignment was involved. *Id.* at 735 (“[i]f in the present case the contract had been assigned, this court might be forced to a different conclusion”).

In the present case, at the time of contracting, the terms of the Equipment Lease gave no notice to the contracting parties of the particular forum which might be applicable in the case of an assignment. As such, the court agrees with those cases, cited above, which have refused to enforce similar clauses. *See also Brock v. Baskin Robbins*, 113 F.Supp. 2d 1078 (E.D. Tex. 2000). The court recognizes that other courts have held to the contrary. *See Popular Leasing USA, Inc. v. Terra Excavating, Inc.*, 2005 WL 1523950 (E.D. Mo. 2005). Under the facts of this case, however, the court rejects the defendant’s reliance on the forum selection clause and accordingly denies the motion to transfer venue (#4).