

When Can Non-Signatories Enforce Forum Selection Clauses Under New York Law?

As a general rule, the signatories to a contract are the only parties who can sue to enforce the terms contained therein. This is based on the general rule that only those in privity of contract can enforce a contract, a hoary rule of contract law subject to certain exceptions, such as the doctrine of third-party beneficiaries. New York courts have addressed whether the extent to which additional exceptions to this principle should exist concerning the enforceability of forum selection clauses. In disputes between citizens of different states or countries, a forum selection clause may dictate where disputes relating to the contract must be filed. Because New York is an important locus of commercial activity and has well-developed jurisprudence in commercial law, many commercial contracts contain forum selection clauses which require disputes to be brought in the New York's state or federal courts.

A difficult issue often arises when a non-signatory wishes to sue a signatory in New York based on a forum selection clause. Potential non-signatory litigants may include brokers or agents of the parties, competitors whose rights may have been affected by the contract, creditors of the signatories, or former employees or agents of the parties. Often, the signatory defendant may not wish to litigate against the non-signatory in New York and may contest jurisdiction in New York.

Non-Signatories May Enforce Forum Selection Clauses Under Three Sets of Circumstances

New York courts have permitted non-signatories to enforce forum selection clauses under three exceptions to the general rule that only parties can enforce contractual provisions. Freeford Limited v. Pendleton, 53 A.D.3d 32, 857 N.Y.S.2d 62 (1st Dep't 2008). First, a non-party may sue a signatory if it is a third-party beneficiary to the contract. However, this requires proof that the non-party is more than an incidental beneficiary, which may be a difficult burden of proof. Second, parties to a "global transaction" comprised of several different agreements may benefit from a forum selection clause if they signed one or more of the operative agreements. To fall within this exception, the plaintiff must show that the agreements were executed at the same time, had identical or at least similar parties, or were undertaken for the same purpose. PT Bank Mizuho Indonesia v. PT. Indah Kiat Pulp & Paper Corp., 25 A.d.3d 470, 808 N.Y.S.2d 72 (1st Dep't 2006). Lastly, non-signatories may sue a signatory in a designated forum if the non-party is "closely related" to a signatory. Here, the nature and extent of a "close relationship" depends on whether it was foreseeable that the signatory would be bound to litigate with the non-signatory in New York. The scope of this third exception has proven to be less clear-cut. For example, intended beneficiaries may avail themselves of this exception even if they are not third-party beneficiaries. Freeford, 53 A.D.3d at 68. In some cases, a "close relationship" may exist based on a parent-subsidary or principal-agent relationship.

Do the Same Rules Apply When Signatories Seek to Force Non-Signatories To Litigate in a Designated Forum?

New York law is less well-settled concerning whether signatories may force non-signatories to litigate in a designated forum. Particularly in the case of tort claims, such as tortious interference with a contract or fraudulent inducement, a signatory may allege that jurisdiction exists over a non-signatory based on its close relationship to a signatory. One New York federal decision, Nanopierce Tech. Inc. v. Southridge Capital Management LLC, 2003 WL 22882137 (S.D.N.Y. Dec. 4, 2003), compelled a non-signatory to litigate in New York when he was the agent (a Chief Financial Officer) of a corporation which signed a contract. However, that case arose under federal securities law, not merely New York state law.

Logically, it should be difficult to show that a non-signatory would have foreseen that it would be bound by a forum selection clause in a document it did not sign. Indeed, in Freeford, the Appellate Division, First Department, dismissed several claims against non-signatories to various agreements, perhaps implicitly recognizing the difficulty of requiring non-signatories to be bound by forum selection clauses. However, federal cases, particularly in other jurisdictions, have taken a broad view of whether signatories can enforce a forum selection clause against non-parties. See, e.g., Manetti-Farrow, Inc. v. Gucci America, Inc., 858 F.2d 509, 514 n.5 (9th Cir. 1988) (“[A] range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses.”).

Why Does This Matter?

Jurisdictional disputes can change the entire course of litigation. It may be too costly or inconvenient to sue a potential party in a different forum. Moreover, jurisdictional defenses often present a relatively low-cost means for a defendant to try to get a case dismissed. For these reasons, New York courts are likely to see more cases fleshing out the contours of this body of law.