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Commercial Division Applies New York Law to Contract Dispute Even Though The Contract At Issue Contained A Colorado Choice-Of-Law Clause

By Sean J. Kirby

In *Transfirst EPayment Services, Inc. v. Advanced Marketing Research, Ltd., et al.*, Index No. 602536/2008 (Sup. Ct. N.Y. County Sept. 29, 2010) ("*Transfirst EPayment*"), Justice Eileen Bransten granted the motion of plaintiff Transfirst EPayment Services, Inc. ("Transfirst") for summary judgment on its breach of contract cause of action against defendants Advanced Marketing Research, Ltd. ("AMR") and the Estate of Albert Dweck. In doing so, Justice Bransten applied New York law to Transfirst's claims even though both of the agreements at issue contained choice of law clauses which mandated the application of Colorado law.

In 2007, AMR, a online furniture retailer, entered into an Agreement and a Guaranty with Transfirst, for Transfirst to provide AMR with credit card processing services for its online retail sales. The Agreement obligated AMR to reimburse Transfirst for all charge-backs, while the Guaranty obligated Albert Dweck to reimburse Transfirst in the event of an AMR default. Both the Agreement and the Guaranty contained Colorado choice-of-law clauses. The action arose out of AMR's failure to reimburse Transfirst for credit card charge backs as provided for in the Agreement and defendant Joseph Dweck's allegedly fraudulent listing of his father, Albert Dweck, as the owner of AMR and the guarantor of the Agreement (Joseph Dweck contends that he signed the Agreement and Guaranty on his father's behalf because he felt that he would by rejected for credit card services because his previous furniture company went bankrupt five years before).

While Justice Bransten ultimately granted Transfirst's motion for summary judgment against AMR and Albert Dweck on its breach of contract claim, the Court first had to determine whether New York or Colorado law governed the dispute. In deciding which state's law to apply, the Court noted that it is the general policy of New York court's to enforce choice-of-law clauses and it is clear that both the Agreement and the Guaranty mandate that Colorado law controls. However, relying on the Court of Appeals decision in *Welsbach Elec. Corp. v. MasTec North America, Inc.*, 7 N.Y.3d 624, 628 (2006), the Court noted that in order to construe a choice-of-law clause as valid and enforceable, the chosen law must have a "reasonable relationship to the parties or the transaction." *Transfirst Epayment* at p. 5 (quoting *Welsbach Elec.*, 7 N.Y.3d at 628).

In determining whether the Colorado choice-of-law clause would be enforced, the Court analyzed three (3) factors. First, the Court looked at the domiciles of the parties and found that neither party was domiciled in Colorado, as Transfirst is a Delaware corporation with its principal place of business in Nebraska and AMR is a New York corporation with its principal place of business in New York. Second, the Court analyzed the connections underlying the transaction. Justice Bransten found that the transaction underlying the breach of contract action had no connection to Colorado, as AMR filled out the credit processing application and signed the Agreement in Brooklyn, and the application and the Agreement each directed AMR to return the documents to Transfirst's offices in Nebraska. Finally, the Court noted that neither of the contracting parties argued for the application of Colorado law. In fact, Transfirst argued New York law in its summary judgment motion and neither defendant disputed to the application of New York law. Thus, given that neither plaintiff nor the

defendants expressed any desire to apply Colorado law, and Colorado had no apparent connection to the parties or transaction at issue, the Court applied New York in deciding the motion for summary judgment.

In light of the *Transfirst EPayment* decision, it is important for parties, when crafting a choice-of-law clause, to ensure that the law which is selected for the clause has some connection to either the parties or the contract at issue, or else the parties run the risk of the court deeming the choice-of-law clause unenforceable.

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