

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

JUDGE PETER J. WALSH

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November 20, 2000

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Dear Counsel:

**Re: Hechinger Investment Company of Delaware, Inc., et al.
vs. Everything Warehouse, Inc.
Adv. Proc. No. A-00-455**

This is with respect to the defendant's motion to dismiss or in the alternative, to transfer venue to Maryland. (Doc. # 5). I deny the motion for the reasons discussed below.

Hechinger Investment Company ("Hechinger") and related affiliates are debtors under chapter 11 of the Bankruptcy Code. The defendant, Everything Warehouse, Inc. ("Defendant") is a buyer and seller of warehouse-related furniture and equipment. Hechinger, with this Court's approval, entered into three purchase

and sale agreements ("Agreements") pursuant to which Defendant bought furniture, fixtures and inventory from Hechinger warehouses located in Virginia, Florida, New Jersey, Delaware, and Maryland. Hechinger's complaint alleges nonperformance under the Agreements.

Defendant argues that Hechinger cannot file suit in this Court based on the forum selection clause in each Agreement. Paragraph 11 of each contract provides:

This Agreement and any disputes arising hereunder shall be governed and construed in accordance with the laws of the State of Maryland, without reference to Maryland's choice of laws, rules and applicable Bankruptcy laws. Purchaser [Defendant] and Hechinger hereby agree that all such matters shall be brought in either the Bankruptcy Court or a Court of competent jurisdiction in the state of Maryland and each hereby consents to personal jurisdiction in such courts. (emphasis added).

Defendant claims that "in the state of Maryland" modifies both "the Bankruptcy Court" and "a Court of competent jurisdiction." Consequently, Defendant argues that Hechinger can only file suit in Maryland, either in a bankruptcy court or some other court. Accordingly, Defendant moves to dismiss this adversary proceeding or alternatively, to transfer venue.

I find Defendant's interpretation implausible. The provision unambiguously permits venue in this Court. Had the parties intended to limit suit as Defendant suggests, "a Court of competent jurisdiction in Maryland" would have sufficed and the reference to "courts" at the end of the sentence would have been in

the singular. It seems to me that the only reasonable interpretation of paragraph 11 is one that gives meaning to both "the Bankruptcy Court," i.e., this Court in which Hechinger filed bankruptcy and which authorized the Agreements, and one "of competent jurisdiction in Maryland."¹

The only remaining issue is whether I should transfer venue under 28 U.S.C. § 1412 in the "interest of justice or for the convenience of the parties." I decline to do so. First, I may treat a valid forum selection clause as Defendant's waiver of its right to assert its own convenience as a factor favoring transfer from the agreed upon forum. See Plum Tree, Inc. v. Stockment, 488 F.2d 754, 758 n.7 (3d Cir. 1973) (analyzing effect of forum selection clause under analogous federal venue transfer statute 28 U.S.C. § 1404(a)). Second, the plaintiff's choice of forum should generally not be disturbed, a consideration compounded in bankruptcy where the debtor-as-plaintiff enjoys the strong presumption of maintaining venue where its bankruptcy case is pending. See, e.g., Continental Airlines, Inc. v. Chrysler (In re Continental Airlines, Inc.), 133 B.R. 585, 587 (Bankr. D.Del. 1991).

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Because I find that the forum selection clause sanctions venue in this Court, I need not determine whether Fed.R.Civ.P. 12 (as made applicable to this proceeding by Fed.R.Bank.P. 7012) is the proper procedural mechanism through which to enforce the clause. I also need not decide whether the clause is valid and enforceable to the extent The Bremen v. Zappata Off-Shore Co., 407 U.S. 1, 92 S.Ct. 1907 (1972) applies, because Defendant concedes that it is.

However, even were Defendant to face a lesser burden, I would still not grant Defendant's motion because Defendant offers no basis on which to transfer venue. Its only factual allegations are that the circumstances and events which gave rise to Hechinger's cause of action, including documents and witnesses, are primarily located in Northern Virginia and Maryland. Def. Mtn. to Dismiss, at p. 5, ¶ 18. Even if this can be established, which I question in light of Hechinger's chapter 11 case here, Defendant gives no reason why this is inconvenient or why it necessitates transfer in the interests of justice. Accordingly, I deny Defendant's motion.

So ordered.

Very truly yours,

Peter J. Walsh

PJW:ipm