

plaintiff to sue in the Montgomery County (Pa.) Court of Common Pleas. Defendant's motion, ¶¶ 2-5.

1. Limitation of liability clause – Defendant contends that under the contract plaintiff's damages are limited to restitution of the amounts paid defendant – \$59,145.15 – and recoveries for incidental or consequential damages (Count I) or damages for fraudulent or negligent misrepresentation (Count III) are impermissible. Limitation of liability clauses are enforceable under Pennsylvania law, "especially when contained in contracts between informed business entities dealing at arms length, and there has been no injury to person or property." Valhal Corp. v. Sullivan Associates, Inc., 44 F.3d 195, 203-04 (3d Cir. 1995). The limitation does not apply, however, to claims for intentional torts. See id. at 203 ("[T]he limitation . . . is not enforceable if the damage is caused by willful or wanton conduct The weight of authority supports interpreting [liability limitation clauses] to extend only to acts of ordinary negligence and exclude conduct found to be willful, malicious or reckless.") (citation omitted). Count III of the complaint includes a claim for fraudulent misrepresentation. Inasmuch as damages are alleged to have been caused by defendant's intentional conduct, the limitation of liability clause does not prevent inclusion of such amounts to satisfy § 1332(a). Dismissal under Rule 12(b)(1) is, therefore, unwarranted.²

² In support of its liability limitation argument,
(continued...)

2. Forum selection clause - "Any cause or action arising out of or relating to this Agreement may only be brought in the courts of applicable jurisdiction in the Commonwealth of Pennsylvania, Montgomery County and the parties hereby submit to the jurisdiction and venue of such courts." Compl., exh. a, at ¶ 11(c). According to defendant, this clause confines the filing of an action to the Montgomery County Court of Common Pleas. Defendant's motion, ¶ 5.

The clause refers, in the plural, to "courts of applicable jurisdiction." This court, albeit federal, is a court that has "applicable jurisdiction" in Montgomery County - being one of the 10 Pennsylvania counties that make up its jurisdictional designation. See 28 U.S.C. § 116(a) (1994). In contrast, the forum selection clauses in cases cited by defendant are much more precisely and narrowly drafted than the one at issue here. See, e.g., Excell, Inc. v. Sterling Boiler & Mechanical, Inc., 106 F.3d 318, 320 (10th Cir. 1997) ("venue shall lie in the County of El Paso, Colorado"); Milk 'N' More, Inc. v. Beavert, 963 F.2d 1342, 1343 (10th Cir. 1992) ("venue shall be proper under this agreement in Johnson County, Kansas"); Cedarbrook Associates v. Equitec

²(...continued)

defendant also invokes the economic loss doctrine, see reply, at 11-12, which "prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows only from a contract," Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 618 (3d Cir. 1995). Analysis of plaintiff's contract and tort claims under this doctrine, however, would require more than the "minimal scrutiny" of claim sufficiency appropriate under Rule 12(b)(1). Suber, 104 F.3d at 583.

Savings Bank, 678 F. Supp. 107, 107-08 (E.D. Pa. 1987) ("any State Court within Alameda County, State of California"). Here, to the extent that any ambiguity lurks in the forum selection clause, it should be construed against the drafter - in this instance, defendant, complaint, exh. a, at 1 ("Software License and Services Agreement"); plaintiff's response, at 8. Rusiski v. Pribonic, 511 Pa. 383, 390, 515 A.2d 507, 510 (1986) (construing ambiguity in contract against drafter); Milk 'N' More, 963 F.2d at 1346 (same).

Edmund V. Ludwig, J.