

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

BLACK BELT, INC. <u>et al.</u>	:	CIVIL ACTION
	:	
v.	:	NO. 04-CV-131
	:	
11TH KYU, INC. <u>et al.</u>	:	

MEMORANDUM AND ORDER

Kauffman, J.

September 23, 2005

In this action, Plaintiffs Black Belt, Inc. and Solomon Brenner (“Plaintiffs”) bring claims relating to an alleged breach of licensing agreements (“Agreements”) against Defendants 11th KYU, Inc. (“11th KYU”), Art Chop, Inc., ASAH Shark, Inc., Button Soup, Inc., G. and E., Inc., J-Man, Inc. (“J-Man”), Kickin’, Inc., Quadshark, Inc., Shodan Enterprises, Inc., Sidekick, Inc., Soft Bo, Inc. (“Soft-Bo”), Jarret Adams, Robert P. Adams, Sharon Adams, Justin Bodamer, Andrew Christman, Daniel W. Conden, Timothy J. Doyle, Jonathan M. Ellis, Alfonso C. Ercolani, Gwyenn Gaittins, John E. Joyce, Jr., Kimberly S. Keller, John Kramer, Richard Kuliga, Dennis Vassalluzzo, and Ellen Vassalluzzo (collectively, “Defendants”). The Complaint seeks injunctive relief, damages and attorney fees. Currently before the Court is a 12(b)(1) and/or (6) Motion to Dismiss by Robert Adams, Sharon Adams, Jarrett Adams, Justin Bodamer, 11th KYU, Soft Bo, and J-Man (“Movants”). For the reasons stated below, the Motion to Dismiss will be granted.

I. BACKGROUND

Viewed in the light most favorable to Plaintiffs, the relevant facts are as follows. Solomon Brenner is the President and sole owner of Black Belt, Inc. (“Black Belt”), a

Pennsylvania corporation which maintains its regular place of business in Pennsylvania.

Complaint ¶¶ 1, 2. Black Belt is engaged in the business of karate instruction and the licensing of Action Karate schools. Complaint ¶ 1.

Since 1996, Black Belt has licensed seventeen karate schools in eastern Pennsylvania and southern New Jersey, three of which - 11th KYU, Soft Bo, and J-Man - are owned and operated by the individual Movants. Complaint ¶¶ 14-17, 39. Black Belt entered into licensing agreements (“Agreements”) on March 8, 1999 with Soft Bo, November 13, 1999 with J-Man, and July 28, 2000 with 11th KYU. Complaint ¶¶ 80, 82, 83. All Movant schools are Pennsylvania corporations. Complaint ¶¶ 3, 8, 13.

Plaintiffs allege that, in the fall of 2003, several meetings were held among Defendants in which a calculated plan for a collective breach of the Agreements was formulated. Complaint ¶ 98. On November 12, 2003, Defendants’ counsel, Thomas P. Heeney, Jr.,¹ sent a letter to Plaintiffs’ counsel, Peter J. Smith, stating that Defendants no longer considered themselves bound by the Agreements in light of Plaintiffs’ alleged fraud.² Complaint ¶¶ 101, 102. Mr. Smith replied with a letter on November 18, 2003, informing Defendants that they were in default of the Agreements and gave them ten days to cure the alleged defaults. Complaint ¶¶ 103, 104.

Defendants failed to cure and have refused to desist from utilizing the name Action

¹ At the time, all Defendants were represented by Mr. Heeney. As of July 30, 2004, however, Movants have been represented by Brian Puricelli.

² Defendants allege that the ASAH shark trademark belonged to defendant Jonathan Ellis and that Plaintiffs fraudulently registered it as their own. The dispute over the true ownership of the ASAH shark mark is not relevant to the present motion.

Karate, the ASAH Shark trademark, and all other Action Karate intellectual and personal property. They have also ceased paying all royalties and commissions due to Plaintiffs under the Agreements. Complaint ¶¶ 105, 107 and 113.

Movants bring this 12(b)(1) and/or (6) Motion to Dismiss based on jurisdictional grounds. Among other things, they argue that: (1) as a result of provision N of the Agreements, this Court lacks subject matter jurisdiction over the action; and (2) pursuant to provision N of the Agreements, the parties have contracted away the right to bring claims in this Court.

II. LEGAL STANDARD

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The Court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted only when it is certain that no relief could be granted under any set of facts provable by plaintiff. See Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

In considering a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the Court must distinguish between motions that attack the complaint on its face and those that attack the existence of subject matter jurisdiction in fact. Mortensen v. First Fed. Sav. & Loan Assoc., 549 F.2d 884, 891 (3d Cir. 1977). A facial attack is considered under the same standard as a motion to dismiss under Rule 12(b)(6); all allegations in the complaint are taken to be true. Id. If, as in this case, however, the attack is factual, the plaintiff's allegations are not presumed to be true. Id. The Court may look beyond the pleadings and make its own

determination as to whether it has the power to hear the action. Cestonaro v. United States, 211 F.3d 749, 752 (3d Cir. 2000). Further, the plaintiff bears the burden of proving that jurisdiction does in fact exist. Mortensen, 549 F.2d at 891.

III. DISCUSSION

A. Rule 12(b)(1) Motion to Dismiss

Movants' primary contention is that provision N of the Agreements is a forum selection clause that deprives this Court of subject matter jurisdiction. In pertinent part, provision N of the Agreements reads:

Venue shall be limited to the Court of Common Pleas of Bucks County, Pennsylvania for any issue related, directly or indirectly, to this transaction. The parties waive the right to a trial by jury.

However, a forum selection clause is merely a stipulation between the parties by which they request the court to decline to exercise its jurisdiction and does not operate to "oust the jurisdiction of the courts." Central Contracting Co. v. Maryland Casualty Co., 367 F.2d 341, 345 (3d Cir 1966). In the instant case, the Complaint pleads facts which, if true, would establish jurisdiction in this court pursuant to 28 U.S.C. §§ 1331, 1338(a), and no agreement between the parties can deprive the court of that jurisdiction. Accordingly, Movants' Rule 12(b)(1) motion to dismiss based on this Court's lack of subject matter jurisdiction will be denied.

B. Rule 12(b)(6) Motion to Dismiss

In the alternative, Movants ask this Court to dismiss this action for failure to state a claim upon which relief can be granted. Specifically, Movants ask the Court to enforce provision N of the agreement.

In their Response, Plaintiffs suggest that Movants' Motion to Dismiss would be more properly characterized as a 12(b)(3) motion to dismiss based on improper venue. Moreover, Plaintiffs contend that Movants waived any objection to venue based on their ongoing participation in this litigation. In particular, Plaintiffs point to the many motions that Movants have filed in addition to their participation in a settlement conference that was conducted before this Court.

Plaintiffs are correct when they argue that a defense of improper venue can be waived. See Niefeld v. Steinberg, 438 F.2d 423, 427 (3d Cir. 1971); Fed. R. Civ. P. 12(h)(1). Under the law of this circuit, however, a motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim is an appropriate mechanism for enforcing a forum selection clause. See Salovaara v. Jackson Nat'l Life Ins. Co., 246 F.3d 289, 298-300 (3d Cir. 2001). Unlike a Rule 12(b)(3) objection based on improper venue, the Federal Rules state, "[a] defense of failure to state a claim upon which relief can be granted ... may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgement on the pleadings, or at the trial on the merits." Fed. R. Civ. P. 12(h)(2). See also Fed. R. Civ. P. 12 advisory committee's note to 1966 amendment to subdivision (h) ("[T]he more substantial defense[] of failure to state a claim upon which relief can be granted ... [is] expressly preserved against waiver by amended subdivision (h)(2) and (3)."). Thus, Movants have not waived any right they have to assert a 12(b)(6) motion seeking to enforce the forum selection clause.

C. Enforceability of the Forum Selection Clause

Forum selection provisions are valid and enforceable under Pennsylvania law and the law of this circuit, absent a showing that they are the result of fraud or overreaching or are

unreasonable or unfair. See Central Contracting Co. v. C.E. Youngdahl & Co., 418 Pa. 122, 133, 209 A.2d 810, 816 (1965); Central Contracting Co. v. Maryland Casualty Co., 367 F.2d 341, 345 (3d Cir 1966).

Even though they are the drafters of the forum selection clause, Plaintiffs argue that the terms of the clause are unreasonable or unfair, and would deprive them of the ability to bring their federal copyright and trademark claims. However, the terms of provision N clearly and unambiguously restrict the venue of any action arising out of a dispute concerning the Agreements to the Court of Common Pleas of Bucks County, Pennsylvania. For the drafters of such an unambiguous forum selection clause to now claim that its enforcement would somehow be unreasonable or unjust is, to say the least, disingenuous.

Because all of the relief sought by Plaintiffs - injunctive relief, damages and costs - could be granted by the Court of Common Pleas, dismissal here would not deprive them of their day in court. See Bremen, 407 U.S. at 18; see also Maryland Casualty, 367 F.2d at 344 (“If the agreed upon forum is available to plaintiff and said forum can do substantial justice to the cause of the action then plaintiff should be bound by his agreement.”) (quoting Central Contracting Co. v. C.E. Youngdahl & Co., 418 Pa. 122, 133-34, 209 A.2d 810, 816 (1965)).

IV. Conclusion

For the foregoing reasons, the Court will grant Defendants’ Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). An appropriate Order follows.

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ORDER

AND NOW, this 23rd day of September, 2005, upon consideration of Movants' Motion to Dismiss (docket no. 55), and the responses thereto, it is **ORDERED** that the Motion is **GRANTED** pursuant to Federal Rule of Civil Procedure 12(b)(6) without prejudice to the right of Plaintiffs to file their claims in the Court of Common Pleas of Bucks County, Pennsylvania.

BY THE COURT:

/s/ Bruce W. Kauffman

BRUCE W. KAUFFMAN, J.