

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

ELISE KAHN,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 06-01832
AMERICAN HERITAGE LIFE	:	
INSURANCE COMPANY, ALLSTATE	:	
FINANCIAL CORPORATION,	:	
ALLSTATE INSURANCE COMPANY,	:	
and THE ALLSTATE CORPORATION,	:	
	:	
Defendants.	:	

**MEMORANDUM AND ORDER**

JOYNER, J.

June 29, 2006

This civil action, which Plaintiff instituted pursuant to the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. §§ 951-63, is now before this Court for disposition of the Defendants' Motion to Dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons which follow, the motion shall be DENIED in part and the case shall be TRANSFERRED to the U.S. District Court for the Middle District of Florida, pursuant to 28 U.S.C. § 1404(a). The remainder of Defendants' motion shall be DENIED as MOOT.

**Statement of Facts**

This case arises out of an agent contract entered into by the Plaintiff, Elise Kahn, and one of the Defendants, American Heritage Life Insurance Company (hereinafter "AHL"), on November 27, 2000. (Def.'s Mot. Dismiss Ex. B.) Plaintiff began working

for AHL pursuant to the agent contract in December 2000, and in or about that same time she was appointed to sell several types of Defendants' insurance products. (Compl. ¶¶ 7-8.) On or about July 17, 2001, Plaintiff met with a representative of the Philadelphia Federal Credit Union (hereinafter "PFCU") to pitch Defendants' supplemental benefits products for sale. (Compl. ¶ 9.) Due to its substantial number of employees and members, PFCU represented a potentially large and very lucrative account. (Compl. ¶ 10.)

In or about September or October 2001, Plaintiff met with her immediate supervisor, Thom D'Epagnier, a Regional Director for AHL. (Compl. ¶ 11.) During this meeting, Plaintiff alleges, Mr. D'Epagnier made derogatory comments about women, especially those of Plaintiff's religious background. (Compl. ¶ 11.) On or about October 30, 2001, Mr. D'Epagnier informed Plaintiff that he intended to reduce her compensation, and sometime in or about January 8-11, 2002, Plaintiff learned that Mr. D'Epagnier had assigned the task of closing the PFCU account to another agent, Jim Bower. (Compl. ¶¶ 12-13.) On or about January 11, 2002, Plaintiff met with AHL Field Vice President, Joe Richardson, to discuss her concerns over these incidents. (Compl. ¶ 15.) Mr. Richardson informed Plaintiff that if the deal with PFCU went through, Pat Ruscio, the Allstate property and casualty agent who originally set up Plaintiff's appointment with PFCU, would be

compensated. (Compl. ¶ 16.)

After this meeting, Plaintiff contacted attorney John C. Penberthy III, and on January 16, 2002, Mr. Penberthy wrote a letter to Mr. Richardson; Mr. D'Epagnier; AHL Vice President, Donald O. Fennel; and AHL Executive Vice President, David A. Bird; alleging that Plaintiff had been discriminated against on the basis of her gender. (Compl. ¶ 19.) On or about January 29, 2002, Mr. Fennel wrote a letter to Plaintiff terminating her agent contracts and appointments. (Compl. ¶ 20.) Defendants were eventually successful in acquiring the PFCU account, and, although Plaintiff had invested significant time and energy into working on the account, she did not become broker of record for the purpose of selling supplemental benefits products to the employees and members of PFCU and did not receive any commissions and/or compensation related to the account. (Compl. ¶¶ 22-25.) Additionally, Plaintiff did not receive any renewal commissions from the other account(s) that she enrolled prior to her termination. (Compl. ¶ 25.)

On or about April 1, 2002, Plaintiff filed a Complaint of Discrimination (hereinafter "First Complaint") with the Pennsylvania Human Relations Commission (hereinafter "PHRC") alleging, inter alia, gender discrimination and retaliation in violation of the Pennsylvania Human Relations Act (hereinafter "PHRA"), 43 Pa. Cons. Stat. Ann. §§ 951-63. (Compl. ¶ 26.) That

complaint was served on the Defendants sometime in May, 2002. (Compl. ¶ 27.) Shortly thereafter, Plaintiff received collection letters dated June 28, 2002 and July 17, 2002, from John A. Markum at Allstate Financial, demanding repayment of advanced commissions she had received from AHL before her termination. (Compl. ¶ 28.) Pursuant to an arrangement with AHL, Plaintiff had been paid a monthly advance from which her earned commissions would be deducted, and at the time of her termination she had not earned the full amount of the advance. (Compl. ¶ 30.) Plaintiff next received a letter dated October 18, 2002 from Gary S. Stere, General Counsel for Allstate Financial, also demanding repayment of the unearned advanced commissions. (Compl. ¶ 29.) Plaintiff alleges that she is not legally obligated to repay the advance. (Compl. ¶ 32.)

In August 2003, Plaintiff received a collection letter from Daniel J. Lowther, Esq., writing on behalf of the Johnson & Roundtree Collection Agency, to which, he claimed, Defendants had assigned Plaintiff's debt. (Compl. ¶ 33.) Plaintiff replied to Mr. Lowther, pursuant to 15 U.S.C. § 1692(c), stating that she disputed the validity of the alleged debt, refused to pay the alleged debt, and requested that Mr. Lowther and Johnson & Roundtree cease all further communications with her. (Compl. ¶ 24.) Despite her response, an adverse item related to the debt appeared on Plaintiff's credit report, which she alleges caused

her to lose a pending employment opportunity. (Compl. ¶¶ 35-36.) Plaintiff thereafter received two more collection letters attempting to collect the same debt; one from William A. Goldman, Esq. dated September 15, 2003 and one from Francine Clair Landau, Esq. dated September 17, 2003. (Compl. ¶¶ 37-38.)

In September 2003, Plaintiff filed a second Complaint of Discrimination (hereinafter "Second Complaint") with the PHRC alleging additional retaliation in violation of the PHRA. (Compl. ¶ 40.) After filing said complaint, Plaintiff stopped receiving collection notices regarding the alleged debt. (Compl. ¶ 41). After receiving a closure letter from the PHRC on the First Complaint on March 18, 2004, Plaintiff brought an action in this Court against Defendants for unlawful discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et. seq., and the PHRA, and for various state law contractual claims. (Def.'s Mot. Dismiss, 3); see, Kahn v. Am. Heritage Life Ins. Co., et al., 324 F.Supp.2d 652 (E.D. Pa. 2004). On June 29, 2004, this Court granted Defendants' motion to dismiss that action, finding that Plaintiff was an independent contractor and therefore not entitled to protection under Title VII, and declining to exercise supplemental jurisdiction over Plaintiff's state law claims. (Def.'s Mot. Dismiss, 3); Kahn v. Am. Heritage Life Ins. Co., et al., 324 F.Supp.2d at 657.

While granting Defendants' motion to dismiss, this Court noted the existence of a forum selection clause in Plaintiff's agent contract establishing that any claims arising out of or related in any way to the solicitation, negotiation, inception or performance of the contract should be brought in a court of competent jurisdiction within Duval County, Florida. Id. While not ruling on the validity of the clause, this Court suggested that if Plaintiff elected to refile her common law claims, she may wish to do so in the specified forum. Apparently following this suggestion, Plaintiff filed a lawsuit against defendants in the Circuit Court for the Fourth Judicial Circuit, Duval County, Florida. (Def's Mot. Dismiss, 4, Ex. E); see Compl., Kahn v. Am. Heritage Life Ins. Co., et al., Case No. 16-20006-CA-0000905-XXX-MA (Fla. Cir. Ct. Duval Cty. Mar. 21, 2006). The action, which is still pending, alleges breach of contract, unjust enrichment, quantum meruit, fraudulent misrepresentation, and tortious interference with a business relationship. Id.

After receiving a closure letter from the PHRC on the Second Complaint, Plaintiff initiated this action on March 15, 2006 by filing a complaint in the Pennsylvania Court of Common Pleas for Bucks County, alleging that Defendants' actions constituted unlawful retaliation against her for engaging in protected activity, pursuant to the PHRA, 43 Pa. Cons. Stat. Ann. § 955(d). Defendants removed the action to this court under diversity

jurisdiction, pursuant to 28 U.S.C. §§ 1332 and 1441(a), and now move to dismiss for failure to state a claim upon which relief can be granted.

**Standards Governing Rule 12(b)(6) Motions**

A motion to dismiss may be granted where the allegations fail to state any claim upon which relief can be granted under any set of facts that the plaintiff could prove. See, Evancho v. Fisher, 423 F.3d 347, 351 (3d Cir. 2005). In deciding whether to dismiss a complaint under Rule 12(b)(6), we take all well-pleaded allegations in the complaint and all reasonable inferences that can be drawn therefrom as true and construe them in the light most favorable to the plaintiff. Id. at 350. This Court can consider all undisputably authentic documents and exhibits attached to both the complaint and the motion to dismiss which are mentioned in the complaint and form the basis of the plaintiff's claim. Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 559-560 (3d Cir. 2000). In addition, this court may consider records and reports of administrative bodies, such as the PHRC, and publicly available records from judicial proceedings in related or underlying cases which have a direct relationship to the matters at issue. Twp. of S. Fayette v. Allegheny County Hous. Auth., 27 F.Supp.2d 582, 594 (W.D. Pa. 1998). When the parties' agreement contains a valid forum selection clause designating a particular forum for settling

disputes arising out of their contract, 12(b)(6) dismissal is a permissible means of enforcing that forum selection clause.

Salovaara v. Jackson Nat'l Life Ins. Co., 246 F.3d 289, 298 (3d Cir. 2001) (affirming Crescent Int'l v. Avatar Cmtys., Inc., 857 F.2d 943 (3d Cir. 1988)).

### **Discussion**

In this motion to dismiss, Defendants contend that Plaintiff fails to state a legally viable claim under the PHRA because, as an independent contractor, she cannot invoke the protections of the PHRA, which Defendants claim only protects employees. Defendants further argue that even if it is determined that Plaintiff is covered by the PHRA, this action should be dismissed to enforce a forum selection clause in Plaintiff's agent contract, which specifies Duval County, Florida, as the exclusive forum for all claims related to the contract.<sup>1</sup> Because it is

---

<sup>1</sup> The forum selection clause is found in paragraph 11(b) of plaintiff's agent contract and states:

"(b) The parties further agree that in any dispute arising out of or related in any way to the solicitation, negotiation, inception, or performance of this Contract (whether the dispute is couched in terms of contractual, statutory, or common law grounds) said dispute shall be exclusively resolved by a Court of competent jurisdiction within the State of Florida and specifically located within the venue of Duval County, Florida and the parties hereto agree that in the event any claim, action, lawsuit or other proceeding is filed in a forum other than the one located in the State of Florida, County of Duval, said claim, action, lawsuit or other proceeding shall be dismissed, transferred or abated and the dispute shall be pursued in an

determinative of this Court's ability to hear any further arguments on this case, we consider the forum selection clause first.

*Validity and Scope of the Forum Selection Clause*

In order to enforce the forum selection clause, it must first be determined that the clause is valid and that the present action falls within the scope of the clause. Federal law, not state law, is applied to the validity of a forum selection clause in a federal diversity case. Jumara v. State Farm Ins. Co., 55 F.3d 873, 877-878 (3d Cir. 1995) (citing Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988)). Forum selection clauses are prima facie valid and should be enforced unless enforcement is shown to be unreasonable under the circumstances. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972); Foster v. Chesapeake Ins. Co., Ltd., 933 F.2d 1207, 1219 (3d Cir. 1991). A forum selection clause will be found unreasonable, and therefore not enforceable, if (1) it was procured by fraud, undue influence, or overweening bargaining power, (2) enforcement would contravene a strong public policy of the forum in which the suit is brought, or (3) litigating in the designated forum would be so seriously inconvenient that the plaintiff will for all practical purposes

---

appropriate forum located within the state of Florida, County of Duval."

Def.'s Mot. Dismiss, Ex. B, ¶ 11(b).

be deprived of his or her day in court. The Bremen, 407 U.S. at 15, 18. The party seeking to avoid the forum selection clause bears the burden of proving its unreasonableness. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 592 (1991); The Bremen, 407 U.S. at 17.

Here, Plaintiff makes no allegations that the forum selection clause was the product of fraud or undue influence. Rather, Plaintiff argues that the forum selection clause is unenforceable on two grounds. First, Plaintiff claims that the clause is unenforceable because the agent contract was a form contract drafted by Defendants without negotiations and was therefore not fairly bargained for. (P.'s Answer to Def.'s Mot. Dismiss, 3). Second, Plaintiff argues that the forum selection clause is unenforceable because the PHRA specifies the Courts of the Commonwealth as having exclusive jurisdiction over PHRA claims and, as such, Florida courts may refuse to exercise subject matter jurisdiction over Plaintiff's claims, thereby depriving her of her day in court. (P.'s Answer to Def.'s Mot. Dismiss, 4-5).

Neither of these circumstances makes enforcement of the forum selection clause unreasonable. It is well established that the placement of a forum selection clause in a non-negotiated form contract does not render it unreasonable. Foster, 933 F.2d at 1219 ("[t]hat there may not have been actual negotiations over

the clause does not affect its validity" (citing Carnival, 499 U.S. at 593)); Barbuto v. Med. Shoppe Int'l, Inc., 166 F.Supp.2d 341, 346 (W.D. Pa 2001). Additionally, Courts generally enforce forum selection clauses in employment contracts, regardless of whether or not there were actual negotiations over the clause, where the contract was executed while the employee still had an opportunity to choose not to enter into the contractual relationship. Barbuto, 166 F.Supp.2d at 346-347. Therefore, the fact that Plaintiff did not engage in actual negotiations with Defendants over the forum selection clause does not make it unreasonable, especially because Plaintiff was presented with the clause within the agent contract before beginning a working relationship with Defendants, providing her with the choice not to enter into the contractual relationship if she did not agree with the clause.

Plaintiff's contention that she may be deprived of her day in court if the case is transferred to Florida or dismissed to be refiled in Florida is without merit, and as such does not make enforcement of the forum selection clause unreasonable.

Plaintiff cites the PHRA, 43 Pa. Cons. Stat. Ann. § 962(c),<sup>2</sup> as

---

<sup>2</sup>43 Pa. Cons. Stat. Ann § 962(c)(1) fully states:

"(c)(1) In cases involving a claim of discrimination, if a complainant invokes the procedures set forth in this act, that individual's right of action in the courts of the Commonwealth shall not be foreclosed. If within one (1) year after the filing of

granting exclusive jurisdiction over PHRA claims to the Courts of the Commonwealth. That section states, "the complainant shall be able to bring an action in the courts of common pleas of the Commonwealth based on the right to freedom from discrimination granted by this act." 43 Pa. Cons. Stat. Ann. § 962 (c)(1). This provision allows complainants to bring a civil action for violation of the PHRA after a one year period during which the PHRC has exclusive jurisdiction over the claims and complaints to that commission are the sole remedy for violation of the PHRA. While the section does specify the courts of common pleas of the Commonwealth as the forum in which complainants "shall be able to bring a civil action," Id., it does not speak to the exclusivity of the courts of common pleas' jurisdiction over PHRA claims. In fact, PHRA claims have been brought in other forums without jurisdictional challenge, including courts outside the Commonwealth of Pennsylvania. See, e.g., Fasold v. Justice, 409 F.3d 178 (3d Cir. 2005); Fogleman v. Mercy Hosp., Inc., 283 F.3d 561 (3d Cir. 2002); Satz v. Tarpina, 2003 WL 22207205 (D. N.J. 2003); Phillips v. Heydt, 197 F.Supp.2d 207 (E.D. Pa. 2002). In

---

a complaint with the Commission, the Commission dismisses the complaint or has not entered into a conciliation agreement to which the complainant is a party, the Commission must notify the complainant. On receipt of such a notice the complainant shall be able to bring an action in the courts of common pleas of the Commonwealth based on the right to freedom from discrimination granted by this act."

fact, if Plaintiff's argument was valid, this Court would not even retain jurisdiction to adjudicate PHRA claims, which it has been asked to do in this action and which it has done in numerous other cases without question. See, e.g., Fries v. Metro. Mgmt. Corp., 293 F.Supp.2d 498 (E.D. Pa 2003); Mroczek v. Bethlehem Steel Corp., 126 F.Supp.2d 379 (E.D. Pa 2001). Therefore, although the PHRA specifies the courts of common pleas of the Commonwealth as an allowable forum for adjudication of PHRA claims, such jurisdiction has not been found to be exclusive and would not prevent Plaintiff from bringing PHRA claims in federal or state court in Florida.

Additionally, if this action is transferred to Florida or dismissed to be refiled in Florida, the courts of Florida, both state and federal, will not decline to decide Plaintiff's PHRA claim and deprive her of her day in court. If the action is transferred to a federal district court in Florida, that court will be bound to apply the same law that would have been applied to the case if it had been heard in this court - the provisions of the PHRA. When a case is transferred from one federal court to another pursuant to 28 U.S.C. 1404(a), such transfer "does not carry with it a change in the applicable law." Stewart Org., Inc., 487 U.S. at 32 (citing Van Dusen v. Barrack, 376 U.S. 612, 636-637 (1964)). A transfer simply authorizes a change in courtrooms; whatever rights the parties had under state law in

the original forum will be unaffected and the case will remain the same in all aspects except for location. Van Dusen, 376 U.S. 633, 637. Accordingly, a Florida federal district court will not be able to refuse to hear Plaintiff's PHRA claims and she will not be deprived of her day in court.

If the action is dismissed and refiled in Florida state court, that court will conduct a conflicts of law analysis, pursuant to Florida law, and will apply Pennsylvania law to Plaintiff's claims. Florida courts have adopted the "significant relationship" test of the Restatement (Second) of Conflict of Laws (1969). Bishop v. Florida Specialty Paint Co., 389 So.2d 999, 1001 (Fla. 1980). Under this analysis, the local law of the state where the Plaintiff's injury occurred applies unless another state has a more significant relationship with the parties and the occurrence. Tune v. Philip Morris Inc., 766 So.2d 350, 353 (Fla. Dist. Ct. App. 2000). Here, the alleged discrimination took place in Pennsylvania, Plaintiff is a Pennsylvania resident, and Plaintiff worked for Defendants in Pennsylvania and reported to Defendants' Fort Washington, Pennsylvania office. Additionally, Pennsylvania has a strong interest in having its law applied to employment discrimination that occurs within the state, regardless of whether the parent company of the employer is headquartered in another state. Florida has no real stake in the outcome of the case, and

application of Florida law would be unjustified. In cases such as this, where "the policies of one state would be furthered by the application of its laws while the policy of the other state would not be advanced by application of its laws," Florida courts sometimes determine that there is no true conflict of laws and bypass the "significant relationship" analysis by applying the law of the one state that has a legitimate interest in the case. Tune, 766 So.2d at 352-353. Either way, Pennsylvania law would be applied to Plaintiff's case in Florida state court and she would not be deprived of her day in court by refileing in Florida to comply with the forum selection clause.

In light of the above, Plaintiff has not met the burden of showing that enforcement of the forum selection clause is unreasonable, and therefore we find the clause to be valid. Plaintiff further contends that even if the forum selection clause is valid, it is limited in scope and does not apply to her PHRA claims. Plaintiff cites the clause as applying only to disputes "arising out of or related in any way to the solicitation, negotiation, inception or performance of *this Contract*." (P.'s Answer to Def.'s Mot. Dismiss, 3). Accordingly, Plaintiff argues that the clause applies only to her common law contractual claims, which she has filed in Florida, but not to her PHRA retaliation claims which are not related to the contract. Id.

In determining the scope of a forum selection clause, it is essential to look to the language of the specific clause at issue. John Wyeth & Bro. Ltd. v. Cigna Int'l Corp., 119 F.3d 1070, 1075 (3d Cir. 1997). The forum selection clause included in Plaintiff's agent contract is very broadly worded and does not support her claim that the clause is limited in scope. The clause grants jurisdiction to Florida courts over any "*disputes arising out of or related in any way*" to the contract. In John Wyeth & Brother Ltd., the Third Circuit Court of Appeals held that forum selection clauses covering 'disputes' have a much broader scope than those covering 'claims' related to a contract. 119 F.3d at 1074. The court also held that a clause using the language "related to" is extremely broad and grants the forum selection clause much broader jurisdiction than a clause using the language "arising under." Id. Additionally, the court has held that generally, "pleading alternative, non-contractual theories is not enough to avoid a forum selection clause if the claims arise out of the contractual relationship and implicate the contract." Crescent Int'l, Inc., 857 F.2d at 944. Plaintiff's PHRA claims, while not based on her contract with Defendants, arise out of the contractual relationship created between them by the contract, and her claims implicate the contract to the extent that she claims termination of the contract was a form of unlawful retaliation under the PHRA.

Thus, Plaintiff's PHRA claims are sufficiently related to the agent contract to fall within the scope of the broadly worded forum selection clause included therein.

*Enforcement of the Forum Selection Clause*

In the Third Circuit, a valid forum selection clause which allows suit in another federal forum is enforced by either a motion to transfer venue, pursuant to 28 U.S.C. § 1404(a) or § 1406, or a motion to dismiss for failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6).<sup>3</sup> Barbuto, 166 F.Supp.2d at

---

<sup>3</sup>In the Third Circuit, a forum selection clause designating another forum does not render venue in the original forum improper, and thus enforcement of a valid forum selection clause is not effectuated through a motion to dismiss for improper venue, pursuant to Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406, when venue is otherwise proper in the original forum. Barbuto v. Med. Shoppe Int'l, 166 F.Supp.2d 341, 347-348 (W.D. Pa 2001) (citing Salovaara v. Jackson Nat'l Life Ins. Co., 246 F.3d 289, 298 (3d Cir. 2001); Jumara v. State Farm Ins. Co., 55 F.3d 873, 878-879 (3d Cir. 1995)). There is a split in the circuits regarding the proper method of enforcing a valid forum selection clause. See MacPhail v. Oceaneering Int'l, Inc., 170 F.Supp.2d 718, 721 (S.D. Tex. 2001). The Third Circuit falls in the minority of this split along with the First and Second Circuits. Id.; see, e.g., Evolution Online Sys., Inc. v. Koninklijke PTT Nederland N.V., 145 F.3d 505, 505 n. 6 (2d Cir. 1998) (granting motion to dismiss on court's finding of a valid forum selection clause based on Rule 12(b)(6)); Lambert v. Kysar, 983 F.2d 1110, 1112 n. 1 (1st Cir. 1993) (finding dismissal to enforce a forum selection clause should be done by a Rule 12(b)(6) motion). The Fifth, Seventh, Ninth and Tenth Circuits have all held that a valid forum selection clause renders venue in the original forum improper and should be enforced by a Rule 12(b)(3) motion to dismiss for improper venue pursuant to 28 U.S.C. § 1406. Id.; see, e.g., McPhail, 170 F.Supp.2d at 721 (holding that motion to dismiss pursuant to a forum selection clause is properly characterized as a Rule 12(b)(3) motion); R.A. Arqueta v. Banco Mexicano, S.A., 87 F.3d 320, 324 (9th Cir. 1996) (finding that a motion to dismiss to enforce a forum selection clause should be

348 (citing Salovaara, 246 F.3d at 298-299). The forum selection clause included in Plaintiff's agent contract specifies "a Court of competent jurisdiction within the State of Florida and specifically located within the venue of Duval County, Florida" as the proper forum in which suit should be brought. Such language, designating that a case must be brought in a court within a certain county, does not limit the forum to state courts, but rather allows the action to be brought in any court, including federal, within the county. Jumara, 55 F.3d at 881. Therefore, this Court can consider whether to enforce the clause by granting the motion to dismiss to allow Plaintiff to refile her claims in a Florida state court within Duval County or by transferring the case to the U.S. District Court for the Middle District of Florida, which has a branch located within Duval County.

When only a 12(b)(6) motion to dismiss is filed, and not a motion to transfer venue, as is the case here, this Court has the power to dismiss the action in order to enforce the forum selection clause without considering the possibility of transfer to another federal forum. Salovaara, 246 F.3d at 298-299. The

---

governed by Rule 12(b)(3)); Frietsch v. Refco, Inc., 56 F.3d 825, 830 (7th Cir. 1995) (declaring that a motion to dismiss pursuant to Rule 12(b)(3) is the proper tool to enforce a forum selection clause); Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 956 (10th Cir. 1992) (finding that a valid forum selection clause is properly enforced through a 12(b)(3) motion to dismiss for improper venue).

filing of only a 12(b)(6) motion, however, does not preclude a district court from *sua sponte* considering whether transfer is the better course, and many courts have exercised their discretionary power<sup>4</sup> to do so. Id. at 299; see e.g. Jumara, 55 F.3d at 878 (ordering a transfer of venue although no motion to transfer was filed); Reynolds Publishers, Inc. v. Graphics Fin. Group, Ltd., 938 F.Supp. 256, 260 (D. N.J. 1996) (granting, *sua sponte*, a transfer of venue even though only a motion to dismiss was filed). In general, a transfer to an appropriate federal forum is preferable to a dismissal because it avoids repetitive refiling and associated fees, avoids possible statute of limitations problems, and ensures that the plaintiff will get his or her day in court. See Wims v. Beach Terrace Motor Inn, Inc., 759 F.Supp. 264, 270 (E.D. Pa 1991); Barnes v. Bonifacio, 605 F.Supp. 223, 225 (D.C. Pa 1985).

Although we may simply dismiss this action, we find it would be in the interest of justice to consider the possibility of a transfer to the federal forum permitted by the forum selection clause because such transfer would promote judicial

---

<sup>4</sup>This power to consider a transfer of venue pursuant to 28 U.S.C. § 1404(a) *sua sponte* is based on the language of the statute, which has been interpreted not to require any formal motion to be filed before a court can determine that a change of venue would be appropriate. See Associated Bus. Tel. Sys., Corp. v. Danihels, 899 F.Supp. 707, 713 n. 3 (D. N.J. 1993) (citing Wash. Pub. Util. Group v. U.S. Dist. Ct. for the W. Dist. of Wash., 843 F.2d 319, 326 (9th Cir. 1988)).

economy and avoid any possible statute of limitations problems.<sup>5</sup> Additionally, such consideration is not completely the result of this Court's discretion because, although no motion to transfer was filed, both parties argued the merits of a transfer to Florida based on the relevant factors under 28 U.S.C. § 1404(a) in their pleadings. Because venue is proper both in the Eastern District of Pennsylvania<sup>6</sup> and the Middle District of Florida<sup>7</sup>, consideration of a transfer to the specified federal forum is

---

<sup>5</sup>We note that, pursuant to the PHRA, 43 Pa. Cons. Stat. Ann. § 962(c)(2), Plaintiff faces a two year statute of limitations for filing her PHRA claims. Because part of Plaintiff's claim is based on alleged discrimination for which she received a closure letter from PHRC on March 18, 2004, she may face a statute of limitations problem if this action is dismissed to be refiled in Florida state court.

<sup>6</sup>Venue is proper in the Eastern District of Pennsylvania because it is a district in which defendants, as corporations, do business and are subject to personal jurisdiction. See 28 U.S.C. § 1391 (a)(1), (a)(3), (c) (declaring venue is proper in a district in which a defendant is subject to personal jurisdiction or resides, and that corporations are deemed to reside in any district in which they are subject to personal jurisdiction). Additionally, the alleged discrimination occurred within the district. See 28 U.S.C. § 1391 (a)(2) (finding venue is proper in a district in which a substantial part of the events giving rise to the claim occurred). In the Third Circuit, a forum selection clause does not affect the propriety of venue. Jumara, 55 F.3d at 878 (citing Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 28 n. 8(1988)).

<sup>7</sup>Venue is proper in the Middle District of Florida because it is a district in which defendants are headquartered, do business, and are subject to personal jurisdiction. See 28 U.S.C. § 1391 (a)(1), (a)(3), (c) (declaring venue is proper in a district in which a defendant is subject to personal jurisdiction or resides, and that corporations are deemed to reside in any district in which they are subject to personal jurisdiction).

governed by 28 U.S.C. § 1404(a), which applies when both the original and the requested venue are proper, rather than 28 U.S.C. § 1406, which only applies when the original venue is improper. Jumara, 55 F.3d at 878; see 28 U.S.C. § 1404(a); 28 U.S.C. § 1406.

In deciding whether a forum selection clause should be given effect through a transfer to another district court in the contractually specified forum under 28 U.S.C. § 1404(a), we must engage in a case-specific balancing pursuant to the factors laid out in § 1404(a). Jumara, 55 F.3d at 878 (citing Stewart Org., Inc., 487 U.S. at 29). In addition to the factors enumerated in § 1404 (convenience of parties, convenience of witnesses, or interests of justice), numerous other public and private interests can be considered. Jumara, 55 F.3d at 879. The private interests include plaintiff's forum preference as manifested in the original choice, whether the claim arose elsewhere, the convenience of the parties as indicated by their physical and financial condition, the convenience of the witnesses (but only to the extent that the witnesses may actually be unavailable for trial in the fora), and the location of books and records relevant to the case. Id. The public interests include the enforceability of the judgment; practical considerations that could make the trial easy, expeditious, or inexpensive; the relative administrative difficulty in the two

fora resulting from court congestion; the local interest in deciding local controversies at home; the public policies of the fora; and the familiarity of the trial judge with the applicable state law in diversity cases. Id. at 879-880.

Within this context, a forum selection clause is considered to be a "manifestation of the parties' preferences as to a convenient forum." Id. at 880. As such, the clause should figure centrally in our analysis and be given substantial, although not dispositive, consideration. Id.; Stewart Org., Inc., 487 U.S. at 31. While courts usually defer to the plaintiff's choice of forum, such deference does not apply when the plaintiff has filed in a forum other than one he or she already contractually agreed to be limited to. Jamura, 55 F.3d at 880. Plaintiff then bears the burden of showing that the balance of factors under § 1404(a) outweighs the contractual choice of forum and that the case should not be transferred. Id.

Here, Plaintiff argues that the forum selection clause is overcome by multiple factors favoring litigation in Pennsylvania. Plaintiff points out that the events giving rise to the claims all took place in Pennsylvania, that the vast majority of witnesses reside in Pennsylvania, and that this Court has more of an interest in, and more familiarity with, the PHRA. (P.'s Answer to Def.'s Mot. Dis., 4). While Plaintiff's arguments have merit, we do not find that they outweigh the parties' contractual choice

of forum, especially in light of Plaintiff's decision to file other claims, arising out of the same events and involving the same witnesses, in a Florida court. The convenience of witnesses is only to be considered to the extent that they would be unavailable in the new forum, Jumara, 55 F.3d at 879, and there is no indication that witnesses in Pennsylvania would not be able to travel to Florida, which they are likely already expected to do in connection with the state court action. Also, while this Court may be more familiar with the PHRA, there is no indication that a U.S. District Court sitting in Florida would be any less capable of interpreting and applying the provisions of the PHRA. In addition, Defendants present valid public interest factors that further support transfer to Florida. Because Defendants are Florida corporations, Plaintiff will have no difficulty enforcing a judgment obtained in Florida. Moreover, transfer to Florida promotes judicial economy by making it possible for all of Plaintiff's claims to at least be heard in the same venue, and possibly the same proceeding if the cases are later consolidated.<sup>8</sup> Thus, Plaintiff fails to meet the burden of showing that, under 28 U.S.C. § 1404, the applicable public and

---

<sup>8</sup> See Burger King Corp. v. Stroehmann Bakeries, Inc., 929 F.Supp. 892, 895 n. 2 (E.D. Pa 1996) (noting that the existence of a related action is a strong factor in a transfer decision where judicial economy may be achieved and duplicative litigation, with possibly inconsistent results, avoided by consolidation of the actions or by coordination of discovery and other pre-trial proceedings).

private interest factors weigh against a transfer to the contractually agreed upon forum.

### **Conclusion**

For the foregoing reasons, we find the forum selection clause in Plaintiff's agent contract to be valid and enforceable. As such, Plaintiff's filing of this action is in violation of the clause, and this Court has the power to dismiss the case, pursuant to Defendants' Rule 12(b)(6) motion to dismiss. In the interest of justice, we have elected not to dismiss, but to exercise our discretionary power to transfer the case to a federal court located within the contractually specified forum, pursuant to 28 U.S.C. § 1404(a). Because of this holding, we will not address the merits of Defendants' other dismissal arguments, but deny them as moot.

An appropriate Order follows.

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

ELISE KAHN,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 06-01832
AMERICAN HERITAGE LIFE	:	
INSURANCE COMPANY, ALLSTATE	:	
FINANCIAL CORPORATION,	:	
ALLSTATE INSURANCE COMPANY,	:	
and THE ALLSTATE CORPORATION,	:	
	:	
Defendants.	:	

**ORDER**

AND NOW, this 29th day of June, 2006, upon consideration of Defendants' Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim, it is hereby ORDERED that the Motion is DENIED in part and the Clerk of Court is hereby ORDERED to TRANSFER this action to the United States District Court for the Middle District of Florida pursuant to 28 U.S.C. § 1404(a). The remainder of Defendants' Motion is hereby DENIED as MOOT.

BY THE COURT:

s/J. Curtis Joyner \_\_\_\_\_  
J. CURTIS JOYNER, J.