United States Bankruptcy Court
Northern District of Illinois
Eastern Division

Transmittal Sheet for Opinions

Will this opinion be published? No

Bankruptcy Caption: In Re Ha-Lo Insutries, Inc., et al.

Bankruptcy No.: 02 B 12059

Adversary Caption: Ha-Lo Industries, Inv. V. Credit Suisse First Boston Corp.

Adversary No.: 02 A 02455

Date of Issuance: **March 14, 2003**

Judge: **Carol A. Doyle**

Appearance of Counsel:

Attorney for Movant or Plaintiff: Robert D. Cheifetz
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Trustee or Other Attorneys:

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In Re:	)	Chapter 11
	)	
HA-LO INDUSTRIES, INC., et al.,	)	
	)	Case No. 02 B 12059
Debtor.	)	
_____	)	
	)	Honorable Carol A. Doyle
HA-LO INDUSTRIES, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 02 A 02455
	)	
CREDIT SUISSE FIRST BOSTON CORP.,	)	
	)	
Defendant.	)	

AMENDED
MEMORANDUM OPINION

This matter is before the court on Credit Suisse First Boston Corporation's ("Credit Suisse") Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(3), made applicable to this proceeding under Federal Rule of Bankruptcy Procedure 7012. In the alternative, Credit Suisse requests that the court transfer the adversary proceeding under 28 U.S.C. § 1404(a). For the reasons stated below, Credit Suisse's motion to dismiss or transfer is denied.

I. Background

Ha-Lo Industries, Inc. is a Delaware corporation with its principal place of business in Sterling, Illinois. On July 30, 2001, Ha-Lo, along with two of its subsidiaries (collectively, the "debtor"), filed

for Chapter 11 relief under the Bankruptcy Code. On March 19, 2002, the cases were transferred to the United States Bankruptcy Court for the Northern District of Illinois.

In November 2002, the debtor filed three complaints in the District Court for the Northern District of Illinois against Credit Suisse and other parties, all arising from the debtor's purchase of Starbelly.com, Inc. ("Starbelly"). The debtor hired Credit Suisse to advise it on the potential purchase of Starbelly. The debtor's complaint against Credit Suisse asserts the following causes of action: (1) gross negligence and negligent misrepresentation; (2) breach of contract; and (3) breach of fiduciary duty. The causes of action against the parties in the other two cases arise from the same Starbelly transaction, and involve many of the same issues, witnesses and documents.

The engagement letter with Credit Suisse contains a mandatory forum selection clause under which the parties consented to "the exclusive jurisdiction of the Supreme Court of the State of New York . . . or the United States District Court for the Southern District of New York." Credit Suisse seeks to dismiss the adversary proceeding under Federal Rule of Civil Procedure 12(b)(3) based on the forum selection clause. In the alternative, it requests that the court transfer this adversary proceeding to the District Court for the Southern District of New York under 28 U.S.C. § 1404(a).

II. Dismissal under Federal Rule of Civil Procedure 12(b)(3)

The first issue before this court is whether the mandatory forum selection clause in the contract between Credit Suisse and the debtor requires dismissal of the adversary proceeding pending before this court for improper venue. Credit Suisse argues that the standard governing dismissal was set forth in M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), and further refined in subsequent

Seventh Circuit decisions, see, e.g., AAR Int'l, Inc. v. Nimelias Enters., S.A., 250 F.3d 510, 525 (7th Cir. 2001). Under the Bremen standard, a mandatory forum selection clause will be enforced absent one of the following exceptions: "(1) [its] incorporation into the contract was the result of fraud, undue influence, or overweening bargaining power; (2) the selected forum is so gravely difficult and inconvenient that [the complaining party] will for all practical purposes be deprived of its day in court; or (3) [its] enforcement . . . would contravene a strong public policy of the forum in which the suit is brought, declared by statute or judicial decision." AAR Int'l, 250 F.3d at 525 (citing Bonny v. Soc'y of Lloyd's, 3 F.3d 156, 160 (7th Cir. 1993)).

Conversely, the debtor argues that the standard enunciated in Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22 (1988), governs this motion. The debtor contends that under Stewart, a motion to dismiss or transfer may be denied in the "interests of justice." In Stewart, the Supreme Court held that when determining whether to transfer a case pursuant to 28 U.S.C. § 1404, the court should not only consider the forum selection clause, but should also "weigh in the balance the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of 'the interest of justice.'" Id. at 30. The debtor argues that the facts of this case satisfy this standard, and therefore, transfer of the case to New York is inappropriate.

The court concludes that dismissal under Federal Rule of Civil Procedure 12(b)(3) is not appropriate. Neither party disputes that venue in this district would be proper absent the forum selection clause. Cf. Zenith Elecs. Corp. v. Kimball Int'l Mfg., Inc., 114 F. Supp. 2d 764, 774 n.11 (N.D. Ill. 2000). Instead, Credit Suisse argues that the forum selection clause renders this otherwise

proper venue improper. See, e.g., McCloud Constr., Inc. v. Home Depot USA, Inc., 149 F. Supp. 2d 695, 698 (E.D. Wis. 2001). However, cases in which the courts have found that dismissal is appropriate generally arise in the context of international litigation, where transfer under 28 U.S.C. § 1404 is not available. See, e.g., M/S Bremen, 407 U.S. 1 (considering dismissal on forum non conveniens grounds); AAR Int'l, 250 F.3d 510 (same); Frietsch v. Refco, Inc., 56 F.3d 825 (7th Cir. 1995); Hugel v. Corp. of Lloyd's, 999 F.2d 206 (7th Cir. 1993). While some courts have analyzed a forum selection clause in the context of a motion to dismiss for improper venue, the better view is that forum selection clauses do not render venue improper. See, e.g., Salovaara v. Jackson Nat'l Life Ins. Co., 246 F.3d 289 (3rd Cir. 2001); Haskel v. FPR Registry, Inc., 862 F. Supp. 909 (E.D.N.Y. 1994); 1A Federal Procedure § 1:812 (Mar. 2003). Rather, when venue is proper, but the parties have agreed to a reasonable forum selection clause that requires a different federal venue, the court should apply the standard for transfer rather than dismissal. See Salovaara, 246 F.3d at 298-99.

Therefore, the court concludes that the Bremen standard, as explained by the Seventh Circuit in AAR International and Northwestern National Insurance Co. v. Donovan, 916 F.2d 372 (7th Cir. 1990), should be applied initially to determine whether the forum selection clause is valid and enforceable. Then, if the clause is enforceable under Bremen, the court must apply the Stewart test to determine whether to transfer in light of a valid forum selection clause. See Polar Mfg. Corp. v. Michael Weinig, Inc., 994 F. Supp 1012, 1017 (E.D. Wis. 1998) (citing Heller Fin., Inc. v. Midwhey Powder Co., 883 F.2d 1286 (7th Cir. 1989)); cf. Donovan, 916 F.2d at 376.

With respect to the validity of the forum selection clause, the debtor does not allege that any of the Bremen exceptions have been satisfied in this case, nor does the court find that any have been met.

First, there is no allegation of fraud, overreaching or unequal bargaining power. Both Credit Suisse and the debtor are sophisticated parties who presumably considered the consequences of including a forum selection clause in the contract. Second, the debtor will not be effectively deprived of its day in court. While the affidavit attached to the debtor's response states that the debtor most likely will not be able to call any of its material witnesses to testify in person in New York, this does not rise to the level of "grave inconvenience" that denies the debtor of its day in court. See M/S Bremen, 407 U.S. at 19 (noting that a party could receive a fair hearing "by using deposition testimony of witnesses from distant places"). Third, enforcement does not contravene a strong public policy. The court has only "related to" jurisdiction over the lawsuit. Therefore, none of the public policy considerations implicated by a core proceeding are applicable. See, e.g., N. Parent, Inc., 221 B.R. 609, 622 (Bankr. D. Mass. 1998). Having determined that the debtor has failed to satisfy any of the exceptions to Bremen, the court finds the clause to be valid and enforceable.

III. Transfer under 28 U.S.C. § 1404(a)

However, even though the forum selection clause is valid and enforceable, the court finds that transfer is not appropriate under 28 U.S.C. § 1404(a). See Heller Fin., Inc. v. Midwhey Powder Co., 883 F.2d 1286, 1293 (7th Cir. 1989) (holding that "[d]espite the existence of a valid forum-selection clause, courts may still transfer a case under § 1404(a)"). The debtor bears the burden of showing why the present venue is "clearly more convenient" than New York, the agreed venue under the forum selection clause. Id. Under the transfer standard enunciated by the Supreme Court in Stewart, transfer can be granted or denied in the "interest of justice" or the "convenience of . . . witnesses." Id. (citation

omitted). However, the court will not consider any inconvenience to the debtor, because the debtor effectively waived any such argument by agreeing to the forum selection clause. See Donovan, 916 F.2d at 378 (holding that "the signing of a valid forum selection clause is a waiver of the right to move for a change of venue on the ground of inconvenience to the moving party").

Balancing the relevant factors for transfer, the court concludes that transfer of this case is not appropriate. Despite the great weight given to the choice of venue under the forum selection clause, the court finds that almost all other factors weigh strongly in favor of the present venue. See Standard Office Sys. of Fort Smith, Inc. v. Ricoh Corp., 742 F. Supp. 534, 537 (W.D. Ark. 1990) (applying Stewart Org., 487 U.S. 22). First, the location of witnesses strongly favors the bankruptcy court. The debtor has asserted that virtually all fact witnesses are located in the Chicago area, and Credit Suisse does not contest this. Neither party has identified any material potential witness who resides outside of this district. While the debtor has waived all arguments about inconvenience to itself by entering into the forum selection clause, Credit Suisse's witnesses will also be inconvenienced by a New York venue.

Second, the "interest[s] of justice" strongly favor this district. Factors to consider include "ensuring speedy trials, trying related litigation together, and having a judge who is familiar with the applicable law try the case." Heller Fin., 883 F.2d at 1293. While trying the proceeding in this court will require the application of New York law, the court does not find that this weighs greatly in favor of transfer. More significantly, several proceedings arising from the same set of operative facts are currently pending before the bankruptcy court, so judicial economy weighs heavily in favor of this forum.

In addition, most of the debtor's potential witnesses would be highly unlikely to travel voluntarily to New York to testify, and they reside outside the range of the New York district court's subpoena power. The debtor has submitted an affidavit from Marc Simon, its chief executive officer, setting forth in detail the names of the material witnesses, why their testimony is significant and why they most likely would not testify voluntarily at a trial in New York. See Affidavit of Marc Simon ¶¶ 5-6. Each of the key witnesses identified in the affidavit has a strong reason not to voluntarily appear in New York to testify, primarily because they themselves are being sued by the debtor or they are employed or otherwise connected to a party the debtor has sued. While this alone does not create circumstances sufficient to meet the Bremen standard, the Seventh Circuit in Heller implicitly recognized that this factor may properly be weighed in the transfer analysis. In Heller, the court rejected a similar argument on the basis that there were no affidavits or other evidence to establish that witnesses who were material would not testify in the relevant forum. Heller Fin., 883 F.2d at 1293-94. Here, as noted above, the debtor's chief executive officer has provided detailed information supporting the debtor's argument in an affidavit which Credit Suisse does not contest. Credit Suisse also never contests that the primary result of a transfer to New York will be that the debtor will not be able to present any live testimony to support its case. A trial in which the significant witnesses give live testimony is highly preferable to one in which only depositions are available for key witnesses.

Finally, all relevant events transpired in this district, and apparently all documents are located here. In fact, there seems to be no connection between this case and New York other than the applicability of New York law. Cf. Standard Office Sys. of Fort Smith, 742 F. Supp. at 537. In light

of this court's proximity to potential witnesses and evidence, and the pendency of the other related actions before this court, the court finds that transfer is not in the interests of justice.

For the foregoing reasons, Credit Suisse's motion to dismiss or transfer is denied.

Date: March 14, 2003 ENTERED:

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CAROL A. DOYLE
United States Bankruptcy Judge