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Reply Brief for Defendant-Appellant

Walter, Conston, Alexander and Green

To be argued by:
Franz S. Leichter

88-7600

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

RED BULL ASSOCIATES,
GORDON WEISS and MURRAY WEISS,
Plaintiffs-Appellees,

v.

BEST WESTERN INTERNATIONAL, INC.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT

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Preliminary Statement

The answering brief of Appellee ("Red Bull") misconstrues the nature of this appeal. Red Bull seeks to cast the order below, which declined to dismiss for faulty venue or to transfer the action to the parties' designated forum, as a traditional exercise of judicial discretion. Appellant's ("Best Western") challenge is incorrectly depicted as bumping into the strong deference accorded to a trial court's ordering of the factors on venue motions. Here, the real question is not the Court's weighing of the customary criteria, but the validity of a novel policy which the District Court applied to vitiate the parties' forum agreement.

Judge Knapp's order -- and appellees' brief -- is based upon the flawed proposition that a forum selection clause otherwise valid in all respects will not be enforced in an action which alleges violations of federal civil rights because public

policy dictates that Red Bull is entitled to a jury in its home federal district. Judge Knapp's flawed proposition is in turn founded on the equally erroneous premise that in the application of national civil rights laws a local jury may express a public policy which differs from that of the forum which the parties have selected. (A 216-28).

Indeed, upon the District Court's customary weighing of the required factors for a determination under 28 U.S.C. §1404(a), it concluded that there is "no reason to set aside the parties' contractual bargain to litigate membership disputes in Arizona" (A 225). However, the Court then decided that a totally different standard was to be applied in cases allegedly arising under federal civil rights laws and held that Red Bull was entitled to have a local jury "to express its interest in promoting integrated housing arrangements in their community..." (A 226-227). The Court, solely on this basis, denied appellant's motion to dismiss or to transfer to the agreed upon forum in Arizona. This appeal followed by permission. (A 234).

Judge Knapp acknowledged that he had departed into new judicial terrain and that this appeal does not "attack (the exercise of discretion ... [but] the legal rule by which we deem [ ] discretion to have been controlled" (A 232).

The real basis of this action is a commercial dispute between a cooperative hotel service company and a member hotel --

Red Bull. The civil rights claims alleged by Red Bull are but a thinly-veiled pretext to camouflage the real economic issues and to escape a choice of forum agreement.* It is Best Western's position on this appeal that the District Court erred by determining the venue transfer/dismissal motion pursuant to an entirely incorrect legal rule -- indeed a legal rule enunciating a public policy which is nowhere else to be found either in statute or judicial decision. The District Court's failure to give any weight at all to a freely negotiated and otherwise fully valid forum selection clause between commercial entities constituted an abuse of discretion and is based upon considerations which exceed the powers of the District Court under controlling law.

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* Although the District Court acknowledges that "a plaintiff should not be able to defeat a valid forum selection clause merely by invoking some civil rights provisions in its complaint" (A 231), this is precisely what the District Court permitted here -- i.e., the defeat of an otherwise valid choice-of-forum agreement by as yet unchallenged and untested allegations of civil rights violations. Neither the sufficiency nor the merit of Red Bull's allegations have yet been challenged. Indeed, this action is still in the preliminary stage of a venue determination. In this context, and at this stage of the proceedings, it cannot be concluded that Red Bull's bald allegations have substance or are otherwise plausible to any degree at all.

Even more than this, it is far, far from clear that Red Bull possesess the requisite standing to bring the claims alleged in this action under 42 U.S.C. §3601, et seq, and 42 U.S.C. §2000 (a)-1, et seq, and 42 U.S.C. §§ 1981 and 1982. Where both the sufficiency of the complaint's allegations and the standing of the plaintiff to bring the action are still undecided, it is clearly erroneous to conclude -- as the District Court purports to have done -- that the claims have substance.

ARGUMENT

I

THE DISTRICT COURT ABUSED ITS DISCRETION AND EXCEEDED ITS AUTHORITY BY REFUSING TO TRANSFER THIS ACTION TO ARIZONA

A. In its Analysis of the § 1404(a) Factors The District Court Found that the Action Should be Transferred to the District of Arizona

The District Court's §1404(a) analysis of the convenience of the parties and witnesses and customary considerations of fairness led it to conclude unequivocally that Arizona was the proper forum designated by the parties to which it would refer the action were it not for Red Bull's alleged civil rights claims. (A-225).

Red Bull contends incorrectly that the Court, in its opinion, recognized that the Arizona forum would be so inconvenient that litigation would not proceed there (Answering Brief, p. 16). The District Court's decision was quite to the contrary (A 225). It accepted at face value the claims of Red Bull's attorney that his clients would not proceed for economic reasons if the suit were transferred to Arizona (A 233) but nontheless noted that "... they [Red Bull] failed to demonstrate

that it would be impossible for them to do so" (A 225).*

In its second opinion, the District Court reaffirmed that Arizona was a proper forum on a traditional §1404(a) analysis, stating

> "..we dismissed as irrelevant plaintiffs' claim to hardship in the event of a removal to Arizona. In context, this was a proper disposition... "(A 230).

Tellingly, the District Court actually recognized that choice-of-forum clauses are utilized precisely for the purpose of allocating the risks of inconvenience and expense. (Id.) As the lower court itself expressly noted, but for the as yet untested civil rights claims, "[p]laintiffs willingly entered into a contract; let them abide by its consequences". (Id.) There is only one conclusion: Under any conceivable traditional §1404(a) venue analysis, the instant action belongs in Arizona.

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* In fact, the District Court went even further and specifically found that "...had plaintiffs attacked their ouster from Best Western on any ground other than racial discrimination, we would find no reason to set aside the parties' contractual bargain to litigate membership disputes in Arizona." (A 225).

1. Any Factual Issues Related to the Claims are as Equally Resolvable in Arizona as in New York

The District Court, in its first opinion, set forth at length Red Bull's alleged civil rights claims, but still concluded "it is clear that the parties have presented a substantial issue of fact." (A 223). These factual issues could be resolved by a jury in Arizona as well as by a jury in New York. Indeed, Red Bull's civil rights claim is suspect and appears to be merely a strategem to avoid the forum selection clause by wrapping their economic dispute in the cloth of civil rights (see fn., p. 3 supra).

The record clearly shows that:

1. Even before Red Bull rented any rooms to the Department of Social Services, it failed Best Western's inspections. Thus, for a long time, its operation had been marginal. (A 81).

2. Red Bull acknowledged in writing that the inspection report of Inspector Hammond was accurate in finding a large number of deficiencies. Thus, Red Bull wrote after Hammond's May 1987 inspection:

> "Concerning the new problems ... they are all being addressed and corrected ... after the improvements are completed and a more capable management staff is hired, this situation will hopefully never happen again." (Emphasis supplied) (A 162).

3. Red Bull draws false inferences from the "Remarks" of Inspector Hammond. (Answering Brief p. 7). A review of these remarks fails to show any discriminatory statement whatsoever (A 64-67). It is true that his inspection showed that the rooms leased to the Department of Social Services had numerous deficiencies (A 47-59). This does not support allegations of discrimination since it is hardly surprising that rooms that are lived in by families for a prolonged period of time will have more wear and tear than rooms that are rented to business people who may be there just overnight. The issue with Inspector Hammond was not who resided in the rooms but the fact that the rooms were not in proper condition. (See A 210-215). This does not permit any discriminatory inferences. Best Western has categorically and emphatically denied that racial factors had anything to do with its determination to terminate Red Bull. (A 75-87, 211).

In short, the District Court expressly found that the parties to this action had freely entered into a forum selection agreement which allocated the risks of inconvenience and expense between them. Under traditional § 1404(a) analysis, the Court was bound -- by its very own findings -- to transfer this action to Arizona. Any factual issues are as capable of resolution in Arizona as in New York.

B. The District Court Exceeded its Authority and Violated the Bremen Standard in Inventing a Public Policy for the Southern District of New York which Differs From the District of Arizona

The District Court erred in refusing to enforce a valid forum selection agreement solely on the grounds that a civil right complainant - a status acquired here by a motel by mere allegations as it really pursues its private economic interest -- is entitled to a home town jury as a matter of policy. Judge Knapp has seen a policy where none exists. His conclusion is flawed because (a) there is no policy in the Southern District of New York which differs from that of the District of Arizona in the implementation of national anti-discrimination laws; and (b) he accords to juries an unauthorized role beyond their fact finding function.

In The M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed. 2d 513 (1972), the Supreme Court stated that it is only where there is a "strong public policy of the forum ... declared by statute or by judicial decision" (id., 407 U.S. at 15) that an otherwise valid forum selection clause would not be enforced. Judge Knapp, unable to ascertain any policy in statute or decisional law, legislated his own policy under which civil rights claimants are "... entitled to have local residents play the part of fact-finder in determining whether or not defendant's actions were inimical to that goal [of insuring fair housing]" (A 227). There is no such public policy. And, when

there is no such policy ascertainable in either statute or judicial decision, there is no basis to ignore a forum selection clause which comports in all respects with the Bremen standards.

It is evident that national laws are to be uniformly applied. Any other conclusion would produce absurd results. What if the Red Bull Motel were located not in New York but instead in the District of Mississippi and this case originated there? Would the forum selection clause then be enforceable because the District of Arizona might be perceived as having a more sensitive public policy in civil rights issues? And, if Red Bull wanted to adhere to its forum agreement in such an instance, could Best Western then argue that the forum selection clause should not be enforced because where there are allegations of civil rights violations a local Mississippi jury must hear the case? It is respectfully submitted that the enforceability of a choice-of-forum clause should not ever depend on the perceived advantage to the complainant of its home federal district. To permit otherwise is to implicity encourage unpredictability, uncertainty and forum shopping.

Further, the role which Judge Knapp perceives for juries is totally without legal basis. The role of the jury is simply to determine facts from the evidence presented. See U.S. v. Gavria, 805 F.2d 1108, 1116 (2nd Cir. 1986). Juries do not create public policies.

Red Bull's citation to Flintkote Co. v. Allis-Chalmers Corp., 73 F.R.D. 463, 466 (S.D.N.Y. 1977) and Chance v. E.I. DuPont de Nemours & Co., 371 F.Supp. 439, 449 (E.D.N.Y. 1974) (Answering Brief, p.20) for the proposition that local jurors should consider the claims alleged in this action is completely misplaced. Both cases are irrelevant to the instant action. Neither case involves a forum selection clause. Instead, both Flintkote and Chance are concerned with the weight to be accorded plaintiff's choice of forum in the typical venue situation not involving a forum selection clause. The instant action involves a choice-of-forum clause between commercial entities voluntarily negotiated and agreed to. Moreover, Flintkote and Chance stress the importance of having local courts and/or juries decide matters in those instances in diversity cases where the local forum's law will be applied. The instant claims, quite the contrary, arise under federal law. Neither Flintkote nor Chance may be relied upon for the proposition that New York jurors are more qualified to consider the claims alleged in this action.

Since the instant action arises under federal law, and jurors everywhere, when properly instructed, are presumed to be equally capable in their fact-finding function, there is plainly no public policy which mandates that a New York rather than an Arizona jury must hear the claims of the Red Bull Motel.

C. The District Court's Decision in Refusing to Enforce a Forum Selection Agreement Violated the Directive of Stewart

Under the still controlling Bremen standard (see M/S Bremen v. Zapata Off-Shore Co., 407 U.S. at 15, supra), as refined in Stewart Organization Inc. v. Ricoh Corp., ___U.S.___, 108 S.Ct. 2239, 101 L.Ed. 2d 22, 56 U.S.L.W. 4659 (June 29, 1988), the District Court was under a duty to weigh the valid forum selection clause as a "significant factor" (id., 101 L.Ed 2d at 31, 56 U.S.L.W. 4661) in its determination of Best Western's transfer motion. The failure to attach any weight at all to that clause was plain error and constituted an abuse of discretion.

The Stewart decision did not vitiate the Bremen analysis of forum selection clauses. First, the Court must still consider whether such a clause is reasonable and was fairly arrived at. Judge Knapp expressly found that the clause was valid (A 224-225). Bremen then requires a public policy analysis. It is only clearly identified policy set forth in statute or judicial precedent which may defeat an otherwise valid choice-of-forum agreement. 407 U.S. at 15, supra. As shown, the District Court erred because it created a public policy where no statute or precedent provided support.

Stewart simply stands for the proposition that forum selection clauses found to be valid under the Bremen test must "figure[] centrally in the District Court's calculus" on a §

1404(a) transfer motion. 101 L.Ed. at 31, 56 U.S.L.W. at 4661, supra. Where, as here, the District Court concluded that transfer was appropriate under traditional §1404(a) analysis, but then vitiated the forum selection clause by application of an invented public policy, and gave it no weight whatsoever, it has exceeded its authority under controlling law.

D. This Court Should Transfer the Action to the District of Arizona

The District Court found that, under traditional § 1404(a) analysis, the convenience of the parties was an allocated risk of their business deal as expressed in the forum selection clause, and further specifically found that the convenience of witnesses and the triability of the case did not preclude transfer to the District of Arizona (A 225, 230). Accordingly, when stripped of the erroneous public policy consideration which underlies the District Court's decision here, under Stewart, the central consideration of the forum selection clause requires that the parties' agreement be enforced and that this case be transferred to Arizona.

CONCLUSION

The District Court exceeded its authority and erred in refusing to enforce the parties' forum selection agreement. For the reason set forth herein and in Appellant's main brief, the order of the District Court dated May 17, 1988, as modified on June 3, 1988, should be reversed and this action should be dismissed, or in the alternative, transferred to the District of Arizona.

Dated: New York, New York
October 24, 1988

Respectfully submitted,

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