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<b>Frequency Elecs., Inc. v Bloch</b>
2020 NY Slip Op 51036(U)
Decided on September 8, 2020
Supreme Court, New York County
Borrok, J.
Published by <a href="#">New York State Law Reporting Bureau</a> pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on September 8, 2020

Supreme Court, New York County

<p style="text-align: center;"><b>Frequency Electronics, Inc., Plaintiff,</b></p> <p style="text-align: center;"><b>against</b></p> <p style="text-align: center;"><b>Martin Bloch, Defendant.</b></p>
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652191/2020

Petitioner - Hunton & Williams LLP (Joseph Saltarelli), 200 Park Avenue, New York, NY 10166, 212-309-1048

Respondent - Ganfer & Shore, LLP (Steven Jay Shore), 360 Lexington Avenue, New York, NY 10017, 212-922-9250

Andrew Borrok, J.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 54, 55, 56, 57, 63, 64

were read on this motion to/for CHANGE VENUE.

Upon the foregoing documents, for the reasons set forth on the record (9/8/2020) and as otherwise set forth below, Martin Bloch's motion to change venue to Nassau County is granted.

## THE FACTS RELEVANT TO INSTANT MOTION

Mr. Bloch, who is 84 years old, founded Frequency Electronics, Inc., (**FEI**) in 1961 and worked there for 58 years until January 27, 2020 when his employment was terminated (NYSCEF Doc. No. 39, ¶¶ 5, 6, n1). He lives in Oyster Bay Cove, Nassau County and FEI is [\*2]headquartered in Mitchel Field, Nassau County and has been headquartered in Nassau County at all times material hereto. All of FEI's officers and senior management reside in either Nassau or Suffolk Counties and FEI does not have any place of business in New York County (*id.*, ¶ 3).

Reference is made to (i) an Agreement dated March 27, 1980 (the **1980 Agreement**; NYSCEF Doc. No. 3), by and between FEI and Mr. Bloch, pursuant to which FEI provided certain supplemental retirement, death disability and severance benefits for Mr. Bloch, which 1980 Agreement was executed prior to the enactment of the American Jobs Creation Act of 2004,(ii) an Amended and Restated Agreement dated March 7, 2008 (the **2008 Agreement**; NYSCEF Doc. No. 4), by and between FEI and Mr. Bloch, pursuant to which, *inter alia*, FEI and Mr. Bloch amended the 1980 Agreement to amend the Plan (as such term is defined in the 2008 Agreement) to address all non-Grandfathered Benefits (as such term is defined in the 2008 Agreement) to ensure compliance with the provisions of § 409A of the Internal Revenue Code of 1986, as amended, and to otherwise to provide that the 1980 Agreement shall remain in full force and effect with respect to Grandfathered Benefits that have accrued thereunder (as § 409A was inapplicable to benefits accrued under the 1980 Agreement before January 1, 2005 provided that such amounts vested as of December 31, 2004), and (iii) a Second Amended and Restated Agreement dated March 17, 2013 (the **2013 Agreement**; NYSCEF Doc. No. 5), by and between FEI and Mr. Bloch, pursuant to which the 2008 Agreement was amended to enhance the benefits payable to Mr. Bloch and his beneficiaries.

Both the 1980 Agreement and the 2013 Agreement provide for arbitration of disputes.

To wit, the 1980 Agreement provides:

**Right of Arbitration.** The Employee and the Company agree that in the event any controversy arises under or in connection with any of the terms or provisions of this Agreement, same shall be settled by arbitration under the rules then obtaining of the American Arbitration Association at its offices located in the City, County and State of New York. Such arbitration shall proceed before a panel of three (3) arbitrators. The complaining party or parties shall select one arbitrator, the remaining party or parties shall select one arbitrator, and each arbitrator as so selected shall choose the third arbitrator. Except as herein provided, the other rules of the American Arbitration Association shall apply. Judgment upon an arbitration award hereunder may be entered in the first instance, in any court in the State of New York having jurisdiction thereof or application may be made to any such court for judicial acceptance of the award or an order of enforcement, as the case may be.

(NYSCEF Doc. No. 3, § 13).

The 2013 Agreement provides:

**Right of Arbitration.** If a Claimant wishes to contest a final decision of the [Compensation] Committee, the Claimant may request arbitration. If the Claimant does not request arbitration pursuant to the procedures herein, the decision of the [Compensation] Committee will be final, binding and unappealable. A written request for arbitration must be filed by the Claimant (or the Claimant's authorized representative) with the [Compensation] Committee within 15 days after the date the Claimant receives the written decision of the Committee. If a request for arbitration is timely filed, the Claimant and the Committee will each name an arbitrator within 20 days after the Committee receives the Claimant's written request for arbitration. The two arbitrators [\*3] will jointly name a third arbitrator within 15 days after their appointment. *If either party fails to select an arbitrator within the 20 day period, or if the two arbitrators fail to select a third arbitrator within 15 days after their appointment, then the presiding judge of the county court (or its equivalent) in the county in which the principal office of the Company is located will appoint such other arbitrator or arbitrators.* The arbitrators will render a decision within 60 days after their appointment and will conduct all proceedings pursuant to the laws of the State of New York and the then current Rules of the American Arbitration Association governing commercial transactions, to the extent that such rules are not inconsistent with applicable state

law. The cost of the arbitration procedure will be borne by the losing party or, if the decision is not clearly in favor of one party or the other, in the manner determined by the arbitrators. The arbitration proceeding provided for in this Section will be the sole and exclusive remedy of a Claimant to contest decisions of the Committee under this Plan, and the arbitrators' decision will be final, binding and unappealable.

(NYSCEF Doc. No. 5, § 12[b][v] [emphasis added]).

The 1980 Agreement, the 2008 Agreement and the 2013 Agreement have virtually identical provisions under the heading "**Governing Law; Service of Process**: [Mr. Bloch] consents to jurisdiction of any state or federal court located within the State of New York and agrees that all actions or proceedings arising, directly or indirectly, from this Agreement shall be litigated only in courts having such situs" (the **Jurisdiction Clause**; NYSCEF Doc. No. 3, § 14; NYSCEF Doc. No. 4, § 14; NYSCEF Doc. No. 5, § 13).

In other words, the 1980 Agreement provides that any arbitration itself shall be held in New York County (NYSCEF Doc. No. 3, § 13), that the headquarters for FEI (at the time) is New Hyde Park and the execution of the 1980 Agreement is deemed to have occurred at such headquarters, and that Mr. Bloch consents to jurisdiction in any state or federal court within the State of New York (*id.*, § 14) but does not otherwise specify the county in which any court proceeding related to arbitration must be brought. The 2008 Agreement also does not specify the county or venue where litigation should be brought — i.e., the 2008 Agreement provides that (i) the 2008 Agreement is deemed executed at FEI's place of business in Mitchel Field, Nassau County and (ii) Mr. Bloch consents to jurisdiction in any state or federal court within the State of New York (NYSCEF Doc. No. 4, § 14), but does not otherwise specify the county where any such proceeding must be brought. Finally, the 2013 Agreement provides that (i) the 2008 Agreement is deemed executed at FEI's place of business in Mitchel Field, Nassau County, and (ii) Mr. Bloch consents to jurisdiction in state or federal court within the State of New York (NYSCEF Doc. No. 5, § 13) but also does not otherwise specify the county where any such proceeding must be brought.

On January 28, 2020, the day after Mr. Bloch was terminated, he commenced a wrongful termination action against FEI in Nassau County Supreme Court (the **First Nassau Lawsuit**) alleging claims for wrongful termination, breach of employment agreement, and age discrimination (Index No. 601369/2020; NYSCEF Doc. Nos. 41-42; NYSCEF Doc. No. 39, ¶

7). The First Nassau Lawsuit was filed in Nassau County because Mr. Bloch's employment agreement with FEI fixed venue for any dispute arising out of his employment in Nassau County (NYSCEF Doc. No. 2, § 14). The First Nassau Lawsuit was assigned to the Commercial Division and is currently pending before the Hon. Vito M. Destefano (*id.*).

On May 13, 2020, Mr. Bloch also filed two Notices of Intention to Arbitrate his deferred compensation benefit claims pursuant to both the 1980 Agreement and the 2013 Agreement before the American Arbitration Association (AAA; NYSCEF Doc. No. 19-20). Pursuant to the terms of both the 1980 Agreement and the 2013 Agreement, Mr. Bloch designated his arbitrator. Subsequently, rather than appoint its arbitrator, on June 2, 2020, FEI brought this Petition here in New York County to stay both arbitration proceedings (NYSCEF Doc. No. 1). Three days later, on June 5, 2020, because the principal office of FEI is located in Nassau County and the 2013 Agreement's arbitration clause authorizes the presiding judge in *that* county to appoint an arbitrator when either party to the 2013 Agreement fails to do so (NYSCEF Doc. No. 5, § 12[b][v]), Mr. Bloch commenced a second action in Nassau County (the **Second Nassau Action**; Index No. 605380/2020; NYSCEF Doc. No. 47) by verified Petition for appointment of an arbitrator in the AAA arbitration demanded pursuant to the 2013 Agreement. The Second Nassau Action is also currently pending in the Commercial Division of Nassau County Supreme Court before the same court (Destefano, J.) (*id.*).

## DISCUSSION

CPLR §7502(a) governs venue of special proceedings related to arbitration and provides:

(a) Applications to the court; venue. A special proceeding shall be used to bring before a court the first application arising out of an arbitrable controversy which is not made by motion in a pending action.

(i) ***The proceeding shall be brought in the court and county specified in the agreement. If the name of the county is not specified, proceedings to stay or bar arbitration shall be brought in the county where the party seeking arbitration resides*** or is doing business, and other proceedings affecting arbitration are to be brought in the county where at least one of the parties resides or is doing business or where the arbitration was held or is pending.

(CPLR § 7501(a)(1) [emphasis added]).

As discussed above, neither the 1980 Agreement nor the 2013 Agreement contain a provision specifying *a county* where a proceeding relating to arbitration shall be brought. In their opposition papers, FEI argues that the Jurisdiction Clause, which authorizes a lawsuit to be brought in any federal or state court in New York, specifies a county for CPLR § 7502(a) (1) purposes. Put another way, FEI argues that the absence to specify any county means that the parties specified every single county. The argument fails as nothing more than a nuanced attempt to conflate jurisdiction and venue. The Jurisdiction Clause is a consent to jurisdiction provision, nothing more. Neither the 1980 Agreement nor the 2013 Agreement specify a county where an action staying arbitration must be brought and neither agreement provides that any objection to venue is deemed waived for CPLR § 7502(a)(1) purposes or otherwise. Taken to its logical conclusion, under FEI's interpretation of the Jurisdiction Clause, venue would be "specified" in Dutchess County, Erie County, Westchester County and every single other county in the State of New York.

To the extent that FEI relies on *LG Funding, LLC v Four Paws Orlando LLC* to argue that inasmuch as there is a consent to jurisdiction in any court of a given state, there is a designation that venue is appropriate in all counties of that state and, as such, the plaintiff's [\*4] choice of venue can only be disturbed, under CPLR § 501, pursuant to CPLR § 510(2), the argument fails (2017 WL 5700330 [Sup Ct Nassau Cnty November 9, 2017]). In *LG Funding*, the contract provided that:

[a]ny suit, action, or proceeding arising hereunder, or the interpretation, performance or breach hereof, shall, if [plaintiff] so elects, be instituted in any court sitting in New York State (the "Acceptable Forums"). The parties agree that the Acceptable Forums are convenient, and submit to the jurisdiction of the Acceptable Forums ***and waive any and all objections to jurisdiction or venue***

(*id.* at \*1 [emphasis added]).

The court in *LG Funding* found that the above-quoted provision was a forum selection clause and held that the defendants failed to demonstrate that it should be set aside because the clause was unreasonable or unjust such that trial in the forum set in the contract would be so gravely difficult or inconvenient for the challenging party that they would be, for all intents and purposes, deprived of their day in court (2017 WL 5700330, \* 2, citing *Hunt v Landers*, 309 AD2d 900 [2nd Dept 2003]). The contract provision in *LG Funding* is materially

different from those at issue here because, here, no county is specified in the agreements as required by CPLR § 7502 and there is no waiver of any objection to venue. Indeed, the provisions are not titled as venue provisions and do not otherwise mention venue or any county in any manner whatsoever. In any event, *LG Funding* is not binding on this court, and indeed, another judge sitting in Nassau County, interpreting the exact same provision mere weeks later in *LG Funding LLC v Advanced Pharma, CR, LLC (LG Funding II)*, reached a different conclusion, writing:

had the parties selected Nassau County as the forum to resolve a contractual dispute there is little doubt on the facts as presented that defendants' motion [to change venue] would be denied. But the parties did not agree to fix Nassau, or any other county, as the place for trial. Instead, they merely agreed to submit any dispute to "any court sitting in New York." Presumably, this means either federal or state court. It is certainly less likely that the parties (and particularly the foreign defendants) meant suit could be brought in any court within the 54,555 square miles that comprise New York State.

If [plaintiff] is correct, it could have selected Chautauqua County (Mayville, New York) as the venue for this action, approximately 440 miles from this courthouse. Or perhaps, Clinton County (Plattsburgh), a mere 330 miles away. The point being, a so-called forum selection clause that doesn't select a forum but instead merely identifies a state in which suit could be brought does not provide certainty or predictability to the parties as to where a dispute may be resolved.

(58 Misc 3d 231, 232-33 [Sup Ct Nassau Cnty November 27, 2017]).

The court in *LG Funding II* concluded that, "Article 5 of the CPLR concerns venue; i.e., the *county* in which suit may be brought" and the parties simply "did not fix a county for trial as contemplated by CPLR 501" (58 Misc 3d at 233). Inasmuch as the provision at issue in that case provided that the parties "waive any and all objections to jurisdiction or venue," the court simply held that "[s]uch a waiver, by itself, cannot be enforceable unless the parties agreed to a selected county in which to venue an action in the first instance (*id.*).

Here, based on CPLR § 7502, Mr. Bloch objects to venue being fixed in New York County and his objection makes sense given that CPLR § 7502(a)(1)'s default provision (i.e., [\*5] absent an agreement specifying a county) requires suit to be brought in the county in which the person seeking arbitration resides (i.e., Nassau County), he is 84 years old, the company is located in Nassau County, and the 2013 Agreement required him to bring suit in

Nassau County to have an arbitrator appointed when FEI failed to appoint their arbitrator (i.e., to the extent a county is specified in an agreement for arbitration related lawsuits, Nassau County, not New York County, was specified).

Stated differently, as no specific county for venue has been specified in the agreements at issue in this action (and as the agreements at issue contain no waiver of objections to venue), CPLR § 7502(a)(1) requires that this action be brought in Nassau County where Mr. Bloch resides, where he was employed by FEI until January of 2020, and where the two other related actions are currently pending.

Accordingly, it is,

ORDERED that the motion for a change of venue is granted, and venue of this action is changed from this Court to the Supreme Court, County of Nassau; and it is further

ORDERED that the Temporary Restraining Order staying the AAA arbitration proceedings now in effect in this action shall be continued until 5 p.m. on September 11, 2020, to enable the parties to address the continuance of the stay in Nassau County; and it is further

ORDERED that the Clerk of this Court shall transfer the file in this action to the Clerk of the Supreme Court, County of Nassau, and shall mark his records to reflect such transfer; and it is further

ORDERED that, within 30 days from entry of this order, counsel for movant shall serve a copy of this order with notice of entry upon the Clerk of this Court, shall pay the appropriate transfer fee, if any, and shall contact the staff of the Clerk of this Court and cooperate in effectuating the transfer; and it is further

ORDERED that the Clerk of the Court shall coordinate the transfer of the file in this action with the Clerk of the Supreme Court, Nassau County, so as to ensure an efficient transfer and minimize insofar as practical the reproduction of documents, including with regard to any documents that may be in digital format; and it is further

ORDERED that such service upon the Clerk of this Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for*

*Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

DATE 9/8/2020

ANDREW BORROK, J.S.C.

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