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

MICHAEL A. MARRONE	**:**	**CIVIL ACTION**
	:	
v.	**:**	**NO. 04-3335**
	:	
MEECORP CAPITAL MARKETS, LLC	**:**	

MEMORANDUM AND ORDER

Kauffman, J. **November 19, 2004**

Plaintiff Michael A. Marrone ("Plaintiff"), brings this diversity action against Defendant Meecorp Capital Markets, LLC ("Defendant"), alleging usury and requesting declaratory judgment. Now before the Court is Defendant's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6), 19(a) and the Federal Abstention Doctrine ("Motion to Dismiss"). For the following reasons, the Court will grant Defendant's Motion and dismiss both for failure to state a claim on which relief can be granted under Fed. R. Civ. P. 12(b)(6) and for failure to join an indispensable party under Fed. R. Civ. P. 19(a).

I. Background

According to Plaintiff's Complaint, Defendant and Plaintiff, on behalf of his company Bayfront LLC ("Bayfront"), signed a $2,700,000 financing agreement on March 11, 2003. Complaint at ¶ 4. On or about July 22, 2003, Defendant and Bayfront, who is not a party to this lawsuit, closed on the loan in the amount of $1,930,000. Id. at ¶ 5. Through the loan, Defendant funded Bayfront's real estate investment by contributing a portion of the purchase price. See

Affidavit of Michael Edrei at ¶ 2 ("Edrei Affidavit").[1] Plaintiff also signed a Guarantee Agreement. Complaint at ¶ 5. The Loan and Security Agreement and the Note were signed by a duly authorized representative of Defendant, and Plaintiff signed for himself and as a duly authorized agent for Bayfront. Id. Plaintiff claims the above loan was paid off and satisfied in full on or about December 4, 2003. Id. at ¶ 8.[2]

Plaintiff contends that as a condition of making this loan, Defendant knowingly demanded a rate of interest exceeding that allowed by both New Jersey and Pennsylvania usury laws, and exceeding the amount permitted to national banking associations under 12 U.S.C. § 85. Id. at ¶ 9(a). Plaintiff claims that the combined excess wrongful interest and illegal charges collected by Defendant total $261,000. Id. at ¶ 9.[3] Plaintiff claims, pursuant to 12 U.S.C. § 86, that he is entitled to $783,000, which is treble the amount of usurious interest knowingly charged by Defendant and paid by Plaintiff. Id. at ¶ 10.

Plaintiff, as guarantor for Bayfront, executed an unconditional guaranty of all of Bayfront's obligations. Id. at ¶ 5. Defendant contends that Plaintiff executed an Assignment of Membership Interest and Security Agreement, assigning to Defendant his 100% interest in Bayfront as part of the financing agreement. Edrei Affadavit at ¶ 7. Defendant claims that the assignment of membership interest and the equity and cash flow provisions survived repayment

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[1] Michael Edrei is the Managing Director of Meecorp Capital Markets, LLC.

[2] In the Complaint, Plaintiff wrote December 4, 2004 as the date by which loan payments were completed. As this date has not yet occurred, the Court assumes Plaintiff intended to write December 4, 2003.

[3] Plaintiff marks two paragraphs of the Complaint "9". This cite refers to the second paragraph so marked.

of the loan, and that Bayfront and Plaintiff have ignored their responsibilities to Defendant under these provisions. See Motion to Dismiss at p. 3. On February 23, 2004, Defendant filed a Complaint against Plaintiff and Bayfront in the Superior Court of New Jersey, in which Defendant asserts its rights to cash flow and equity participation pursuant to the loan documents. See id. On March 9, 2004, Defendant filed a lis pendens against the property owned by Bayfront. Id. at ¶ 15.

While Plaintiff concedes that the Loan and Security Agreement provides for an equitable interest in the real estate that is the subject matter of the loan, he claims the entitlement to such equity was predicated upon Plaintiff receiving $2,700,000, less reasonable costs not to exceed $200,000. Complaint at ¶ 11. However, Plaintiff claims that because the loan was only $1,930,000, he was relieved of any equity obligations. Id. at ¶¶ 12-14. Plaintiff thus asks for declaratory judgment that Defendant has no equity interest in the real estate which was the subject matter of the loan, that any lis pendens filed by Defendant in this or any other court be dissolved, and any other relief that the Court deems just and proper. Id. at ¶ 15. Defendant responds with this Motion to Dismiss, based in part on a forum selection clause included in the loan agreement and its accompanying documents, and in part on Plaintiff's failure to join an indispensable party.

II. Legal Standard

When deciding a motion to dismiss pursuant to Fed. R. Civ. P. 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 that could be proved by the plaintiff. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). Where parties' agreement contains a valid forum selection clause designating a particular forum for settling disputes arising out of their contract, a Fed. R. Civ. P. 12(b)(6) dismissal is the appropriate way to enforce the clause. See Salovaara v. Jackson Nat'l Life Ins. Co., 246 F.3d 289, 298 (3d Cir. 2001); Crescent Int'l v. Avatar Communities, Inc., 857 F.2d 943 (3d Cir. 1988).

Federal Rule of Civil Procedure 19 determines when joinder of a particular party is compulsory. A court must first determine whether a party should be joined if "feasible" under Rule 19(a).[4] If the party should be joined but joinder is not feasible because it would destroy diversity, the court must then determine whether the absent party is "indispensable" under Rule 19(b).[5] If the party is indispensable, the action cannot go forward. Janney Montgomery Scott,

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[4] Fed. R. Civ. P. 19(a) characterizes "feasibility" as follows "a person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party." Fed. R. Civ. P. 19(a).

[5] If these parties cannot be joined, then under Fed. R. Civ. P. 19(b), "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable ..." Fed. R. Civ. P. 19(b).

Inc. v. Shepard Niles, Inc., 11 F.3d 399, 404 (3d Cir. 1993).

III. Analysis

A. The Forum Selection Clause

Plaintiff is a Pennsylvania citizen and Defendant is a New Jersey corporation. See Edrei Affadavit at ¶ 1. However, Bayfront, who has not been joined, is also a New Jersey corporation, and the real estate purchase this loan agreement financed is located in New Jersey. See id. at ¶ 2. The loan and security agreement, and the accompanying documents, contain at least four different provisions assigning jurisdiction in case of a dispute in the federal or state courts of New Jersey. See Id. at Exhibits A-D.[6]

Forum selection clauses are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972). A forum selection clause is unreasonable where a defendant can make a strong showing either that the forum selected is "so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court" or that the clause was procured through "fraud or overreaching." Id. at 15-18; see also Foster v. Chesapeake Ins. Co., Ltd., 933 F.2d 1207 (3d Cir. 1991). Where there has been no fraud, influence, or "overweening bargaining power," the forum selection clause is valid and the

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[6] The forum selection clause of the Security and Loan Agreement specifically states: "(b) Jurisdiction: ... ANY LEGAL SUIT, ACTION OR PROCEEDING AGAINST BORROWER OR LENDER, ARISING OUT OF OR RELATING TO THIS NOTE OR THE OTHER LOAN DOCUMENTS SHALL BE INSTITUTED IN ANY FEDERAL OR STATE COURT IN NEW JERSEY ... AND BORROWER IRREVOCABLY SUBMITS TO THE JURISDICTION OF ANY SUCH COURT IN ANY SUIT, ACTION OR PROCEEDING." Edrei Affadavit, Exhibit A.

plaintiff bears the burden of demonstrating why they should not be bound by their contractual choice of forum. Jumara v. State Farm Ins. Co., 55 F.3d 873, 880 (3d Cir. 1995). Further, "although not dispositive, a forum selection clause is to be given substantial consideration and overcomes a court's usual deference to the plaintiff's choice of forum." Id.

Plaintiff cannot legitimately contend that it would be inconvenient to litigate this case in New Jersey. Bayfront is a New Jersey limited liability company which owns property in New Jersey. New Jersey is geographically proximate to the Eastern District of Pennsylvania, the real estate that was purchased with the loaned money involved in this dispute is located in New Jersey, and the borrower and lender are both New Jersey corporations. Further, Plaintiff has made no claim that the forum selection clauses were the product of fraud. As Defendant demonstrates, this contract was the result of extensive negotiations and it seems clear that "the forum clause was a vital part of the agreement, and [that] it would not be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of forum clause figuring prominently in their calculations." Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 592 (1991) (citing, Bremen, 407 U.S. at 14). Moreover, including a reasonable forum selection clause in a contract is beneficial because it limits the fora in which parties could potentially be subject to suit and dispels any confusion about where suits arising from an agreement may be brought, thus sparing litigants the time and expense of pretrial motions to determine the correct forum and "conserving judicial resources that otherwise would be devoted to deciding these motions." Carnival, 499 U.S. at 593-94.

Plaintiff cannot "contest the validity of the forum selection clause 'by questioning the enforceability of the entire contract ... but must show that the clause itself was the product of

fraud and coercion.'" Barbuto v. Med. Shoppe Int'l, Inc., 166 F. Supp. 2d 341, 346 (W.D. Pa. 2001) (citing, Dentsply Int'l, Inc. v. Benton, 965 F. Supp. 574, 577 (M.D. Pa. 1997). To invalidate a forum selection clause on the grounds of fraudulent inducement, the party challenging the clause must show that the clause itself was procured through fraud, and fraudulent inducement, as to the entire contract will not invalidate an otherwise valid forum selection clause. Nemo Associates, Inc. v. Homeowners Marketing Services Int'l, Inc., 942 F. Supp. 1025, 1028 (E.D. Pa. 1996) (noting that under a different rule, a party could defeat a validly negotiated forum selection clause merely by alleging fraudulent inducement and general allegations of fraud without more are insufficient). The record includes no evidence of "fraud, influence, or overweening bargaining power," Bremen, 407 U.S. at 12-13, and the forum selection clause is in capitalized letters and not inconspicuous. See BABN Techs. Corp. v. Bruno, 25 F. Supp. 2d 593, 496 (E.D. Pa. 1998). Any potential inconvenience with this forum was foreseeable at the time the agreement was made.

Accordingly, the parties' forum selection clause is valid.

B. An Indispensable Party Cannot Be Joined

In any event, Bayfront is an indispensable party under Fed. R. Civ. P. 19, because it is the only real party-plaintiff in interest. See Motion to Dismiss at p. 6. Because this court finds that Bayfront is an indispensable party and cannot be joined without destroying diversity, the action must be dismissed. See Fed. R. Civ. P. 19. The Rule outlines four factors a court should consider when determining whether or not to dismiss a case: (1) to what extent a judgment rendered in the party's absence might be prejudicial to the party or to those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief or other

measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder. See Fed. R. Civ. P. 19.

The loan documents reveal that the borrower was Bayfront. See Edrei Affadavit, Exhibits A-D. Defendant invested in Bayfront and not in Plaintiff as an individual; Plaintiff merely guaranteed the obligations of Bayfront. Thus, any claim that the interest rate charged by Defendant to Bayfront was usurious belongs only to Bayfront. Plaintiff has no right to recover directly for alleged damages caused to Bayfront. See Kauffman v. Dreyfus Fund, Inc., 434 F. 2d 727, 732-733 (3d Cir. 1970); Crawford v. SAP America Inc., 2004 WL 764393, at *1 (E.D. Pa. Mar. 2, 2004). Defendant is attempting to obtain cash flow participation from Bayfront, not from Plaintiff, and Defendant has filed a lis pendens against property owned by Bayfront, not owned by Plaintiff personally. The claims that Defendant is not entitled to any equity or cash flow participation in Bayfront and that the lis pendens filed by Defendant against Bayfront is wrongful belong to Bayfront and not Plaintiff.

Because Bayfront is an indispensable party under Fed. R. Civ. P. 19 who can not be joined without destroying diversity, the action will be dismissed.

IV. Conclusion

For the foregoing reasons, the Court will grant Defendant's Motion to Dismiss pursuant to both Fed. R. Civ. P. 12(b)(6) and 19(a). An appropriate Order follows.

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ORDER

AND NOW, this 19th day of November, 2004, for the reasons stated in the accompanying Memorandum, **IT IS ORDERED** that Defendant's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and 19(a) (docket no. 2) is **GRANTED**.

BY THE COURT:

S/Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.