

IN THE COUNTY COURT OF THE  
ELEVENTH JUDICIAL CIRCUIT IN AND FOR  
MIAMI DADE COUNTY, FLORIDA

THE OPEN MRI GUYS OF  
PALM BEACH, LLC.,  
(a/a/o Elizabeth Galli)

CASE NO.: 2022-038761 CC 23 (2)

Plaintiff/Appellant,

v.

PROGRESSIVE AMERICAN INSURANCE  
COMPANY,

Defendant/Appellee.

**NOTICE OF APPEAL**

NOTICE IS GIVEN that THE OPEN MRI GUYS OF PALM BEACH, LLC. (a/a/o Kevin Gier), Defendant/Appellant, appeals to the Third District Court of Appeal the "Order Granting Motion to Transfer Venue" rendered on October 13, 2023. The nature of the Order, a copy of which is attached hereto, is non-final for which review by this Court is provided under to Rule 9.130(a)(3)(A). A copy of such order is attached hereto.

I HEREBY CERTIFY that on October 10, 2023 a copy of the foregoing was sent by e-mail service in accordance with the applicable rules of procedure to all counsel listed for service of process by and through the Court's e-filing portal.

/s/ Kenneth J. Dorchak  
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STATE OF FLORIDA, COUNTY OF MIAMI-DADE  
I HEREBY CERTIFY that the foregoing is a true and correct copy of the  
Original on file in this office 11-13 AD 20 23  
Clerk Ad Interim of Circuit and County Courts  
Deputy Clerk [Signature] 12062



**IN THE COUNTY COURT OF THE ELEVENTH JUDICIAL  
CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

CASE NO: 2022-038761-CC-23

SECTION: ND02

JUDGE: Natalie Moore

**Open M R I Guys Of Palm Bch (The)**

Plaintiff(s) / Petitioner(s)

vs.

**Progressive American Ins Co**

Defendant(s) / Respondent(s)

\_\_\_\_\_ /

**ORDER GRANTING MOTION TO TRANSFER**

This cause came before the Court on Defendant's Motion to Dismiss and/or Transfer Based on Mandatory Venue Clause. The Court has heard the arguments of the parties, reviewed the relevant evidence, and considered the applicable law. It is hereby

ORDERED AND ADJUDGED Defendant's motion to transfer is **GRANTED**.

Plaintiff alleges in its complaint that it seeks payment of overdue PIP benefits pursuant to an assignment of benefits from the insured. Plaintiff stands in the shoes of the insured and has no greater rights or benefits than the insured under the terms of the Policy. *Gables Ins. Recovery, Inc. v. Seminole Casualty Ins. Co.*, 10 So. 3d 1106 (Fla. 3d DCA 2009).

A review of the insurance policy shows the contracting parties agreed that "[U]nless we agree otherwise, any legal action against us must be brought in a court of competent jurisdiction for the county and state where the person seeking coverage from this policy lived at the time of the accident." "It is well-established that parties to a contract may stipulate to a particular forum in which to resolve future disputes, and such forum selection clauses are presumptively valid." *Am. K-9 Detection Servs., Inc. v. Cicero*, 100 So. 3d 236, 238 (Fla. 5th DCA 2012).

Plaintiff filed this case in Miami-Dade County. Defendant argues that the insured (the person seeking coverage from the policy) resided in Palm Beach County at the time of the accident. Defendant has moved to either dismiss this case or to have the case transferred to Palm Beach County, arguing that the contractual language amounts to a mandatory forum selection clause. Plaintiff asks the Court to deny the motion, making three alternative arguments. First, Plaintiff argues that the evidence showing where the insured resided is insufficient. Next, Plaintiff asks the Court to find that the contractual language is permissive, not mandatory. Finally, Plaintiff argues that the contract is a contract of adhesion and therefore the forum selection clause should not be enforced.

First, the insured did not reside in Miami-Dade County at the time of the accident; therefore, this case cannot be heard in Miami-Dade County. "A court is permitted to consider evidence outside the four corners of the complaint where the motion to dismiss challenges . . . improper venue. A motion to dismiss based on a contractual forum selection

clause is similar. . . . We can discern no reason for treating them differently for purposes of applying the exception to the 'four corners' rule." *Steiner Transocean Ltd. v. Efreanova*, 109 So. 3d 871, 873 (Fla. 3d DCA 2013). The evidence filed by Defendant clearly establishes, and the Court finds, that the insured lived in Palm Beach County at the time of the accident and therefore Palm Beach County is the proper forum for this claim.

Next, the Court concludes this is a mandatory forum selection clause. Mandatory forum selection clauses provide "for a mandatory and exclusive place for future litigation. *Quinones v. Swiss Bank Corp. (Overseas), S.A.*, 509 So. 2d 273, 274–75 (Fla. 1987). Forum selection clauses are permissive where they lack words of exclusivity. See *Sanwa Bank, Ltd. v. Kato*, 734 So.2d 557, 562 (Fla. 5th DCA 1999). Permissive clauses do nothing more than consent to jurisdiction and venue in a given forum but do not exclude any other forum. In contrast, a clause is mandatory if it states that litigation "must", or "shall" be initiated in the specified forum. *Sauder v. Rayman*, 800 So. 2d 355, 358 (Fla. 4<sup>th</sup> DCA 2001).

Plaintiff argues the forum selection clause here is permissive because it creates an exception that allows Defendant to agree to a different forum. This is not correct. "A subordinate clause such as 'unless otherwise agreed' does not by itself render a forum selection clause permissive." See, e.g., *Baosteel America, Inc. v. M/V Ocean Lord*, 257 F. Supp.2d 687, 689 & n.1 (S.D.N.Y. 2003) Further, a lack of mutuality in a forum selection clause does not render it permissive. *Antoniazzi v. Wardak*, 259 So. 3d 206 (Fla. 3rd DCA 2018). Nor does the reservation of a party's right to waive the forum selection clause as parties can generally agree to waive any portion of a contract if there is agreement. Here, the language of the agreement means exactly what it says. The case "must" be brought where the person seeking coverage lived at the time of the accident.

Finally, the Court finds that the mandatory forum selection clause must be enforced. "Absent a showing that a mandatory forum selection clause is unreasonable or unjust, a trial court must enforce the clause." See *Manrique v. Fabbri*, 493 So.2d 437, 440 (Fla.1986); see also *Farmers Group, Inc. v. Madio & Co., Inc.*, 869 So.2d 581, 582 (Fla. 4th DCA 2004). Merely showing that the litigation in the contractually mandated forum would be inconvenient or result in additional expense is insufficient. *Id.* "A party seeking to avoid enforcement of a mandatory forum selection clause bears a heavy burden of establishing that the enforcement is unjust or unreasonable and must demonstrate that the contractually designated forum essentially amounts to 'no forum at all,' thereby depriving the party of its day in court." *Est. of Stern v. Oppenheimer Tr. Co.*, 134 So. 3d 566, 568 (Fla. 3d DCA 2014). That burden has not been met here.

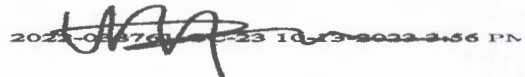
Plaintiff seems to argue that the contract is a contract of adhesion and, therefore, the clause is automatically rendered invalid or unenforceable. A contract of adhesion is "a standardized contract, which, imposed and drafted by the party of superior bargaining strength [insurer], relegates to the subscribing party [insured] only the opportunity to *adhere* to the contract or *reject* it." *Seaboard Fin. Co. v. Mutual Bankers Corp.*, 223 So.2d 778, 782 (Fla. 2d DCA, 1969). Finding that a contract is one of adhesion does not render the contract void, but instead only means that any ambiguities would be resolved or construed against the drafter. There are no ambiguities in the mandatory forum selection clause at issue here.

The Court cannot refuse to enforce a mandatory forum selection clause solely because the parties had unequal bargaining power. *Bombardier Capital Inc. v. Progressive Mktg. Group, Inc.*, 801 So.2d 131, 135 (Fla. 4th DCA 2001); *Ware Else, Inc. v. Ofstein*, 856 So.2d 1079 (Fla. 5th DCA 2003). Instead, Florida courts may decline to enforce a contract or its provisions when there is a showing of unconscionability. To make such a finding, the Court must consider both procedural and substantive unconscionability. *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 574 (Fla. 1<sup>st</sup> DCA 1999). "The procedural component of unconscionability relates to the manner in which the contract was entered, and it involves consideration of such issues as the relative bargaining power of the parties and their ability to know and understand the

disputed contract terms." *Id.* The substantive component requires the Court to look at the reasonableness or fairness of the terms itself. *Id.* Merely concluding the contract is one of adhesion does not settle the issue. Nowhere in the record has Plaintiff shown that the contract was created involuntarily, or that the insured could not choose another insurer, or that the insured did not know or understand the forum selection clause. And certainly, there is nothing that would lead the Court to conclude that the clause itself is unfair or unreasonable, especially when the choice of venue Defendant is seeking to enforce is where the insured actually lives. Even if finding that the contract was a contract of adhesion (without any other findings of unconscionability or unreasonableness) gave the Court discretion to decline to enforce the mandatory forum selection clause, this Court would not exercise that discretion here. The record and the arguments of the parties fail to show a sufficient reason for the Court to choose not to enforce the contractual provision the parties bargained for.

For these reasons, Defendant's motion to transfer venue is **GRANTED**. Plaintiff shall transfer this case to Palm Beach County within 30 days of the date of this order, and pay any transfer or filing fees, or this case will be dismissed without further notice or hearing.

**DONE and ORDERED** in Chambers at Miami-Dade County, Florida on this 13th day of October, 2023.

  
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Hon. Natalie Moore

**COUNTY COURT JUDGE**

Electronically Signed

No Further Judicial Action Required on **THIS MOTION**

CLERK TO **RECLOSE** CASE IF POST JUDGMENT

**Electronically Served:**

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