

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

KRIS PARONTO, an individual,  
KRIS PARONTO AS SETTLOR of  
14<sup>TH</sup> HOUR FOUNDATION FUND, a  
Nebraska Charitable Trust, and  
KPI, LLC, a Nebraska limited liability  
Company,

Plaintiffs,

v.

JUDY L. WILKINSON, an individual,  
d/b/a JL Wilkinson Consulting,

Defendant.

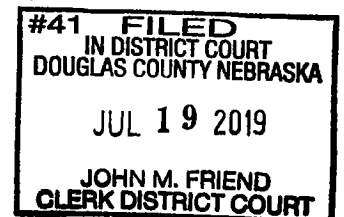
CASE NO. CI 19-4663

ORDER ON DEFENDANT'S  
MOTION TO DISMISS AND ORDER  
ON PLAINTIFFS' APPLICATION FOR  
TEMPORARY INJUNCTION

This matter is before the Court pursuant to the Application for Temporary Injunction filed by Plaintiff Kris Paronto on or about June 11, 2019, and the Motion to Dismiss filed by Defendant Judy L. Wilkinson on or about June 19, 2019. Hearing was held on June 25, 2019, at which time Plaintiff was represented by David Skalka and Defendant was represented by Shuli Green and Patrick Cooper. The Court received into evidence Exhibits 1, 2, 3, and 4 which were offered in connection with both motions. The Court also heard live testimony from Plaintiff Kris Paronto. The record was left open for the Defendant to offer a supplemental affidavit in response to the Court allowing testimony from Plaintiff. The Court receives the supplemental affidavit of July Wilkinson as Exhibit 5. Any portion of exhibits lacking foundation, stating legal conclusions or containing hearsay will be disregarded.

**I. Defendant's Motion to Dismiss**

Before addressing Plaintiff's Application for Temporary Injunction, the Court is required



to determine whether it has jurisdiction over this action and jurisdiction over the Defendant. The Court therefore begins its analysis by evaluating Defendant's Motion to Dismiss for lack of jurisdiction pursuant to Neb. Ct. R. Pldg. §§ 6-1112(b)(1)-(2).

**A. Forum Selection Clause**

Defendant first argues that the Court is required to dismiss this action pursuant to Neb. Rev. Stat. § 25-415, which provides as follows:

[I]f the parties have agreed in writing that an action on a controversy shall be brought only in another state and it is brought in a court of this state, the court will dismiss or stay the action, as appropriate, unless (1) the court is required by statute to entertain the action; (2) the plaintiff cannot secure effective relief in the other state, for reasons other than delay in bringing the action; (3) the other state would be a substantially less convenient place for the trial of the action than this state; (4) the agreement as to the place of the action was obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; or (5) it would for some other reason be unfair or unreasonable to enforce the agreement.

Neb. Rev. Stat. § 25-415.

The Court finds that Nebraska law governs the issue of the enforceability of the forum selection clause because this is a procedural issue, not a substantive issue. E.g., Houseboat Store, LLC v. Chris-Craft Corp., 302 Ga.App. 795, 692 S.E.2d 61 (2011) ("because forum selection clauses involve procedural and not substantive rights, [Georgia courts] apply Georgia law to determine their enforceability notwithstanding a choice of law provision requiring that the laws of another state shall govern"). But even if Georgia law controlled this issue, the forum selection clause would also be valid under Georgia law. See, e.g., Equity Trust Co. v. Jones, 339 Ga.App. 11, 11-12 (2016); Houseboat Store, LLC v. Chris-Craft Corp., 302 Ga.App. 795 (2010).

The Supreme Court of Nebraska has held that "the appropriate procedure in Nebraska for raising an issue seeking to enforce a forum selection clause which provides that an action be

brought in another state is a motion to dismiss pursuant to § 25-415." Polk Cty. Rec. Assn. v. Susquehanna Patriot Leasing, 273 Neb. 1026, 1032, 734 N.W.2d 750, 756 (2007). In ruling on a motion to dismiss pursuant to § 25-415, the Court may base its decision solely on the Complaint if the contract containing the forum selection clause is attached to the Complaint, or the Court may need to review other evidence and make findings of fact if the contract is not attached to the Complaint. Id. at 1034, 734 N.W.2d at 757.

To resolve the Defendant's argument pursuant to Neb. Rev. Stat. § 25-415, the Court is required to evaluate evidence outside of the Complaint and make factual findings because there is a dispute as to whether the parties agreed to the forum selection clause found in the contract attached to Defendant's Affidavit as Attachment 1.

Plaintiff pleaded in his Complaint that the parties entered into a contract dated November 25, 2014. (Complaint, ¶ 26). The Professional Services Agreement ("Contract") attached to Defendant's Affidavit as Attachment 1 states twice on its first page that it is dated and effective as of November 25, 2014. (Ex. 1, p. 5). The parties stipulated that this Contract is the only contract ever exchanged between the parties. (Transcript, 13:1-6 ("Q: So we agree, then, that the Exhibit 1 is substantively -- is the only -- substantively the only version of any agreement between you and the defendant which you have seen; is that correct? A: Yes, that's correct.")). When asked if there was any contract or agreement between the parties other than the Contract attached as Attachment 1 to Exhibit 1, Paronto testified that this Contract is the only agreement between the parties. (Transcript, 14:4-6 ("Q: Was there any other agreement you all had with respect to what services she would provide? A: No, not that I recall.")). Paronto also testified that the contract was not "followed to a T," but it was "loosely" followed by the parties. (Transcript, 13:7 - 14:3).

With respect to the forum selection clause itself, Paronto testified that he never objected to

the contract provision containing the forum selection clause:

Q: And when she sent you the agreement that you recall seeing, did you -- did you raise any objections to the forum selection provision in the agreement?

A: No. Being brand-new from just deploying for ten years and this being new to me, you tend to trust people that say they know what they're doing and have your back, and, obviously, I made a mistake. Ignorance doesn't give away culpability, but still, though, I didn't know any better, lesson learned, I guess, and lesson learned to trust certain people."

(Transcript, 17:3-13).

Based on the affidavits and the testimony received at the evidentiary hearing, the Court finds that the parties agreed to the forum selection clause found in the Contract.

The Court also finds that the forum selection clause is enforceable. None of the exceptions found in § 25-415 apply in this case: (1) the Court is not required by statute to entertain this action; (2) there is no evidence Plaintiff cannot secure effective relief in Georgia; (3) there is no evidence that Georgia would be a substantially less convenient place for the trial of this action than Nebraska; (4) the forum selection clause was not obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; and (5) there is no other reason apparent from the record why it would be unfair or unreasonable to enforce the agreement. Neb. Rev. Stat. § 25-415.

The Court notes that the forum selection clause broadly applies to "any dispute arising under or in connection with this agreement or related to any matter which is the subject of the agreement..." (Exhibit 1, p. 8, § 11(b)). Accordingly, the Court finds that the forum selection clause is enforceable and applies to this action, and the Court will dismiss this case pursuant to Neb. Rev. Stat. § 25-415 based upon the forum selection clause found in section 11(b) of the Contract.

## **B. Personal Jurisdiction**

Although it is not necessary, the Court will address the issue of personal jurisdiction. In addition to the forum selection clause, this Court will also dismiss this action for lack of personal jurisdiction over Defendant Judy Wilkinson.

The Court finds that it lacks personal jurisdiction over Defendant Wilkinson. Wilkinson and Paronto acknowledge that Wilkinson traveled to Nebraska on one occasion, but a singular trip to Nebraska for an event several years ago that is unrelated to the dispute between the parties does not purposefully avail Wilkinson of this Court's jurisdiction. The evidence is undisputed that Judy Wilkinson resides in Georgia and maintained the relevant Facebook page, booking web site, and the content for those sites from her home office in Georgia. Defendant has no interest in any real property within the State of Nebraska, she has no offices or employees in the State of Nebraska, and this matter does not involve a policy of insurance.

Although Plaintiff argues that this case involves a tortious injury in the State of Nebraska and that the Court may therefore exercise personal jurisdiction under section 25-526(1)(d) because Defendant derived substantial revenue from the Contract, that section of the long-arm statute does not apply because Wilkinson did not derive substantial revenue from services rendered "in this state," as Defendant performed nearly all of her work from her home office in Georgia.

Accordingly, the Court finds that it lacks personal jurisdiction over Defendant Judy Wilkinson, and the Court will dismiss this action for this separate and independent reason.

## **II. Plaintiff's Application for Temporary Injunction**

Because of the Court's findings with respect to the forum selection clause and personal jurisdiction, the Court lacks jurisdiction to entertain the Plaintiff's Application for Temporary Injunction. However, if the Court were to reach this issue, the Court would deny Plaintiff's

Application for Temporary Injunction for the following reasons.

There is a dispute of facts as to who "owns" the Facebook page, the domain name, and the content on those sites. The evidence presently before the Court indicates that Paronto or his former employee Candace Fields originally registered the domain name www.kristantoparonto.com but that it was subsequently transferred to Defendant, as she is currently the sole registrant for that domain name. Defendant testified that she created all of the content currently featured on the booking web site at that domain, and Paronto testified that he wrote the "Bio" section of that site and contributed certain photographs. Even if Paronto owns the domain name, he would arguably not be the owner of that portion of the content on the web site created by Defendant because Defendant would own the exclusive rights to that content under the Copyright Act since Defendant was not Plaintiff's employee and there is no "Work-for-hire" agreement under the Copyright Act. Thus, in the absence of evidence about what content was created by Defendant and what was created by Plaintiff, the Court is not in a position to make determinations about who is the rightful "owner" of any specific content.

Plaintiff has not established irreparable harm or that he lacks an adequate remedy at law. Plaintiff has a substantially similar booking web site and personal Facebook page where he can market and has marketed himself for speaking engagements. Moreover, his Affidavit sets forth specific financial losses he claims to have incurred as a result of Defendant's conduct, and therefore he has an adequate remedy at law in the form of money damages. The Court notes also that Plaintiff acknowledges owing money under the Contract to Defendant, and it would be unjust and inequitable to require Defendant to turn over assets related to the Contract when Plaintiff has admittedly not paid for Defendant's services. Accordingly, the Court finds that Plaintiff has not satisfied the elements of a temporary injunction and Plaintiff's Application for Temporary

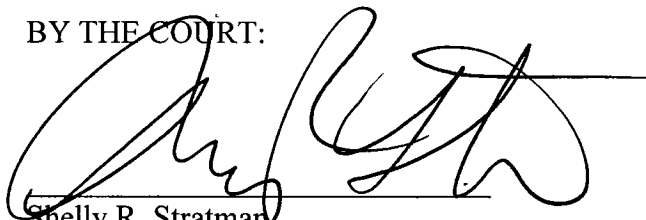
Injunction would be denied if the Court had jurisdiction to entertain such Application.

Accordingly, IT IS HEREBY ORDERED:

1. Defendant's Motion to Dismiss is granted pursuant to Neb. Rev. Stat. § 25-415 and pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(1)-(2).
2. This action is dismissed without prejudice.

Dated this 19 day of July, 2019.

BY THE COURT:

A handwritten signature in black ink, appearing to read 'Shelly R. Stratman', written over a horizontal line.

Shelly R. Stratman  
District Court Judge