

compensatory and punitive damages based on breach of contract, fraud, and negligence causes of action. Warehouses answered and counterclaimed against Mid Atlantic and two new parties, Andrew J. Quillen and Charles P. Quillen, for money owed. Warehouses also filed a Motion to Dismiss on the ground that a forum selection clause applicable to the case required that the lawsuit be brought in state court. The Motion to Dismiss has been briefed and is ripe for decision.¹

The facts as they relate to the Motion to Dismiss are not in dispute. In its Complaint, Mid Atlantic contends that it leased certain real estate located in this judicial district from Warehouses in a series of leases, beginning in 1999. As required by one of the leases, the lessor Warehouses constructed a loading dock as part of the leased premises. On March 18, 2002, and May 9, 2002, the premises were flooded, damaging Mid Atlantic's inventory and interrupting its business. (Compl. ¶ 13.) Mid Atlantic claims that Warehouses improperly constructed the loading dock, causing water to be "channel[ed]" into the premises. (*Id.*)

The last lease between the parties was dated April 1, 2003, after the flooding, and contained a provision that the parties released each other from any and all claims.

¹ Warehouses also moved to dismiss on the ground of lack of subject matter jurisdiction, but following a hearing, that motion was denied. Jurisdiction of this court exists pursuant to diversity of citizenship and amount in controversy. *See* 28 U.S.C.A. § 1332(a) (West 1993 & Supp. 2003).

This last lease² also contained a forum selection clause, which provides that “[t]he laws of the Commonwealth of Virginia shall govern any dispute hereunder and venue for such dispute shall lie with the Virginia courts in Washington County.”

Warehouses asserts in its motion that this clause requires that the present action be dismissed because the agreed-upon sole permissible venue is in the Circuit Court of Washington County, Virginia. Mid Atlantic argues that because Warehouses knew but concealed the fact that it had improperly constructed the loading dock, the 2003 lease was fraudulently induced and thus the forum selection clause is unenforceable.³

II

Once improper venue is raised, the burden to establish that venue is proper in this court is on the plaintiff. *See United Coal Co. v. Land Use Corp.*, 575 F. Supp. 1148, 1158 (W.D. Va. 1983). Forum selection clauses are enforceable, so long as

² Mid Atlantic alleges that there were three leases in total, while Warehouse claims there were actually four leases. The difference is not material to the present question.

³ Mid Atlantic does not claim that the forum selection clause is merely a geographical limitation (any litigation must be located in Washington County, Virginia), rather than a sovereignty limitation (must be in state court). *See Ferri Contracting Co. v. Town of Masontown, W.Va.*, No. 02-1303, 2003 WL 22244905, at *2 (4th Cir. Sept. 29, 2003) (unpublished) (holding that “in a court[] within the state [of West Virginia]” is a geographical limitation only); *see also Johnson v. N. States Power Co.*, No. CIV.A.99-2394-GTV, 2000 WL 1683658, at *3 (D. Kan. Nov. 2, 2000) (holding that “appropriate courts of the State of Minnesota” included federal courts).

they are not unreasonable or unjust, or obtained by fraud. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972); *Paul Bus. Sys., Inc. v. Canon U.S.A., Inc.*, 397 S.E.2d 804, 807 (Va. 1990).⁴

Although Mid Atlantic claims fraud in this case, it is the forum selection clause itself that must be the subject of the fraud, and not the whole agreement. *See Afram Carriers, Inc. v. Moeykens*, 145 F.3d 298, 301 (5th Cir. 1998) (holding that “[a]llegations that the entire contract was procured as the result of fraud or overreaching are ‘inapposite to our [forum-selection clause] enforceability determination’”).

Moreover, while it is true that Mid Atlantic asserts various causes of action, even tort claims are properly within the scope of a contractual forum selection clause, when they arise as a result of the contractual relationship. *See Paul Bus. Sys., Inc.*, 397 S.E.2d at 807 (holding that claims of defamation, conspiracy, and tortious interference are covered under forum selection clause). The disputes in this case are sufficiently connected to the April 2003 lease to be governed by its forum selection clause, particularly including the defense that all prior claims were contractually

⁴ There is a conflict in the cases as to whether state or federal law applies in a diversity case in determining whether a forum selection clause is enforceable, with most courts holding that state law is to be applied. *See Kendra Johnson Panek, Forum Selection Clauses in Diversity Actions*, 36 J. Marshall L. Rev. 941, 945 (2003) (analyzing cases). It makes no difference in resolving the present case.

released by a clause of that lease. Since there is no reason suggested to hold the forum selection clause invalid, it must be enforced and this action dismissed for lack of proper venue. *See* Fed. R. Civ. P. 12(b)(3).

III

For the foregoing reasons, this action will be dismissed without prejudice to being filed in the Circuit Court of Washington County, Virginia. A separate order will be entered forthwith.

DATED: February 23, 2004

/s/ JAMES P. JONES
United States District Judge