THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
NO. 2016-001105

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Letitia Verdin, Circuit Court Judge

EMDI, LLC, and FLASR, INC.,.....Appellants,

v.

INMOTION CONSULTING GROUP, LLC.....Respondents.

REPLY BRIEF OF THE APPELLANT

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Respondent maintains that, reading Judge Verdin's orders in their totality, the court addressed the issue of subject matter jurisdiction. This position misreads the two orders. The first order states that the court has personal jurisdiction over Defendants, that the complaint states a claim for unjust enrichment and quantum meruit, and, citing to the S.C. venue statute, that venue is appropriate in Greenville. The second order simply states that the issues were already heard and a decision was rendered. Neither order speaks to subject matter jurisdiction. Because the lower court has not addressed the issue of subject matter jurisdiction, either in the original order denying the Appellants' motions to dismiss, or in the order denying Appellants' motion for reconsideration and/or clarification, this appeal is ripe for determination. Because the lower court has failed to rule, the errors made on determining venue and personal jurisdiction are also properly before the appellate court. Appellant seeks reversal on all issues and asks this court to dismiss this case as to both defendants.

I. The Lower Court Erred In Failing To Rule On Appellant FLASR's Motion To Dismiss For Lack of Subject Matter Jurisdiction.

In response to appellants' position on subject matter jurisdiction, Respondent contends that "the lower court...specifically ruled on the issue of subject matter jurisdiction by finding Greenville County to be a proper forum." InMotion Reply Brief, p. 7. This position conflates venue with subject matter jurisdiction. The appropriateness of a forum is entirely irrelevant to the court's power over the subject matter of a dispute. In Dove v. Gold Kist, Inc., the Supreme Court of South Carolina stated:

> "The distinction between subject matter jurisdiction and venue is an important one in the law. The terms are not synonymous. Subject matter jurisdiction is "the power to hear and determine cases of the general class to which the proceedings in question belong." On the other hand, venue is the place or geographical

> location of trial. The propriety of either is independent of the other. A court sitting where venue is improper may nevertheless render judgment provided the party who possesses the venue right consents, either expressly or impliedly. A court lacking subject matter jurisdiction, however, has no authority to act regardless of the geographical location or consent of the litigants."

314 S.C. 235, 237–38 (1994) (internal citations omitted). Although the lower court addressed Respondent's arguments as to venue when it found Greenville to be a proper forum, the court failed to decide the issue of subject matter jurisdiction.

Further, contrary to Respondent's position, Appellants are not appealing the lower court order because Judge Verdin failed to use the words "subject matter jurisdiction." Rather, appellants are seeking a resolution to a fundamental issue of the court's authority to hear this dispute. Although appellants raised the issue twice, once in a motion to dismiss and again in a motion for clarification and reconsideration, the court failed to render a decision. The court's failure to consider an issue relating to its inherent constitutional or statutory authority to hear a dispute was in error.

II. The Lower Court Erred In Denying the Motion to Dismiss for Improper Venue Where the Contract Provides that the Exclusive Jurisdiction for Litigation Disputes is in Delaware.

InMotion drafted a contract in which they offered to unconditionally submit to Delaware courts. They then attempted to argue that their own contact is ambiguous, and that subjecting them to venue in Deleware would cause an undue burden. Neither argument is legally sufficient to overcome its own contractual terms.

In its brief, InMotion argues that venue is proper for two reasons, First, InMotion contends that requiring the parties to litigate in Delaware "would impose upon respondent an undue hardship...." Given that neither party has conducted business in Delaware, Respondent

insists that they should not be required to litigate in the state.[1] Not only did they contractually agree to litigate in Delaware, Respondent *drafted* the contract, which explicitly provides that Delaware is the exclusive jurisdiction for litigating disputes. Appellants' Brief, Ex. A at 5. Dismissing the case for improper venue would not subject InMotion to an unforeseen burden; it would merely enforce the parties' bargained-for exchange. Respondent cannot contract to litigate "exclusive[ly]" in Delaware and then seek to avoid this clause based on the undue hardship it would impose. Id.

InMotion further asserts that the venue provision is permissive, not mandatory. Therefore, the parties can sue in any jurisdiction they wish. In support of this assertion, Respondent points to the following clause:

> "In any action or proceeding arising out of or relating to this Agreement...each of the Parties hereto hereby irrevocably and unconditionally agrees that all claims in respect of any such action or proceeding **may** be heard and determined in any such Delaware state court or, to the extent permitted by law, in any such federal court."

Id. (emphasis supplied.)

Respondent claims that the "may" in the above sentence should be read to mean that the parties "may" use Delaware courts, or they "may" use any other court. This tortured reading of their own contract ignores the immediately preceding clause it, which provides:

> **"[E]ach of the Parties** hereto hereby **irrevocably and unconditionally submits**, for itself and its property **to the exclusive jurisdiction** of **any Delaware state court or federal**

[1] Respondent also states, "[p]resumably, to transfer this matter to Delaware would also impose upon Appellants an undue hardship...." InMotion Response Brief, p. 9–10. Appellants reject this contention. EMDI seeks enforcement of the contractual venue provision that it entered into with Respondent. FLASR represents that it would not be unduly burdened to litigate this dispute in Delaware.

> **court** of the United States of America **sitting in Dover, Kenty County Delaware...**"

Id. (emphasis added). Respondent offers no explanation as to how the venue clause can be permissive when it states that the "exclusive jurisdiction" for resolving disputes is in Delaware.

This court is well aware that it is black letter law that when interpreting contracts, courts should construe them liberally "so as to give them effect and carry out the intention of the parties." Brady v. Brady, 222 S.C. 242, 246 (1952). Different provisions dealing with the same subject matter are to be read together. Id. The clause Respondent cites to can only be reconciled with the "exclusive jurisdiction" provision above, if it is read as permissive in the sense that the parties "may" use Delaware courts if they are unable to resolve any dispute through mediation, and must proceed to litigation. Therefore, the only logical reading of the contract is a requiring a party to litigate exclusively in Delaware.[2]

III. The Court Erred in Denying Appellant's Motion to Dismiss for A Lack of Personal Jurisdiction where FLASR has No Contacts with the Forum State.

Respondents arguments that personal jurisdiction exists against Appellant FLASR are neither legally supported or correctly plead. In support of personal jurisdiction, Respondent advances at least three arguments. First, Respondent contends that South Carolina may exercise personal jurisdiction because InMotion has alleged successor liability. Second, Respondent insists that the long-arm statute authorizes the exercise of jurisdiction. Third, Respondent contends that FLASR transacted business within the state. Respondent's positions are misguided as a matter of fact and law.

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[2] But even if the Court were find these clauses ambiguous and capable of more than one interpretation, the law requires the contract term to be construed against the drafter, which is the Respondent. S. Atl. Fin. Servs., Inc. v. Middleton, 349 S.C. 77, 84 (Ct. App. 2002), aff'd as modified, 356 S.C. 444 ("It is well settled that ambiguities arising within a contract must be construed against the drafter.")

First, Respondent states that they have "made a *prima facie* showing of personal jurisdiction by sufficiently alleging successor liability in its complaint." InMotion Reply Brief, p. 10. In advancing this argument, Respondent restates the mistaken proposition of law advanced to the lower court: that "successor liability" grants the court with personal jurisdiction over FLASR. Again, successor liability is a theory of liability, not a basis for invoking personal matter jurisdiction over a defendant. Whereas liability may be grounded in statute, tort or, in this case, contract, personal jurisdiction is a Constitutional inquiry. Counsel has offered no authority–from any jurisdiction–supporting their claim that successor liability may be used to grant a court with personal jurisdiction over a defendant. This position is unavailing and unsupported by legal authority.

Second, Respondent argues that jurisdiction over FLASR is authorized by the long-arm statute. The South Carolina Supreme Court has held that the Long-Arm statute extends to the bounds of Due Process. Therefore, the statutory and Constitutional analysis of personal jurisdiction merges into one. Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005) ("Because South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction would violate due process."). Accordingly, discourse into the long-arm statute is not useful in a personal jurisdiction analysis. The relevant analysis is whether exercising personal jurisdiction over FLASR comports with the Due Process Clause of the Fourteenth Amendment. The facts, as set forth in the principal brief, demonstrate that it does not.

With respect to the Constitutional inquiry, Respondent argues that FLASR has transacted business by "executing the agreement in South Carolina." InMotion Reply Brief, p. 12. Respondent's brief misstates the facts. FLASR was not a signatory to the contract between

EMDI and InMotion. This fact is reflected in the contract itself and confirmed by Everett Dickson's affidavit. See Appellants' Brief, Ex. A at 7; Dickson Aff ¶5 ("FLASR has never contracted with or entered into an agreement with InMotion Consulting Group, LLC....). Respondent also states that FLASR transacted business within South Carolina. In support of this assertion, Respondent's brief relies on the affidavit of InMotion's President, Chad Melinik. Aff Chad Melinik, ¶1. Although Mr. Melinik's affidavit states that, upon on information and belief, FLASR was transacting business within South Carolina, the affidavit of Everett Dickson rebuts Mr. Melinik's assumption in clear and unambiguous terms. Aff Chad Melinik, ¶5. Mr. Dickson's affidavit confirms that FLASR did not enter into an agreement with Respondent nor does FLASR focus its activities in the state, have distributors, property, or offices in South Carolina. Dickson Aff ¶4–5.

For these reasons, Appellants respectfully request that the court reverse the trial court's denial of the motion to dismiss Appellant FLASR for lack of personal jurisdiction.

IV. The Lower Court Erred in Denying Appellant's Motion to Dismiss for Failure to State A Claim for Breach of Contract, Where FLASR is Not a Party to the Contract nor subject to Successor Liability As A Matter of Law.

In response to Appellants' position on the motion to dismiss for failure to state a claim, Respondent argues that, because they have alleged successor liability, then this court must affirm the lower court's denial of the 12(b)(6) motion to dismiss. This court is empowered to determine that successor liability does not apply as a matter of law. The threshold question of whether the doctrine is applicable is not a factual determination and merely invoking successor liability does not save Respondent's claims from a 12(b)(6) motion to dismiss.

Here, Respondents have not asserted that FLASR was a party to the contract. Their breach of contract claim against FLASR relies solely on its claim for successor liability. However, by definition, successor liability attaches where there is a "a successor or purchasing

company" involved. Simmons v. Mark Lift Indus., Inc., 366 S.C. 308, 312 (2005). FLASR cannot be a successor because it is undisputed that EMDI is still a functioning business. Likewise, it is also undisputed that FLASR did not purchase or acquire EMDI's assets in a transaction (nor has Respondent alleged as much). FLASR and EMDI are separately functioning business entities, which are incorporated in different states. Everett Dickson Aff ¶3. Accordingly, FLASR cannot be liable as a successor or purchasing entity to EMDI as a matter of law. Therefore, the lower court erred in denying Appellant's motion to dismiss Respondent's breach of contract claim against FLASR.

CONCLUSION

For the reasons set forth above and in their principal brief, FLASR and EMDI respectfully request that the Court reverse the trial court's denial of Appellants' motions to dismiss.

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Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 19th day of August, 2016, she mailed a copy of **FLASR, Inc., and EDMI, LLC's Reply Brief of the Appellant** by first-class mail, proper postage affixed, addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es):

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August 19, 2016

Jenny Abbott Kitchings
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Re: FLASR, Inc. and EDMI, LLC. v. InMotoin Consulting Group, LLC
Appeal from Greenville County Court of Common Pleas
Appellate Case No. 2016-001105

Dear Ms. Kitchings:

Attached please find the original and one copy of the **Reply Brief of the Appellant** in the above-referenced matter. Please return a filed copy to us in the enclosed stamped, self-addressed envelope.

By copy of this letter to Allen L. West, we are serving him a copy of same.

With kind regards, I remain

Sincerely yours,

Michael S. Cashman

Michael S. Cashman

MSC/dps
Enclosure

cc: Allen L. West, Esq.

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