

dc
Judge Cooper

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Senior Ride Connection, f/k/a
ITNCharleston Trident,

Plaintiff,

Civil Action No. 2016-CP-10-1629

vs.

ORDER

ITNAmerica,

Defendant.

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JAN 06 2017

FILED
2016 DEC 28 PM 2:28
JULIE J. ANDERSON
CLERK OF COURT

SC Court of Appeals

Before the Court is ITNAmerica's motion to partially reconsider a prior order from this Court, which dismissed Senior Ride Connection's claim for breach of contract but denied the remainder of ITNAmerica's motion to dismiss. Because the parties unambiguously agreed to litigate their dispute in Maine, the Court reconsiders its earlier decision, grants this motion, and dismisses the remainder of this case pursuant to the doctrine of *forum non conveniens* and the parties' forum-selection clause.

BACKGROUND

This case involves a dispute between two nonprofit organizations that provide transportation services for seniors. ITNAmerica (based in Maine) and Senior Ride Connection (based in South Carolina) entered into an Affiliate Agreement in August 2007 under which ITNAmerica would provide certain administrative and "best practices" services in exchange for fees. Senior Ride Connection alleges that ITNAmerica has breached the parties' agreement.

On December 8, 2015, Senior Ride Connection filed suit against ITNAmerica in Charleston County in a case captioned *Senior Ride Connection v. ITNAmerica*, Civil Action No. 2015-CP-10-6613. ITNAmerica removed that matter to federal court and sought to transfer the

case to Maine based on a forum-selection clause in the Affiliate Agreement. On March 31, 2016, Senior Ride Connection voluntarily dismissed that complaint before the federal court took any action on ITNAmerica's motion.

That same day, Senior Ride Connection re-filed the instant complaint in Charleston County, but modified its pleadings to disclaim any entitlement to money damages. ITNAmerica again removed the case to federal court, again sought transfer to Maine based on the forum-selection clause, and sought dismissal of Senior Ride Connection's claim for breach of contract due to its waiver of money damages. In response, Senior Ride Connection sought remand of the case back to state court.

On June 30, 2016, the federal court granted Senior Ride Connection's motion to remand, holding that it lacked subject matter jurisdiction due to the case falling below the federal court's amount-in-controversy threshold, thereby mooting ITNAmerica's motion to transfer and motion to dismiss before that court. (Order (Dkt. No. 19 in *Senior Ride Connection v. ITNAmerica*, Case No. 2:16-cv-1353-RMG (D.S.C. June 30, 2016)).)

ITNAmerica then filed in this Court a motion to dismiss the case based on the parties' forum-selection clause and Rule 12(b)(6). In response, Senior Ride Connection filed a motion to strike ITNAmerica's motion to dismiss, contending that the federal court had already resolved ITNAmerica's motion.

This Court heard oral arguments on these cross-motions on September 6, 2016, and the parties also submitted memoranda and supplemental authorities supporting their respective positions. On September 26, 2016, the Court issued an Order dismissing Senior Ride Connection's claim for breach of contract for lack of damages. The Court denied the remainder of ITNAmerica's motion at that time.

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ITNAmerica timely moved for partial reconsideration of the Court's Order.¹ In that motion, ITNAmerica reiterated its argument that the case should be dismissed under the doctrine of *forum non conveniens* due to the parties' forum-selection clause, which is found in the "Governing Law" section of their Affiliate Agreement. Senior Ride Connection filed a memorandum in opposition.

After considering all submissions, arguments, and the governing law, the Court finds that this case should be dismissed in its entirety, as the parties agreed to litigate "any suit, action, or proceeding between them which concerns" their contract in Maine.

STANDARD OF REVIEW

Rule 59(e), SCRPC, permits a party to seek reconsideration of a prior decision "not later than 10 days after receipt of written notice of the entry of the order." Such a motion is appropriate when an issue has been raised but not ruled upon, or when the Court appears to have misunderstood or failed to fully consider an argument or issue. *Elam v. S.C. DOT*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Rule 59(f), SCRPC, provides that "[t]he motion may in the discretion of the court be determined on briefs filed by the parties without oral argument."

DISCUSSION

I. *Forum Non Conveniens*

ITNAmerica's motion seeks to enforce the "Governing Law" section of the parties' Affiliate Agreement—in particular, the Maine forum-selection clause—through the doctrine of *forum non conveniens*. That provision provides that any litigation involving the parties' contract "shall be" adjudicated by the federal or state courts in Portland, Maine:

¹ In transmitting a copy of its motion to the Court on October 11, 2016—as required by Rule 59(g), SCRPC—ITNAmerica indicated that it received written notice of entry of the Court's Order on October 5, 2016.

Governing Law. The rights and obligations of the parties under or relating to the Agreement, in all respects, shall be governed by the laws of the State of Maine. UN America and the Affiliate Community agree that any suit, action, or proceeding between them which concerns this Agreement shall be brought and heard in Federal or state court in Portland, Maine, and each party hereby consents to the personal jurisdiction of such courts and agrees to waive any objection to such venue, irrespective of their current or future residence.

(Affiliate Agreement ¶ “Governing Law,” at 24.)

The South Carolina Supreme Court has adopted the doctrine of *forum non conveniens* into state law, describing it as a “well established” doctrine that has been “applied by the federal courts and a clear majority of our sister states.” *Braten Apparel Corp. v. Bankers Trust Co.*, 273 S.C. 663, 667–70, 259 S.E.2d 110, 113–14 (1979). It has further adopted the federal framework for this doctrine, which includes analyzing a series of private and public factors to assess whether a court should dismiss or retain jurisdiction over a matter. *Id.* at 668–69, 259 S.E.2d at 113.

When a forum-selection clause is present, the traditional analysis of these private and public factors is altered in three ways:

1. No Deference to Plaintiff’s Chosen Forum: A court should give “no weight” to the plaintiff’s choice of forum. *See Atl. Marine Constr. Co. v. U.S. District Court*, 134 S. Ct. 568, 581 (2013) (“First, the plaintiff’s choice of forum merits no weight.”). This is because “the plaintiff has effectively exercised its ‘venue privilege’ before a dispute arises” when it enters into a forum-selection clause. *Id.* at 582.

2. No Consideration of Private-Interest Factors: A court should not consider any of the private-interest factors of the traditional *forum non conveniens* framework, as a party “waive[s] the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses” when they agree to a forum-selection clause. *Id.* Accordingly, a court “must deem the private-interest factors to weigh entirely in favor of the preselected forum” identified in the parties’ contract. *Id.*

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3. No Choice-of-Law Rules from Original Venue: Prior to *Atlantic Marine*, courts receiving transferred cases were forced to use the original venue's choice-of-law rules. Because this created a perverse incentive for a party to "flout[] its contractual obligation" in order to secure an improper "state-law advantage," the *Atlantic Marine* Court held that "[t]he court in the contractually selected venue should not apply the law of the transferor venue to which the parties waived their right." *Id.* at 582–83.

Under this framework, the Court may account for three "public" factors when evaluating a motion based on *forum non conveniens*: (1) potential congestion of the court system, (2) "the local interest in having localized controversies decided at home," and (3) a desire to have the court most familiar with the applicable law handle the case. *Atlantic Marine*, 134 S. Ct. at 581 n.6; see also *Braten Apparel*, 273 S.C. at 668–69, 259 S.E.2d at 113 (adopting the same "public" factors into South Carolina jurisprudence (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947))). Only in "the most unusual cases" should an evaluation of these factors override the forum-selected in the parties' contract. *Atlantic Marine*, 134 S. Ct. at 583.

As the party opposing enforcement of the forum-selection clause, Senior Ride Connection has "the burden of showing why the court should not transfer the case to the forum to which the parties agreed." *Id.* at 582. Here, the Court finds that the public factors weigh in favor of enforcing the parties' forum-selection clause.

Regarding the case load of each court system, the District of Maine—where parallel litigation between the parties is already pending—has considerably less activity than Charleston County. According to the United States Courts' statistical reports for the latest reporting period, the District of Maine had 650 pending cases in total, and 217 pending cases per judge. See generally *Maine*, in United States Courts, *District Courts—National Judicial Caseload Profile*, at

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<http://www.uscourts.gov/file/19809/download> (Dec. 31, 2015 Reporting Period). By contrast, according to the South Carolina Supreme Court's most recent data, Charleston County had 3,955 pending civil cases, and 1,318 pending civil cases per resident judge. *See generally Charleston County, in South Carolina Supreme Court, South Carolina Common Pleas Cases Pending End of Period Trends*, at http://www.judicial.state.sc.us/trends/Common%20Pleas/CPT_Dis.pdf (FY 2015/16 Reporting Period). The first public-interest factor, therefore, weighs in favor of dismissal so that the case can be resolved in the less-burdened forum of Maine.

The second public factor—whether there is a uniquely local interest in the litigation—also counsels in favor of dismissal. ITNAmerica operates a national network through its affiliate organizations; Senior Ride Connection's attempts to rescind or void some or all of the Affiliate Agreement could have a cascading effect throughout the entire ITNAmerica network and could disrupt senior transportation services in numerous communities throughout the United States. Because the nerve center of that entire network is in Maine—at ITNAmerica's headquarters—Maine has at least as much of a “localized” interest in this matter as South Carolina.

Finally, the parties have agreed that Maine law will govern their relationship. (Affiliate Agreement ¶ “Governing Law,” at 24.) The third public factor, therefore, also favors dismissing this matter in favor of litigation in Maine, as courts in that state are more familiar with Maine law.

Additionally, the Court finds that it is important to enforce the parties' forum-selection clause according to its plain terms. Other courts have warned about the consequences of not enforcing these contract provisions, observing that “finding forum selection clauses unenforceable could affect the business climate in this State.” *T.R. Helicopters, LLC v. Bell*

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Helicopter Textron, Inc., Case No. 3:10-2250-JFA, 2010 U.S. Dist. LEXIS 121923, at *12 (D.S.C. Nov. 17, 2010).

Moreover, South Carolina's appellate courts have favorably cited, relied on, and enforced these contractual terms. *See, e.g., Minorplanet Sys. USA Ltd. v. Am. Aire, Inc.*, 368 S.C. 146, 150 n.1, 628 S.E.2d 43, 45 n.1 (2006) (stating that forum-selection clauses are "presumed valid and enforceable" when they are entered between businesses, and favorably citing authority that extends this presumption to the consumer context); *St. John's Episcopal Mission Ctr. v. S.C. DSS*, 276 S.C. 507, 508-09, 280 S.E.2d 207, 207 (1981) (reversing trial court's failure to enforce the parties' forum-selection clause and noting that "[w]e have upheld such agreements in the past"); *Sec. Credit Leasing, Inc. v. Armaly*, 339 S.C. 533, 546, 529 S.E.2d 283, 290 (Ct. App. 2000) (affirming that a lease agreement "contained a valid forum selection clause"); *Stanley Smith & Sons v. D.M.R., Inc.*, 307 S.C. 413, 417-18, 415 S.E.2d 428, 430-31 (Ct. App. 1992) (enforcing a forum-selection clause despite arguments that the provision was written in "small print" and that the contract was entered "under exigent circumstances").

Because the parties' forum-selection clause is unambiguous, and because important interests are served by enforcing it, the Court holds that this case should be dismissed pursuant to the doctrine of *forum non conveniens*.

II. Senior Ride Connection's Arguments

To avoid enforcing the parties' forum-selection clause, Senior Ride Connection argues that the federal court has already declined to enforce this provision and, therefore, ITNAmerica's original motion to dismiss was an improper serial Rule 12 motion. The Court disagrees. In remanding this matter, Judge Gergel held that the federal court lacked subject matter jurisdiction and, therefore, denied ITNAmerica's then-pending motion as moot before that court. He made no

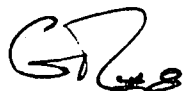
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determination of the motion on its merits, nor could he, as the federal court did not have subject matter jurisdiction to issue any such rulings. As such, ITNAmerica was free to, and properly did, renew its arguments before this Court.

Senior Ride Connection also attempts to bypass the parties' forum-selection clause by arguing that its enforcement would violate South Carolina public policy as embodied by South Carolina Code § 15-7-120(A). That statute states as follows: "Notwithstanding a provision in a contract requiring a cause of action arising under it to be brought in a location other than as provided in this title and the South Carolina Rules of Civil Procedure for a similar cause of action, the cause of action alternatively may be brought in the manner provided in this title and the South Carolina Rules of Civil Procedure for such causes of action." The Court rejects Senior Ride Connection's argument for several reasons.

First, the parties agreed that Maine law would govern the "rights and obligations of the parties under or relating to this Agreement, in all respects." (Affiliate Agreement ¶ "Governing Law," at 24.) As such, Senior Ride Connection's argument that a South Carolina statute should govern and displace the enforcement of a contract term is incorrect. *See, e.g., Bonanno v. VTB Holdings, Inc.*, Case No. 10681-VCN, 2016 Del. Ch. LEXIS 24, at *15 (Del. Ch. 2016) ("When a contract contains a forum selection clause, this court will interpret the forum selection clause in accordance with the law chosen to govern the contract." (quoting *Ashall Homes Ltd. v. ROK Entm't Group Inc.*, 992 A.2d 1239, 1245 (Del. Ch. 2010))); *see generally Team IA, Inc. v. Lucas*, 395 S.C. 237, 248, 717 S.E.2d 103, 108 (Ct. App. 2011) ("Choice of law clauses are generally honored in South Carolina.").

Even without considering the parties' choice-of-law clause, this statute is still unhelpful to the analysis. South Carolina Code § 15-7-120(A) applies only to intrastate forum-selection



clauses, not those, such as the instant provision, that select venue in a jurisdiction outside of South Carolina. See, e.g., *SFL+A Architects, PA v. Marlboro County Sch. Dist.*, Case No. 4:13-cv-3071-RBH, 2014 U.S. Dist. LEXIS 119905, at *5–8 n.2 (D.S.C. Aug. 28, 2014) (reiterating that South Carolina Code § 15-7-120(A) “deals exclusively with proper venue among the various counties in South Carolina” (quoting *Atl. Floor Servs. v. Wal-Mart Stores, Inc.*, 334 F. Supp. 2d 875, 879 (D.S.C. 2004))); *Atlantic Floor Services*, 334 F. Supp. 2d at 879 (holding that South Carolina Code § 15-7-120(A) applies only “to intra-state forum selection clauses” and “deals exclusively with proper venue among the various counties in South Carolina, not whether venue would be proper in one state over another”). Accordingly, this statute is facially inapplicable.

Finally, the Court disagrees that South Carolina Code § 15-7-120(A) generally indicates a state policy against enforcing forum-selection clauses. Several courts, in fact, have examined and rejected this exact argument. See generally *Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643, 652 (4th Cir. 2010) (“[W]e can find virtually no evidence to indicate that S.C. Code Ann. § 15-7-120(A), overriding exclusive forum selection clauses in favor of applying state procedural rules for venue, manifests a strong public policy of South Carolina.”); *Power-Linx, Inc. v. Satiis, Inc.*, Case No. 4:05-cv-3281-TLW, 2006 U.S. Dist. LEXIS 53209, at *13 (D.S.C. July 13, 2006) (“South Carolina has simply not declared through clear legislative action or judicial decision that forum selection clauses in a contract are void and against public policy.”). Because there is little more disruptive to commerce than uncertainty about whether contracts will be enforced according to their plain language, the Court rejects Senior Ride Connection’s argument that enforcing the parties’ forum-selection clause would be contrary to South Carolina public policy.²

² To the extent Senior Ride Connection has raised any additional arguments in opposition to enforcing the parties’ forum-selection clause and dismissing this case, the Court rejects those arguments as being without merit.



CONCLUSION

The Court finds that the parties' forum-selection clause should be enforced according to its plain language, and this case is properly adjudicated in Maine. Accordingly, ITNAmerica's Motion for Partial Reconsideration is granted, and the remainder of this case is dismissed pursuant to the doctrine of *forum non conveniens*.

AND IT IS SO ORDERED.



The Honorable G. Thomas Cooper, Jr.
Circuit Court Judge

DECEMBER 21, 2016
Charleston, South Carolina



State of South Carolina
The Circuit Court of the Fifth Judicial Circuit

G. Thomas Cooper, Jr.
Judge

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December 21, 2016

The Hon. Julie J. Armstrong
Charleston County Clerk of Court
100 Broad St., #106
Charleston, SC 29401

RE: Senior Ride Connection f/k/a ITNCharlestonTrident v ITNAmerica C/A No.: 2016-CP-10-1629

Dear Ms. Armstrong:

Please find enclosed for filing, a signed Order in the above captioned case. I have enclosed a copy, and if possible, please timestamp and return to Judge Cooper's chambers for our records.

Very truly yours,

A handwritten signature in black ink, appearing to read "George James".

George James
Law Clerk to the Honorable G. Thomas
Cooper, Jr.

GTCJr.:gcj

Enclosures

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