

STATE OF SOUTH CAROLINA )  
COUNTY OF CHEROKEE )

IN THE COURT OF COMMON PLEAS  
IN THE SEVENTH JUDICIAL CIRCUIT

Herbie's Famous Fireworks, Inc.; )  
et.al.; )  
Plaintiff/s, )

C/A No.: 2018-CP-11-00825

v. )

ORDER

**RECEIVED**

AUG 30 2019

SC Court of Appeals

Fantasy Fireworks, Inc., )  
Defendant/s. )

Hearing Date: June 10<sup>th</sup>, 2019, at 1:30 p.m.  
Hearing Judge: Grace Gilchrist Knie  
Counsel for Plaintiff/s: Andrew A. Mathias & Konstantine P. Diamaduros  
Counsel for Defendant/s: John C. Strickland  
Court Reporter: Michael A. Watts

This matter was before The Court on Monday, June 10<sup>th</sup>, 2019, at 1:30 p.m., in Cherokee County, SC, the Seventh Judicial Circuit, upon Defendant's Motion to Dismiss for Lack of Jurisdiction and Motion for Limited Appearance Regarding Jurisdiction, filed with the Court on April 15<sup>th</sup>, 2019. Attorneys Andrew A. Mathias and Konstantine P. Diamaduros of Nexsen Pruet, LLC, were present representing the interests of Plaintiff. Attorney John C. Strickland of Strickland Law was present representing the interests of Defendant. Michael A. Watts was the Court Reporter.

**PROCEDURAL HISTORY:**

Plaintiff filed the Summons and Complaint in the Circuit Court, Court of Commons Pleas on November 28<sup>th</sup>, 2018, asserting claims of breach of contract, fraud, fraudulent misrepresentation, and fraudulent inducement. Defendant filed a Rule 12(b)(2), SCRPC Motion to Dismiss for Lack of Jurisdiction and Motion for a Limited Appearance Regarding Jurisdiction on April 15<sup>th</sup>, 2019. Plaintiff filed a Response in Opposition to Defendant's Motion on June 7<sup>th</sup>, 2019.

**FACTUAL SUMMARY:**

This case arises out of Defendant's alleged failure to fulfill its obligations under an agreement ("Agreement") and subsequent promissory note ("Promissory Note") that it entered into with Plaintiff. On or about May 9, 2014, Plaintiff, as Supplier, and Defendant, as Retailer, entered into an Agreement for the distribution of consumer fireworks whereby Plaintiff granted Defendant the exclusive right to sell such fireworks in New Hampshire to Defendant's retail customers. Pursuant to the Agreement, Defendant agreed to exclusively purchase its consumer fireworks from Plaintiff.

In April of 2018, Plaintiff began having concerns about Defendant's intention to pay an outstanding balance of \$45,254.26. As a result, on April 30, 2018, Defendant executed a Promissory Note, which acknowledged that Defendant owed Plaintiff a principal balance of \$45,254.26, and contained Defendant's promise to pay that balance by August 15, 2018. Plaintiff continued shipping consumer fireworks to Defendant until Defendant's outstanding balance reached \$114,406.24. Plaintiff filed this action on November 28, 2018, alleging, among other things, that Defendant was in breach of both the Agreement and the Promissory Note. In response, Defendant contended that this action should be litigated in New Hampshire pursuant to a Forum Selection Clause in the Agreement, which reads at Section G of the contract, as follows:

**"G. Jurisdiction**

1. This agreement shall be exclusively governed by and construed in accordance with the laws of the State of New Hampshire and any controversy or claim arising out of or relating to this Agreement or the breach thereof shall be exclusively adjudicated in a New Hampshire court of competent jurisdiction."

This page 3 of the Agreement/contract was initialed by both parties and both parties signed the Agreement/contract. This choice of law provision calls for the Agreement to be governed by and construed by the laws in the State of New Hampshire.

LAW:

“The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case.” *Cribb v. Spatholt*, 382 S.C. 490, 496, 676 S.E.2d 714, 717 (Ct. App. 2009). “At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a prima facie showing of jurisdiction either in the complaint or in affidavits.” *Id.* at 497, 676 S.E.2d at 717 (quoting *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005)). Indeed, “[w]hen a nonresident defendant attacks the allegations of a complaint based on jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction.” *Id.* at 497, 676 S.E.2d at 718.

“Courts may . . . have specific jurisdiction over a cause of action arising from a defendant’s contacts with the state pursuant to the long-arm statute.” *Cribb*, 382 S.C. at 498, 676 S.E.2d at 718 (citing *State v. NV Sumatra Tobacco Trading, Co.*, 379 S.C. 81, 88, 666 S.E.2d 218, 222 (2008)). Under the long arm statute, S.C. Code Ann. § 36-2-803, “a court may exercise personal jurisdiction over an individual acting directly or through an agent for causes of action arising from the individuals: (1) transacting any business in this State; . . . [or] (7) entry into a contract to be performed in whole or in part by either party in this State[.]” *Cribb*, 382 S.C. at 498, 676 S.E.2d at 718.

The South Carolina Supreme Court has addressed the issue of Forum Selection Clauses and has found them to be valid. The Supreme Court found that Forum Selection clauses will be invalidated "only (1) if it was the product of fraud or overreaching, (2) if the agreed forum is so inconvenient as to deprive the litigant of his day in court, or (3) if enforcement would contravene a strong public policy of the forum in which the suit is brought." *Minorplanet Systems USA Ltd. v.*

*American Aire, Inc.*, 368 S.C. 146, 150, 628 S.E.2d 43, 45 (2006) (quoting *Tri-State Building Specialties v. NCI Building Systems*, 184 S.W.3d 242, 2005 WL 2470528 (Tex. App. 2005)). The Court further held that the "party opposing enforcement of the forum selection clause carries a heavy burden of showing the 'forum selection clause' should not be enforced." *Id.*

In *Albermarle Corp. v. AstraZeneca UK Ltd*, 628 F. 3d 643 (2010), the Fourth Circuit Court of Appeals found "no evidence to indicate that SC Statute overriding exclusive forum selection clauses in favor of applying state procedural rules for venue, manifests a strong public policy of South Carolina." The Fourth Circuit stated they could "find no South Carolina Court that has so held. Indeed, we have cases in which South Carolina courts have enforced forum selection clauses in contracts notwithstanding the existence of the SC Statute §15-7-120(a)." *Id.*; see, e.g., *Security Credit Leasing Inc. v. Armaly*, 339 S.C. 533, 529 S.E.2d 283 (2000); *Firestone Fin Corp v. Owens*, 309 S.C. 73, 419 S.E.2d 830 (1992).

Additionally, the Fourth Circuit, Court of Appeals found that in "South Carolina's cases, federal courts sitting in South Carolina have enforced forum selection clause notwithstanding the statute." *Id.* In the opinion of the Fourth Circuit, as it would relate to this case at hand, the forum selection clause should be upheld as it can be expected that other contracts with a South Carolina forum selection clause the South Carolina Corporation would seek to uphold that clause. *Id.*

In *The Bremen v. Zapata Off-Shore Company*, 407 U.S. 1 (1972), the United States Supreme Court found that "in light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside." The Forum Selection Clause should be enforced unless the party seeking to avoid it meets a showing it to be unreasonable or unjust or that the clause is invalid for such reasons as fraud or overreaching.

**ARGUMENTS OF COUNSEL:**

Defendant, in support of the Rule 12(b)(2), SCRCP Motion to Dismiss for Lack of Jurisdiction, contends there is a specific provision in the contract between the parties in which it states that jurisdiction is governed by New Hampshire law and that any and all controversies or claims arising from the contract be adjudicated in the state of New Hampshire. Defendant contends that all parties were aware of this provision and that all parties initialed this provision.

Defendant contends that this Court lacks personal jurisdiction over Defendant Corporation. First, Defendant contends that it has had no contact with South Carolina except for this one contract. Defendant does not supply fireworks to any other retailers in South Carolina, has no other business in South Carolina, and has no property in South Carolina. Additionally, Defendant contends that a companion case to this matter has been filed in the District Court of New Hampshire, involving the same parties, but different causes of actions. The moving party in that action is Fantasy Fireworks, Inc.

With regard to the Forum Selection Clause, Defendant contends that in both this State and other federal cases, courts have upheld Forum Selection Clauses. Defendant contends that although there is a statute which states that Forum Selection Clauses should not be upheld, there are South Carolina Supreme Court cases in which the Court stated it would invalidate the Forum Selection Clause if the forum was so inconvenient to deprive the parties' day in court or would strongly be against public policy. Defendant contends that none of the instances has occurred. First, the forum of New Hampshire is not so inconvenient to deprive Defendant of its day in court because many of the witnesses that would be called, live outside of the South Carolina. Defendant contends that there was no fraud in the agreement choosing to litigate this matter in New Hampshire, and that enforcement of the Forum Selection Clause is not against public policy. Defendant contends that

the United States Supreme Court has held that “forum selection clause should control absent a strong showing that it should be set aside.” See *The Bremen vs. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). Defendant contends that the Forum Selection Clause should be upheld because Plaintiff knew of the existence of the clause when it signed the contract and to disallow the forum selection clause would hamper the stream of commerce.

Defendant further argues that Plaintiff in this matter has entered his products into the stream of commerce in the state of New Hampshire, and as such Plaintiff is subject to the jurisdiction in the state of New Hampshire. There is no personal jurisdiction over Defendant. Defendant has not sold products in South Carolina, sent products to South Carolina nor located his business in the state of South Carolina. As to the Subject matter jurisdiction, it is well known that all actions must be tried where the cause of action took place. In this matter, the alleged breach occurred in New Hampshire, where Defendant is located and where Plaintiff allegedly shipped nonconforming goods and breached the contract in New Hampshire. Subject matter jurisdiction would be best suited for the US District Court in New Hampshire where Plaintiff can then assert his claims as counterclaims in the action that is currently pending in that Court.

In response to Defendant’s arguments, Plaintiff contends that this Court has personal jurisdiction over Defendant due to the long arm statute, S.C. Code Ann. § 36-2-803. Here, Plaintiff contends that Defendant entered into two contracts that were to be performed in part in South Carolina, the Agreement and the Promissory Note, and thereafter transacted business in this State pursuant to one of those contracts. Plaintiff contends that the Forum Selection Clause in the Agreement is unenforceable for several reasons. Plaintiff’s first argument is that enforcement of the Forum Selection Clause would contravene a strong public policy of the State of South Carolina, and that South Carolina statutory law allows a South Carolina plaintiff to bring a cause of action

in South Carolina, regardless of whether a contract contains a Forum Selection Clause and the Defendant's motion should be dismissed.

**CONCLUSION:**

The Court acknowledges and appreciates the amount of research and preparation for the hearing by all counsel, as well as, the professionalism of counsel in their presentations to the Court. After consideration of the record, memoranda, arguments presented, and the applicable law, the Court acknowledges that pursuant to South Carolina law Forum Selection Clauses, have been found to be valid and controlling. In the case at hand, all parties were aware at the time the contract was signed that there was a Forum Selection Clause and all parties agreed to that forum being the State of New Hampshire. Further there has been no clear showing that the enforcement of the Forum Selection Clause would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching, therefore the Court finds that Defendant's Rule 12(b), SCRCP Motion To Dismiss for Lack of Jurisdiction filed with the Court on April 15th, 2019, is granted.

**IT SO ORDERED.**

*/s/Grace Gilchrist Knie*  
Grace Gilchrist Knie, Judge  
Resident Judge, Seventh Judicial Circuit

July 9th, 2019  
Spartanburg, South Carolina



Cherokee Common Pleas

**Case Caption:** Herbie's Famous Fireworks, Inc. , plaintiff, et al VS Fantasy Fireworks, Inc.  
**Case Number:** 2018CP1100825  
**Type:** Order/Dismissal

IT IS SO ORDERED.

S/GRACE GILCHRIST KNIE - 2760