THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
FEB 17 2022
SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Steven H. John, Circuit Court Judge

Appellate Case No. 2021-001399

B & B Crane Service, LLC, Appellant,

v.

Iron Planet, Inc., Mickey Meekins Truck & Auto Sales, Inc., and Lloyd "Mickey" Meekins, Jr, Defendants,

Of Whom Iron Planet, Inc. is the Respondent.

Appellant's Initial Brief

Wright, Worley, Pope, Ekster & Moss, PLLC
Attorneys for the Appellant
Kenneth R. Moss, Esquire SC Bar No. 15520
Richard L. Snyder, Esquire SC Bar No. 105192
628A Sea Mountain Highway
North Myrtle Beach, SC 29582
Tel: 843/ 281-9901/ Fax: 843/ 281-9903
KennethMoss@wwpemlaw.com
RichardSnyder@wwpemlaw.com

North Myrtle Beach, SC
February 14, 2022

TABLE OF CASES, STATUES, AND OTHER AUTHORITES

A. CASES **PAGE**

I. STATEMENT OF ISSUES ON APPEAL

A. Did the trial court err in granting Defendant Iron Planet, Inc.'s Motion to Dismiss based on the forum selection clause contained in Respondent's terms and conditions, when Respondent induced Appellant to enter into the contract through misrepresentations and fraudulent acts.

II. STATEMENT OF THE CASE

This case involves Plaintiff's (hereinafter "Appellant") assertion that the Defendant Iron Planet Inc. (hereinafter "Respondent") induced the Appellant to enter into a contract to purchase a tractor on Respondent's internet sales platform by misrepresentations and fraudulent acts attributable to the Respondent and/or its agents. On or about July 18, 2019, Appellant purchased a 2013 Peterbilt Tractor truck online through the Respondent's internet sales platform. The 2013

Peterbilt Tractor truck was previously owned by Mickey Meekins Truck & Auto Sales, Inc. Prior to purchasing the Tractor truck, Appellant reviewed an online video depicting the truck as operational with the motor running. The Appellant at the time, relying on the video believed the Tractor truck was operational and did purchase the same. When Appellant arrived to retrieve the Tractor truck the engine would not start and was not in working condition as advertised. Appellant's representatives who traveled to retrieve the truck were initially told that the truck was out of fuel. It was not. The Tractor truck was transported to a Peterbilt shop in Florence, South Carolina, for repairs; however, the mechanics there were never able to make the Tractor truck's engine run. Appellant has been unable to use the Tractor truck since the date of purchase.

In addition to the Tractor truck, Appellant also purchased through Respondent's online internet sales platform a flatbed trailer on or about August 22, 2019. When Appellant's employees went to retrieve the flatbed trailer in South Carolina, as directed by Respondent the trailer was not at said location. Appellant later learned the flatbed trailer was at another location and Appellant incurred costs and expenses to retrieve the flatbed trailer.

Appellant filed a Complaint on November 30, 2020 alleging Fraud, Breach of Merchantability, Larceny, Breach of Expressed Warranty, Breach of Contract, Breach of Contract accompanied by a Fraudulent Act, Negligent Misrepresentation, Negligence and Violation of the SC Automobile Dealer's Act. On February 12, 2021, Respondent filed a motion to dismiss pursuant to Rule 12(b)(6) or in the alternative pursuant to Rules 12(b)(1), 12(b)2 and 12(b)(3), South Carolina Rules of Civil Procedure (SCRCP). On March 29, 2021, Respondent's Motion to Dismiss was heard before the Honorable Steven H. John. On April 13, 2021 an Order Granting Respondent's Motion to Dismiss was entered by the Honorable Steven H. John. Appellant then filed a Motion to Reconsider on April 22, 2021. On November 5, 2021, an Order Denying

Appellant's Motion to reconsider was entered by the Honorable Steven H. John. Appellant asserts that the granting of Respondent's Motion to Dismiss was in error. Appellant filed a Notice of Appeal on November 30, 2021, transcripts of the proceedings were ordered, and then received on December 15, 2021.

III. STANDARD OF REVIEW

A 12(b)(6) motion should not be granted if "facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." Plyler v. Burns, 647 S.E.2d 188, 373 S.C. 637 (S.C. 2007) The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. Id.

A claim may be dismissed when the defendant demonstrates that the plaintiff has failed to allege facts sufficient to establish a cause of action. Rule 12(b)(6), SCRCP. An appellate court reviews the grant of dismissal according to the same standards applied by the circuit court. See Williams v. Condon, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct.App.2001). A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true. Disabato v. S.C. Ass'n of Sch. Adm'rs, 404 S.C. 433, 746 S.E.2d 329 (S.C. 2013). If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. Brazell v. Windsor, 682 S.E.2d 824, 384 S.C. 512 (S.C. 2009).

IV. ARGUMENT

A. The Trial Court Erred in Granting Respondent's Motion to Dismiss when South Carolina common Law states that a forum selection clause should not be deemed enforceable when a party was induced to enter into the contract by misrepresentations and/or fraudulent conduct.

Respondent asserts the "Site Usage Agreement" contains a forum selection clause that requires this case to be brought in King County, Washington. However, Appellant's principals are informed and believe the acts committed by the Respondent prior to the signing of the contract induced Appellant into signing said contract and but for this inducement Appellant would not have entered into the contract at all.

In Respondent's Memorandum in Support of its Motion to Dismiss, Respondent did not assert any binding South Carolina authority. Rather, said memorandum referred the Court to several federal court authorities and to one South Carolina Circuit Court opinion that was readily distinguishable.

South Carolina courts have a history of strongly disfavoring forum selection clauses in contracts. Furthermore, where actions relating to events that "induced . . . [plaintiff] into entering the contract by misrepresenting or hiding pertinent information" prior to signing the contract "it would not make logical sense to allow a forum selection clause to operate to prevent suit in South Carolina where the acts alleged occurred prior to the execution of the contract." (*Johnson v. Key Equipment Finance*, 367 S.C. 665, 627 S.E.2d 740, 742 (2006)). In this case, the contract between the Appellant and Respondent was induced by Respondent's conveyances through certain videos and inspections in an online platform that the Tractor truck was operational prior to signing the contract. However, the Tractor truck has not been operational since the date of purchase. The facts of this case are analogous to those in *Johnson v. Key Equipment Finance* in that "but for the events leading to the signing of the contract, the agreement allegedly would not have been

consummated." *Id.* It defies all logic that Appellant would have purchased or entered into a contract for a Tractor truck that was not operational.

Among its several asserted theories to bar this case from proceeding in South Carolina, Respondent has asserted the doctrine of *forum non coveniens* in its Motion to Dismiss. South Carolina Courts have "never expressly adopted or rejected the doctrine of *[f]orum non coveniens,* . . . [though on] occasion [has] recognize[d] the existence, and under appropriate circumstances, the application of this precept". *Braten Apparel Corp. v. Bankers Trust Co.*, 273 S.C. 663, 666, 259 S.E.2d 110, 112 (1979) (citing *Chapman v. Southern Railway Company*, 230 S.C. 210, 215 95 S.E.2d 170, 173 (1956)). This doctrine generally allows a change of venue for the convenience of the parties or witnesses in the interests of justice. The purpose of the doctrine of *forum non coveniens* ". . . is to allow . . . a court to dismiss an action although jurisdiction is validly asserted, when in its discretion the convenience of the parties and the ends of justice would be better served if the action was tried elsewhere." *Braten Apparel Corp. v. Bankers Trust Co.*, 273 S.C. 663, 668 259 S.E.2d 110, 113-114 (1979) (citing *Del Rio v. Ballenger Corp.*, 391 F.Supp. 1002, 1003 (D.S.C.1975)). However, Respondent cannot attack venue for this case on this basis. The facts of this case do not implicate anything to do with the State of Washington, despite the boiler-plated language in the Site Usage Agreement purporting to be a Washington contract. All individuals involved in this matter transacted business within the State of South Carolina. Specifically, Appellant is authorized to transact business and are transacting business within the State of South Carolina. Appellant has an office located within the State of South Carolina at: 1019 Highway 17 South, Suite 202, North Myrtle Beach, SC 29582. The Tractor truck was examined by mechanics in the Peterbilt shop in Florence, South Carolina. All witnesses to the events in this case are located in North Carolina or South Carolina. In addition, a flatbed trailer (which is part of this action) was

purchased by the Appellant and was said to be located and picked up after purchase in South Carolina. By Respondent's own admission in its Motion to Dismiss its principal place of business is not even located in the State of Washington, but is located in Pleasanton, California (*See* Defendant Iron Planet's Notice and Motion to Dismiss, Paragraph II, Statement of Facts, pp. 1). Despite asserting Washington as a more convenient forum, all parties involved in this transaction conduct business within the State of South Carolina and nothing relating to this case took place in the State of Washington.

Under the doctrine of *forum non coveniens*, Respondent referenced enforcement of forum selection clauses as outlined in *Senior Ride Connection v. Itnamerica*, No. 2016-CP-10-1629, 2016 S.C. C.P. LEXIS 1, *5(Charleston Cnty., 9th Judicial Circ, Dec. 28, 2016) however, this argument completely leaves out what the courts have determined when it comes to reasonability of a forum selection clause. This court must first address if the forum selection clause is reasonable and determine it to be valid or invalid before addressing venue. Forum selection clauses are generally enforceable unless they are found to be unreasonable. "Forum selection clauses may be unreasonable if: (1) their formation was induced by fraud or overreaching; (2) the complaining party will for all practical purposes be deprived of his day in court' because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) their enforcement would contravene a strong public policy of the forum state." *Insurance Products Marketing v. Indianapolis Life*, 176 F.Supp.2d 544, 546 (D.S.C. 2001). Here, Appellant was clearly induced by fraud or misrepresentations by the Respondent or agents of the Respondent, thus the forum selection clause should be found unreasonable and unenforceable.

Finally, although *Senior Ride Connection v. Itnamerica* is analogous to the instant action because both cases contain a forum selection clause in an agreement; it is certainly distinguishable as there were no allegations of fraud or misrepresentation in *Senior Ride Connection v. Itnamerica.* Here, Appellant has specifically pled that the contract was induced by fraud, larceny, and negligent misrepresentations. Furthermore, *Senior Ride Connection v. Itnamerica* is a Circuit Court opinion and is not binding upon this Court.

V. CONCLUSION

For all the foregoing reasons, the trial court erred in granting Respondent's Motion to Dismiss because Respondent failed to demonstrate just and sufficient cause to overcome Appellant's choice of Horry County, South Carolina, as the proper venue for this action. Accordingly, Appellant respectfully requests that the trial courts order granting Respondent's Motion to Dismiss be overturned.

Wright, Worley, Pope, Ekster & Moss, PLLC
Attorneys for the Appellant

s/ Kenneth R. Moss

Kenneth R. Moss, Esquire SC Bar No. 15520
Richard L. Snyder, Esquire SC Bar No. 105192
628A Sea Mountain Highway
North Myrtle Beach, SC 29582
Tel: 843/ 281-9901/ Fax: 843/ 281-9903
KennethMoss@wwpemlaw.com
RichardSnyder@wwpemlaw.com

North Myrtle Beach, SC
February 14, 2022

PROOF OF SERVICE OF INITIAL BRIEF OF APPELLANTS &
DESIGNATION OF MATTER

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Honorable Steven H. John, Presiding Judge

Appellate Case No. 2021-001399

B & B Crane Service, LLC..... *Appellant,*

v.

Iron Planet, Inc., Mickey Meekins Truck & Auto Sales, Inc.,
and Lloyd "Mickey" Meekins, Jr..... *Defendants,*

Of Whom Iron Planet, Inc. is ..... *Respondent.*

PROOF OF SERVICE

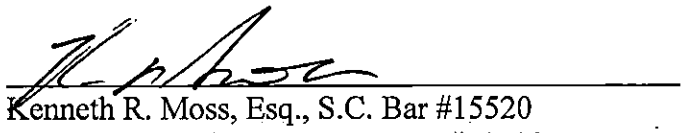
I certify that I have re-served the Initial Brief of Appellants and Designation of Matter upon Elbert S. Dorn and Alexandra H. Austin, attorneys for the Respondents Iron Planet, Inc., by emailing same and by depositing copies of it in the United States Mail, postage prepaid, on February 14, 2022 to:

Elbert S. Dorn, Esq.
Nexsen Pruet
1101 Johnson Avenue, Suite 300
Myrtle Beach, SC 29577
Telephone (843) 213-5412
Email: edorn@nexsenpruet.com

Alexandra H. Austin, Esq.
Nexsen Pruet
205 King Street, Suite 400 (29401)
Post Office Box 486
Charleston, SC 29402
Telephone (843) 577-9440
Email: aaustin@nexsenpruet.com

February 14, 2022

Wright, Worley, Pope, Ekster & Moss, PLLC
Attorneys for Appellant



Kenneth R. Moss, Esq., S.C. Bar #15520
Richard L. Snyder, Esq., S.C. Bar #105192
Wright, Worley, Pope, Ekster & Moss, PLLC
628A Sea Mountain Highway
North Myrtle Beach, SC, 29582
Telephone (843) 281-9901
KennethMoss@wwpemlaw.com
RichardSnyder@wwpemlaw.com

WRIGHT, WORLEY, POPE, EKSTER & MOSS, PLLC

ATTORNEYS AT LAW
628A SEA MOUNTAIN HWY
NORTH MYRTLE BEACH, SOUTH CAROLINA 29582
Telephone (843) 281-9901 - Fax (843) 281-9903

O. RICHARD WRIGHT, JR.
DENNIS T. WORLEY*
HAROLD G. "BUTCH" POPE
PAUL J. EKSTER*
KENNETH R. MOSS*
MICHAEL T. SMITH*
NAPOLEON B. BAREFOOT, JR.*
BOYD T. WORLEY
PRESTON B. HILTON
CHRISTOPHER C. RUSSELL
BRITTANY C. MOORE*
THOMAS V. ALDRIDGE, JR.
DAVID H. COOLEY*
GEORGE N. SPIRAKIS*
JOEL C. HYNES*
RICHARD L. SNYDER*
MARTHA HENLEY SLEDGE (Retired)

D.F. McGOUGAN, JR.
(1921 - 1994)

OTHER OFFICES
TABOR CITY, NC
WHITEVILLE, NC
SUPPLY, NC

*licensed only in SC
**licensed in NC & SC
*licensed in NC, DC & SC
*DRC-Certified Family Financial Mediator
*Of Counsel

February 14, 2022

Via Certified Mail Return Receipt Requested #70210350000139336180
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: B & B Crane Service, LLC v. Iron Planet, Inc., Mickey Meekins Truck & Auto Sales, Inc., and Lloyd "Mickey" Meekins, Jr.
Appellate Case No. 2021-001399
WWPEM File No. SC-5907-005

Dear Judge Kitchings:

Please find enclosed for filing one (1) unbound original of Initial Brief of Appellants and Designation of Matter in the above-referenced case. I have also enclosed a Certificate of Service evidencing that the same has been served upon all counsel of record.

With best regards, I am

Sincerely,

Kenneth R. Moss

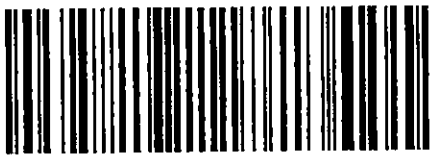
KRM/mlm
Enclosures: as stated

cc: Elbert S. Dorn, Esq. (via Email Transmission to edorn@nexsenpruet.com and US Mail)
Alexandra H. Austin, Esq. (via Email Transmission to aaustin@nexsenpruet.com and US Mail)

Wright Worley Pope Ekster & M
628 A Sea Mountain Highway
N. Myrtle Beach, SC 29582

OF THE RETURN ADDRESS, FOLD AT DOTTED LINE

CERTIFIED MAIL®



7021 0350 0001 3933 6180

CPU

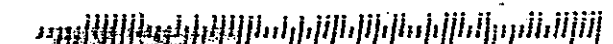
U.S. POSTAGE
$7.78
FCML 0000
Orig: 29582
Dest: 29211
02/15/22
2000051881
R2305H127153 02 6W

RETURN RECEIPT REQUESTED

RECEIVED
FEB 17 2022
SC Court of Appeals

Via Certified Mail Return Receipt Requested
#70210350000139336180

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211



2/17