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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The 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.

[INITIAL] BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

Whether, in granting Respondent's Motion to Dismiss, the circuit court erred in enforcing the mandatory and exclusive forum selection clause in the Site Usage Agreement?

STATEMENT OF THE CASE

This case involves claims by Appellant B & B Crane Service, LLC (“Appellant” or “B & B”) concerning equipment it purchased using Respondent IronPlanet, Inc.’s (“Respondent” or “IronPlanet”) online platform.

I. FACTS

B & B is a North Carolina Limited Liability Company, with its principal place of business in Ocean Isle Beach, North Carolina. (R. pp. ___ (Compl. ¶ 1; MTD Order at 1).) IronPlanet, is an online marketplace that allows third parties to buy and sell equipment over its online platform, and has its principal place of business in Pleasanton, California. (R. pp. ___ (Compl. ¶ 2; MTD Order at 1).) In order to use IronPlanet’s services, participants agree to the terms and conditions set forth in IronPlanet’s “Site Usage Terms and Conditions” (the “Site Usage Agreement”). (R. pp. ___ (MTD Tr. at 3:15-24; MTD Order at 1).) B & B agreed to the Site Usage Agreement when it registered and used IronPlanet’s online auction platform. (R. pp. ___ (MTD Tr. at 3:15-24; MTD Order at 1).)

Section 12.2 of the Site Usage Agreement contains a forum selection clause for the State of Washington. (R. pp. ___ (Ex. A, Site Usage Agreement).) It provides as follows:

12.2 Contracting Entity/Governing Law/Jurisdiction. This Agreement shall be governed by the internal substantive laws of the State of Washington, without respect to its conflict of laws principles. The application of the United Nations Convention on Contracts for the International Sale of Goods is expressly excluded. You hereby attorn to and agree to submit to the exclusive personal jurisdiction of the federal and state courts located in King County, Washington for any action relating to this Agreement.

(*Id.*)

On July 18, 2019, using IronPlanet’s online platform, B & B successfully bid on a 2013 Peterbilt Tractor (the “Tractor”).¹ (R. pp. ___ (Compl. ¶ 11; MTD Order at 2).) The Tractor was previously owned by Defendant Mickey Meekins Truck & Auto Sales, Inc. (“Meekins, Inc.”), a North Carolina Corporation, with its principal place of business in Lumberton, North Carolina.² (R. p. ___ (Compl. ¶¶ 4, 6).) B & B alleged the listing for the Tractor contained an inspection report and a video representing the Tractor to be operational. (R. p. ___ (Compl. ¶¶ 8-9).) Upon retrieving the Tractor in Lumberton, North Carolina, B & B alleged it was not in working condition. (R. pp. ___ (Compl. ¶¶ 13-16).) B & B alleged it contacted IronPlanet and was instructed to transport the Tractor to a Peterbilt dealership in Florence, South Carolina, but that it was not restored to working condition. (R. pp. ___ (Compl. ¶¶ 18-19, 22).)

Subsequent to purchasing the Tractor, B & B also successfully bid on a 2000 Manac flatbed trailer (the “Trailer”). (R. pp. ___ (Compl. ¶¶ 24-25; MTD Order at 2).) B & B

¹ All statements contained in this fact section concerning the Truck and the Trailer, defined below, are allegations contained in B & B’s Complaint, and taken to be true for purposes of IronPlanet’s Motion to Dismiss and of this appeal. Though not directly germane to the issue on appeal, they are included herein for clarity and completeness.

² Defendant Lloyd “Mickey” Meekins, Jr. (“Meekins”) is a citizen and resident of Robeson County, North Carolina, and is the principal and agent of the Meekins, Inc. (R. pp. ___ (Compl. ¶¶ 5, 28).)

alleged it was advised to pick up the Trailer in South Carolina, but that it was in fact at another location. (R. pp. ____ (Compl. ¶ 25).)

II. PROCEDURAL HISTORY

On November 30, 2020, B & B filed an action in the Court of Common Pleas for the County of Horry, State of South Carolina, bearing case number 2020-CP-26-06922, against IronPlanet, Meekins, and Meekins, Inc. in connection with its purchase of the Tractor and the Trailer. (R. pp. ____ (Compl.)) B & B alleged causes of action for fraud, breach of merchantability, larceny, breach of expressed warranty, breach of contract accompanied by a fraudulent act, negligent misrepresentation, negligence, and violation of the South Carolina Automobile Dealer's Act. (*Id.*) The breach of contract alleged by B & B pertains to the agreement between IronPlanet, Meekins, Inc., and Meekins to sell, and B & B to purchase, the Tractor. (*Id.* at ¶¶ 51-53.) The fraud alleged by B & B was that it was induced to purchase the Tractor based on purported misrepresentations as to its condition. (*Id.* at ¶¶ 31-36, 54-58.)

IronPlanet moved to dismiss B & B's Complaint on February 12, 2021 (the "Motion to Dismiss"), pursuant to Rule 12(b)(6), SCRCPP, or, in the alternative, pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(3), SCRCPP, based upon the mandatory forum selection clause in the Site Usage Agreement. (R. pp. ____ (MTD).) Following briefing and oral argument, by Order dated April 13, 2021, the circuit court granted IronPlanet's Motion to Dismiss, and dismissed IronPlanet from the case. (R. pp. ____ (MTD Order).) The court based its

ruling on its findings that “the Site Usage Agreement was entered into in an arms-length transaction by sophisticated business entities and that the forum selection clause is *prima facie* valid and enforceable.” (R. p. ___ (MTD Order at 3).) Further, that B & B had “failed to demonstrate any compelling reason not to enforce the forum selection clause, or that its enforcement would be unreasonable.” *Id.*

B & B filed its Motion to Reconsider the Order on April 22, 2021 (the “Motion to Reconsider”), asking the circuit court to reconsider its Order on the grounds that controlling South Carolina law disfavors forum selection clauses, and that a forum selection clause in a contract should not be enforced where the plaintiff was induced into entering the contract by false or fraudulent acts. (R. pp. ___ (Mot. to Recon. at 1-2).) IronPlanet filed a Memorandum in Opposition to B & B’s Motion to Reconsider on May 27, 2021. Following consideration of B & B’s motion, IronPlanet’s response, and the record in the case, the circuit court denied the Motion to Reconsider by order dated November 5, 2021.

B & B appeals the circuit court’s orders granting IronPlanet’s Motion to Dismiss and denying B & B’s Motion to Reconsider.

STANDARD OF REVIEW

An appellate court reviews the dismissal of a case pursuant to Rule 12(b)(6), SCRCP, de novo. See *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009) (“[o]n appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court.”). However, a circuit court’s decision to invoke or not to invoke the doctrine of *forum non conveniens* is reviewed for abuse of discretion. See *Braten Apparel Corp. v. Bankers Trust Co.*, 273 S.C. 663, 667, 259 S.E.2d 110, 112 (1979) (“[t]he decision to invoke the doctrine of [*forum non conveniens*] is one which lies within the discretion of the trial court.”).

An appellate court reviews the dismissal of a case pursuant to Rule 12(b)(1), SCRCP, de novo. See *Cap. City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009) (“[t]he question of subject matter jurisdiction [pursuant to Rule 12(b)(1), SCRCP] is a question of law for the court,” and the appellate court is “free to decide questions of law with no deference to the trial court.”).

An appellate court reviewing the dismissal of a case pursuant to Rule 12(b)(2), SCRCP, should affirm the circuit court’s decision “unless unsupported by the evidence or influenced by an error of law.” *Cribb v. Spatholt*, 382 S.C. 490, 496-97, 676 S.E.2d 714, 717-18 (Ct. App. 2009).

An appellate court reviews the dismissal of a case pursuant to Rule 12(b)(3) de novo. *See Sucampo Pharms., Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544, 550 (4th Cir. 2006) (appellate court reviews a motion to dismiss under Rule 12(b)(3) de novo).

ARGUMENT

The forum selection clause in the Site Usage Agreement is valid and enforceable pursuant to the doctrine of *forum non conveniens*. See *Int'l Specialty Servs. v. Willis Ins. Servs. of Ga., Inc.*, 515 F. Supp. 3d 374, 378 (D.S.C. 2021) (“[t]he appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens*.”) (citing *Atl. Marine Constr. Co. v. United States Dist. Court.*, 571 U.S. 49, 60 (2013)). See also *Braten Apparel Corp.*, 273 S.C. at 667-68, 259 S.E.2d at 113 (holding lower court’s failure to exercise the doctrine of *forum non conveniens* and dismiss the case was an abuse of discretion).

Where a valid forum selection clause exists, [], the usual presumption in favor of the plaintiff’s choice of forum is reversed. The forum selection clause is given controlling weight in all but the most exceptional cases, and the plaintiff bears the burden of proving why it should not be enforced. In this context, the plaintiff’s choice of forum merits no weight and arguments about the parties’ private interests are not to be considered. When the parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation. However, the court will enforce a forum selection clause only if it would not be unreasonable to do so.

Int'l Specialty Servs., 515 F. Supp. 3d at 378 (internal citations and quotations omitted).

In addition to dismissal on the basis of the doctrine of *forum non conveniens* pursuant to Rule 12(b)(6), SCRCF, dismissal of B & B’s claims was also proper pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(3), SCRCF. While the doctrine of

forum non conveniens is a proper vehicle for dismissal, “there does not appear to be a consensus as to which rule such a motion should be made pursuant to.”³ See *Atlantic Floor Services, Inc. v. Wal-mart Stores, Inc.*, 334 F. Supp. 2d 875, 876-80 (D.S.C. 2004) (consideration a motion to dismiss on the basis of a forum selection clause under Rules 12(b)(1), 12(b)(2), and 12(b)(3), Fed. R. Civ. P.). Regardless of the vehicle utilized, however, dismissal was proper because the mandatory and exclusive forum selection clause in the Site Usage Agreement was valid and enforceable, and its enforcement was not unreasonable.

³ Dismissal is proper under Rules 12(b)(1) and 12(b)(2), SCRCF, because the mandatory and exclusive forum section clause in the governing Site Usage Agreement divested the circuit court of jurisdiction over disputes arising pursuant to the agreement, as well as over the persons of the parties to the agreement. Courts have dismissed cases pursuant to a Rule 12(b)(1) motion for lack of subject matter jurisdiction under similar circumstances. See *Jewel Seafoods Ltd. V. M/V Peace River*, 39 F. Supp. 2d 628, 630-35 (D.S.C. 1999) (holding that plaintiff had failed to demonstrate the court had subject matter jurisdiction where the forum selection clauses in the bills of lading granted jurisdiction of disputes arising thereunder to the People’s Republic of China). Similarly, courts have dismissed cases for lack of personal jurisdiction where, as here, the forum selection clause contains mandatory jurisdictional language. See *Excell, Inc. v. Sterling Boiler & Mechanical, Inc.*, 106 F.3d 318, 321 (10th Cir. 1997).

Dismissal is likewise proper under Rule 12(b)(3), SCRCF, because the Site Usage Agreement contains mandatory provisions providing for disposition of this case in another venue. Courts have found dismissal appropriate under these circumstances. See *SeaCast of Carolinas, Inc. v. Premise Networks, Inc.*, No. 4:09-cv-00186-RBH, 2009 WL 5214314, at *2 (D.S.C. Dec. 28, 2009) (dismissing the case on the basis of improper venue where the forum selection clause provided for disputes arising thereunder to be litigated in North Carolina).

I. THE FORUM SELECTION CLAUSE IS VALID AND ENFORCEABLE.

A forum selection clause is presumed to be valid and enforceable when made at arm's length by sophisticated business entities. See *Minorplanet Sys. USA Ltd. V. Am. Aire, Inc.*, 368 S.C. 146, 150 n.1, 628 S.E.2d 43, 45 n.1 (2006) (“[u]nder South Carolina law, a consent to jurisdiction clause is generally presumed valid and enforceable when made at arm's length by sophisticated business entities.”) (citation omitted). See also *Int'l Specialty Servs.*, 515 F. Supp. 3d at 378 (“[a] forum selection clause is given controlling weight in all but the most exceptional cases, and the plaintiff bears the burden of proving why it should not be enforced.”) (citation omitted); *Leventis v. AT&T Adver. Solutions*, No. 3:11-cv-03437-CMC, 2012 WL 931081, at *3 (D.S.C. Mar. 19, 2012) (“[f]orum selection clauses are prima facie valid and should be enforced when made in arms-length transactions by sophisticated businessmen, absent some compelling and countervailing reason.”) (citation omitted).

B & B signed the Site Usage Agreement when it registered to use IronPlanet's online auction platform. The Site Usage Agreement contains the terms and conditions required of B & B to, among other things, bid on and purchase items that are listed for auction. B & B is a sophisticated North Carolina limited liability company that conducts business in multiple states. (R. pp. ___ (Compl. ¶ 1).) B & B could have chosen not to use IronPlanet's online auction platform to purchase equipment. However, having decided to obtain the benefits of IronPlanet's platform, B & B freely entered into the Site Usage

Agreement and should be held to its agreement that it would bring any and all disputes arising therefrom exclusively in King County, Washington. As an arms-length transaction between sophisticated parties, the mandatory, exclusive forum selection clause in the Site Usage Agreement is valid and enforceable under South Carolina law.

II. ENFORCEMENT OF THE FORUM SELECTION CLAUSE IS NOT UNREASONABLE.

B & B has not demonstrated that enforcement of the forum selection clause in the Site Usage Agreement is unreasonable.⁴ See *Donnelly v. ProPharma Group Topco, LLC*, No. 2:20-cv-4110-JD, 2021 WL 5865683, at *3 (D.S.C. June 22, 2021) (“[a] forum-selection clause is prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances.”) (citation and internal quotations omitted). See also *Int’l Specialty Servs.*, 515 F. Supp. 3d at 378 (holding plaintiff bears the burden of proving why a forum selection clause should not be enforced).

(1) The Formation of the Forum Selection Clause Was Not Induced by Misrepresentations or Fraud.

B & B’s claims of fraud and misrepresentation relate to its purchase of the Tractor and Trailer, not to the execution of the Site Usage Agreement. Such claims relate to the

⁴ “Forum selection clauses may be found 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.” *Leventis*, 2012 WL 931081, at *4 (citation omitted).

sales transaction, and could only have arisen after B & B had entered into the Site Usage Agreement to gain access to the auction marketplace. Accordingly, B & B has not alleged any fraud or misrepresentation prior to the execution of the contract. B & B's reliance on *Johnson v. Key Equipment Finance* is misplaced because it addresses only the applicability of a forum selection clause to causes of action alleging fraud in the inducement of the contract containing the forum selection clause. See *Johnson v. Key Equip. Fin.*, 367 S.C. 665, 668-69, 627 S.E.2d 740, 742 (2006) (declining to enforce "a forum selection clause that is narrowly tailored to certain activities. . . where the cause of action relates to acts inducing the execution of the contract.").

None of B & B's allegations against IronPlanet relate to "acts inducing the execution" of the Site Usage Agreement. The Site Usage Agreement is a valid and enforceable contract that was properly executed between two sophisticated business entities, and its enforceability is not impacted by B & B's allegations of misrepresentations allegedly made in connection with the purchase of the Tractor or Trailer taking place after the execution of the agreement. B & B's fraud allegations have no bearing on the enforceability of the forum selection clause in the Site Usage Agreement because none of those allegations relate to the formation of the Site Usage Agreement. B & B has not provided any authority for the proposition that it may escape the jurisdiction of the parties' agreed-upon forum by alleging that misrepresentations were made in connection

with a transaction subsequent to the execution of the contract containing the forum selection clause.

(2) The Forum Selection Clause Does Not Contravene South Carolina Public Policy.

There is no public policy preventing enforcement of the forum selection clause under the circumstances of this case. Despite B & B's argument that courts in South Carolina have a strong public policy disfavoring forum selection clauses in contracts, "South Carolina courts. . . have enforced forum-selection clauses in contracts, and, therefore, no such strong public policy exists." *Donnelly*, 2021 WL 5865683, at *4. *See also Leventis*, 2012 WL 931081, at *7 ("Plaintiff cannot argue that South Carolina has a sufficiently strong public policy against enforcement of forum selection clauses. . . ."); *Albemarle Corp. v. Astrazeneca UK Ltd.*, 628 F.3d 643, 652-53 (4th Cir. 2010) (rejecting public policy argument and enforcing parties' forum selection and choice of law clauses); *Lunn v. Flower*, No. 1:15-cv-04454, 2016 WL 5073928, at *6 (D.S.C. Sept. 20, 2016) (rejecting plaintiff's argument that enforcement of forum selection clause would contravene a strong public policy of South Carolina).

In fact, all public policy considerations weigh in favor of enforcement of the forum selection clause in the Site Usage Agreement. Pursuant to the doctrine of *forum non conveniens*, South Carolina courts "may account" for three "public" factors when assessing whether to dismiss or retain jurisdiction over a matter: "(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.” *Senior Ride Connection v. ITNAmerica*, No. 2016-CP-10-1629, 2016 WL 9651271, at *3 (Charleston Cnty., 9th Judicial Cir., Dec. 28, 2016). “Only in ‘the most unusual cases’ should an evaluation of these factors override the forum selected in the parties’ contract.” *Id.* (citing *Atl. Marine Constr. Co. v. United States Dist. Court*, 571 U.S. 49, 64 (2013)).

Here, there are no South Carolina parties or residents involved. B & B is a North Carolina company; IronPlanet is a foreign corporation with its principal place of business in Pleasanton, CA, (R. pp. ___ (Compl. ¶ 1)); Meekins, Inc. is a North Carolina company; and Meekins is a citizen and resident of North Carolina. In freely entering into the Site Usage Agreement, which contains a mandatory forum selection clause, the parties contemplated that litigation relating to the Site Usage Agreement would occur only in King County, Washington. South Carolina courts find that “it is important to enforce the parties’ forum-selection clause according to its plain terms.” *Id.* at *4. Indeed, South Carolina’s “appellate courts have favorably cited, relied on, and enforced these contractual terms.” *Id.* (citing *Minorplanet*, 368 S.C. at 150 n.1, 628 S.E.2d at 45 n.1). South Carolina does not possess any “unique interest” in this litigation that would warrant this Court to declare void a valid forum selection clause contained in a contractual agreement between two business entities, neither of which are domiciled in South Carolina.

Moreover, Washington State courts are best situated to apply Washington’s internal substantive laws. Paragraph 12.2 of the Site Usage Agreement is a mandatory

forum selection clause that authorizes lawsuits only in federal and state courts in King County, Washington, to the exclusion of all other jurisdictions and venues. Courts in King County, Washington are adequate forums for the resolution of this dispute, and are well versed in Washington State's substantive law, which governs the parties' dispute. Enforcement of the forum selection clause will not deprive B & B of a remedy, nor of its day in court.

Finally, additional public considerations weigh in favor of enforcement of the forum selection clause. *See T.R. Helicopters, LLC v. Bell Helicopter Textron, Inc.*, No. 3:10-2250-JFA, 2010 WL 4781158, at *4 (D.S.C. Nov. 17, 2010) (holding that if South Carolina courts found forum selection clauses unenforceable, it could affect the business climate of the state). Public policy favors the freedom of contract by private parties, and thus courts should enforce contracts in order to effectuate outcomes that the parties contemplated when they formed their contracts. As an online platform that facilitates the sale of heavy equipment across the country, IronPlanet provides an efficient market for sellers and buyers of large vehicles. By creating this market, IronPlanet's online services reduce procurement costs for construction companies, transportation companies, and other companies like B & B, which are a vital part of the American economy. Patchwork litigation across the country would increase the legal risks for IronPlanet and potentially harm its ability to provide online services across state lines. *See Senior Ride Connection,*

2016 WL 9651271, at *3 (explaining that voiding certain provisions of a contract had potential to impact communities throughout the United States).

Thus, because there is no strong public policy preventing enforcement of the forum selection clause in the Site Usage Agreement, and additional public policy considerations weigh in favor of its enforcement, the circuit court properly enforced the mandatory and exclusive forum selection clause and the case was properly dismissed.

CONCLUSION

For the reasons set forth above, this Court should affirm dismissal as to IronPlanet pursuant to Rules 12(b)(6), SCRCP, or, in the alternative pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(3), SCRCP, on the grounds that the mandatory and exclusive forum selection clause in the Site Usage Agreement is valid and enforceable, and its enforcement would not be unreasonable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document, [INITIAL] BRIEF OF RESPONDENT, was served on Appellant by depositing a copy of same in the United States Mail, postage prepaid, on March 16, 2022, addressed to its counsel of record as set forth below, and also by emailing a copy of same to its counsel of record as set forth below.

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