

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

W.G. NICHOLS, INC. : CIVIL ACTION  
d/b/a NICHOLS PUBLISHING :  
 :  
v. :  
 :  
 :  
CSK AUTO, INC. :  
 : NO. 01-3789

M E M O R A N D U M

WALDMAN, J.

November 21, 2001

This action arises from a master vendor agreement by which plaintiff sold and shipped automotive books and related materials to defendant for use in its after-market automotive parts business. Plaintiff is a New Jersey corporation with its principal place of business in Pennsylvania. Defendant is an Arizona corporation with its principal place of business in that state. The amount in controversy exceeds \$75,000.

Plaintiff asserts breach of contract and breach of duty of good faith and fair dealing claims based on defendant's alleged failure to pay for merchandise received. Plaintiff asserts a conversion claim based on defendant's ordering and selling plaintiff's merchandise without paying for it. This plaintiff alleges "deprived [it] of its property rights to a portion of the proceeds." Plaintiff asserts claims for negligent and fraudulent misrepresentation based on defendant's statement that it could pay for the merchandise it ordered when it knew or should have known it could not. Plaintiff also asserts a Lanham

Act claim for an unfair and deceptive trade practice based on defendant allegedly misrepresenting itself as a supplier of plaintiff's merchandise although it has "cancelled" the agreement and ceased to do business with defendant.

The parties' agreement contains a choice of law provision which states that the agreement will be construed under Arizona law and that all rights and remedies of the parties to the agreement will be governed by the law of that state. The agreement also contains a consent to jurisdiction in Arizona and a venue or forum selection clause providing that any legal action by a party arising out of the agreement must be instituted in the Courts of Maricopa County, Arizona.

Defendant has filed a Motion to Dismiss for lack of personal jurisdiction, lack of venue and failure to state a claim. The two latter contentions are predicated on the forum selection clause.

Based on the uncontroverted affidavit of James Wigle, it clearly appears that defendant is not subject to general personal jurisdiction in Pennsylvania. Plaintiff does not contend otherwise. Rather, plaintiff relies on the existence of specific jurisdiction.

A determination regarding personal jurisdiction is claim specific. See Remick v. Manfredy, 238 F.3d 248, 255 (3d Cir. 2001). While the court accepts a plaintiff's averments as

true, the burden is on a plaintiff to establish sufficient facts to sustain an exercise of personal jurisdiction to adjudicate a claim once a defendant challenges the existence of such jurisdiction. See Mellon Bank (East) PSFS v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992); DiMark Mktg., Inc. v. Louisiana Health Serv. & Indem. Co., 913 F. Supp. 402, 405 (E.D. Pa. 1996).

Specific jurisdiction exists if a plaintiff's claim arises from a defendant's forum-related activities such that he should reasonably anticipate being haled into court in that forum in response to such a claim. See Vetrotex Certainteed Corp. v. Consol. Fiber Glass Prod. Co., 75 F.3d 147, 151 (3d Cir. 1996). A plaintiff must show that a defendant purposefully availed itself of the privilege of conducting activities within the forum. See Hanson v. Denckla, 357 U.S. 235, 253 (1958).

That a defendant entered into a contract with a forum resident and directed communications related to the contract to the resident in the forum is not alone sufficient to establish personal jurisdiction over a breach of contract claim. See Vetrotex, 75 F.3d at 152; Farino, 960 F.2d at 1223; Atlantic Fin. Fed. V. Bruno, 698 F. Supp. 568, 572-73 (E.D. Pa. 1988). In determining personal jurisdiction over a breach of contract claim, a court considers the character and location of the contract negotiations, the terms of the contract, the type of goods being sold and the parties' course of dealing. See Remick,

238 F.3d at 256; Allied Leather Corp. v. Altama Delta Corp., 785 F. Supp. 494, 501 (M.D. Pa. 1992); Cloverbrook C&D, Inc. v. Wm. Graulich & Assoc., 664 F. Supp. 960, 961 (E.D. Pa. 1987).

It appears that defendant proactively negotiated price and thus was not a purely passive purchaser. There is, however, no showing of protracted negotiations over details of the agreement. Plaintiff has not demonstrated that negotiations were based or centered in the forum. Rather, each party appears to have communicated from its home base to the other at its home base.

There were no shipments of goods into the forum. Payment, however, was to be sent to plaintiff in the forum. The agreement contained both a non-Pennsylvania choice of law provision and forum selection clause which would certainly diminish, if not extinguish, any expectation of being sued in the seller's home state. See Allied Leather, 785 F. Supp. at 501.

The goods being sold were preprinted books and related business materials. They were not sophisticated highly priced equipment. See id. at 502.

As to the parties' course of dealing, they had done business with each other for several years. The nature of that business, however, was merely the periodic purchase as needed of merchandise by defendant from plaintiff. Plaintiff did agree to give defendant certain discounts and marketing credits and to

sell merchandise to defendant during the one-year contract period at terms at least equal to those offered any other customer. The agreement expressly provided that defendant was not required to make any purchase from plaintiff and could cancel any order which was placed, without cost, upon a determination by defendant that it no longer needed the product. Either party could terminate the agreement within 30 days of the one-year renewal period.

There was no franchise arrangement. There was no agency relationship. There was no joint venture. Indeed, the parties' agreement expressly provided that the sole relationship between them was that of buyer and seller. There was no exclusive dealing arrangement. There was no provision requiring an ongoing series of transactions. There is no showing that defendant ever sent a representative to the forum or did anything in Pennsylvania to facilitate the performance of the contract or the resolution of any dispute arising from it.

Plaintiff has not established sufficient forum contacts to warrant an exercise of personal jurisdiction over this claim.

The relationship of buyer and seller is not the type of special or fiduciary relationship which may give rise to an independent claim for breach of a duty of good faith and fair dealing. See Enyart v. Transamerica Insurance Co., 985 P.2d 556, 561 (Ariz. App. 1998). Insofar as plaintiff asserts that defendant breached such a duty by "failing to pay" for goods

received, this is merely a reiteration of a breach of contract claim predicated on defendant denying plaintiff the benefits of its bargain. As the parties' agreement expressly provides for payment, plaintiff's remedy is its breach of contract claim. See Rowland v. Great States Insurance Co., 20 P.3d 1158, 1167 (Ariz. App. 2001). In any event, a buyer's failure to tender payment occurs in the buyer's state and not in the state where payment would have been received by the seller. See Cottman Transmission Systems, Inc. v. Martino, 36 F.3d 291, 295 (3d Cir. 1994).

Plaintiff has not established sufficient forum contacts to warrant an exercise of personal jurisdiction over this claim.

Conversion is the wrongful exercise of dominion or control over the property of another party which denies or seriously interferes with that party's rights in the property. See Focal Point, Inc. v. U-Haul Co. of Arizona, Inc., 746 P.2d 488, 489 (Ariz. App. 1986). Plaintiff's claim is predicated on defendant's alleged deprivation of plaintiff's "property rights to a portion of the proceeds" of the sale of the purchased merchandise. Plaintiff, however, does not otherwise allege facts from which a right to receive or to be paid from a portion of these proceeds is apparent. In any event, the act of conversion occurs where a defendant wrongfully exercises dominion over the property in question. If an act of conversion occurred in this case, it would have been in Arizona.

Plaintiff has not established sufficient forum contacts to warrant an exercise of personal jurisdiction over the conversion claim.

The direction by a defendant of a misrepresentation to a plaintiff in the forum is a forum contact sufficient to warrant an exercise of personal jurisdiction over a claim predicated on that very misrepresentation. See Ealing Corp. v. Harrods Ltd., 790 F.2d 978, 983 (1st Cir. 1986); Glen Eagle Square Equity Associates v. First National Bank of Pasco, 1993 WL 405387, \*2 (E.D. Pa. Oct. 12, 1993); Bruno, 698 F. Supp. at 573 n.6. Plaintiff has shown a forum contact sufficient to warrant an exercise of personal jurisdiction over its misrepresentation claims.

The gist of plaintiff's Lanham Act claim appears to be that by selling its products without paying for them, defendant has engaged in an unauthorized sale of plaintiff's products which constitutes a deceptive and unfair trade practice. The unauthorized sale of a trademarked item does not constitute a Lanham Act violation, however, representations by a seller falsely suggesting that it is an authorized dealer of the producer may. See F. Schumacher v. Silver Wallpaper & Paint, 810 F. Supp. 627, 631 (E.D. Pa. 1992). Plaintiff seems to allege the latter in paragraph 44 of its complaint.

The Lanham Act does not provide for nationwide service of process. Thus, the same minimum forum contacts analysis is applied in determining personal jurisdiction. See Max Daetwyler Corp. v. Meyer, 762 F.2d 290, 293 (3d Cir.), cert. denied, 474 U.S. 980 (1985); DeJames v. Magnificence Carriers, Inc. 654 F.2d 280, 286 (3d Cir.), cert. denied, 454 U.S. 1085 (1981); Delta/Ducon Components Group Co. v. Ducon Fluid Transport Co., 2000 WL 15072, \*3 (E.D. Pa. Jan. 3, 2000). Plaintiff provides no information regarding how, where or to whom the alleged offending sales and representations were made. The court cannot conscientiously conclude that personal jurisdiction may properly be exercised over plaintiff's Lanham Act claim.

It appears that the court lacks personal jurisdiction over most of plaintiff's claims. Any judgment rendered in the absence of such jurisdiction would, of course, be void. See In re Tuli, 172 F.3d 707, 712 (9th Cir. 1999); Rogers v. Hartford Life & Accident Ins. Co., 167 F.3d 933, 940 (5th Cir. 1999).

The forum selection clause provides an independent basis for dismissal. See Salovaara v. Jackson Nat. Life Ins. Co., 246 F.3d 289, 298 (3d Cir. 2001); International Software Systems, Inc. v. Amplicon, 77 F.3d 112, 114-15 (5th Cir. 1996). Plaintiff does not claim the forum selection clause was procured by fraud and has not made a "strong showing" that litigation in the selected forum would be "so gravely difficult" as to

effectively deprive it of its proverbial day in court. Foster v. Chesapeake Ins. Co., 933 F.2d 1207, 1219 (3d Cir. 1991).

Plaintiff does contend that litigation in Arizona would be burdensome. Plaintiff notes that "[b]ecause Nichols values the opinions of its current counsel, it would end up having to pay two law firms to prosecute this action." Such a self-imposed burden cannot defeat a forum selection clause. Were it otherwise, a party could always evade such a clause by initiating suit in a preferred forum through counsel whose opinions it presumably values or who would not have been retained. Maricopa County includes Phoenix which is a major city with many law firms.

Plaintiff also identifies three witnesses involved in plaintiff's dealings with defendant who are not subject to subpoena in Arizona. One states that he is afraid to fly since the events of September 11, 2001 and two state they are too busy to go to Arizona. These witnesses are former officers of plaintiff and appear to be quite cooperative with it. If these individuals ultimately refuse to appear to testify at the time of any trial in Arizona, their testimony can be presented by videotape without impairing plaintiff's case. The proffered testimony is not involved. The essence of the testimony is that the witnesses received assurances from defendant that it would

pay its account and relied on them in continuing to ship merchandise on credit to defendant.

Assuming that a court may appropriately weigh the factors pertinent to a transfer under 28 U.S.C. § 1404(a) in considering a motion to dismiss because of a forum selection provision, see Salovaara, 246 F.3d at 299, these factors do not weigh against enforcement of the clause in this case. In any such balancing process, a forum selection clause is entitled to substantial weight. See Jumara v. State Farm Ins. Co., 55 F.3d 873, 880 (3d Cir. 1995); Versar, Inc. v. Ball, 2001 WL 818354, \*1 (E.D. Pa. July 12, 2001).

Of the applicable Jumara factors, see Jumara, 55 F.3d at 879-80, two favor trial here. Plaintiff and three of its witnesses would be more inconvenienced. Four favor trial in Arizona. Defendant would be more inconvenienced. Most of the claims arose there. The court in Arizona would be far more familiar with that state's governing law. The enforceability of any judgment is better ensured if rendered by a court which unquestionably has personal jurisdiction over all of the claims presented. There has been no showing or suggestion that any necessary records could be produced in one forum but not the other. Neither forum has a particularly more significant local interest in deciding the controversy than the other. The public policies of neither forum would be frustrated by trial in the

other. The interest of each community and the public policy of both states is satisfied by a fair determination of the rights and obligations of their respective corporate citizens in this relatively routine business dispute. There has been no showing of administrative difficulties in either forum or of any net inefficiency from trial in the designated forum. The substantial consideration accorded to the parties' valid forum selection provision is not outweighed by the balance of other factors.

Plaintiff asks that the case be transferred to the District of Arizona rather than dismissed upon enforcement of the forum selection provision and suggests that the court may do so sua sponte. Where a defendant does not move under § 1404(a) but only for dismissal under Rule 12, "a district court retains the judicial power to dismiss notwithstanding its consideration of § 1404." Salovaara, 246 F.3d at 299. Nevertheless, it is generally more practical to transfer a case to a designated forum when this may be done and the court also has the power to do so. Id. A federal court, however, may not transfer a case to a state court. This is true under § 1404(a) and for lack of jurisdiction.

Plaintiff contends that the parties' forum selection clause encompasses the United States District Court for the District of Arizona whose jurisdiction includes Maricopa County. The clause contains no reference to the federal courts. It does

not specify courts "in" Maricopa County. It specifies courts "of" Maricopa County. This suggests literally the Maricopa County courts and not any court which sits "in" the County or whose jurisdiction includes the County. At a minimum, it is unclear that the parties designated a federal forum and a determination of their intent would require consideration of extrinsic evidence. Any question regarding ambiguity of or the effect to be given to this language is best resolved by a federal court in Arizona applying Arizona contract law, should plaintiff elect to proceed there. In these circumstances, the prudent course is dismissal and not transfer. Plaintiff will not be prejudiced thereby as Arizona has a savings statute. See A.R.S. § 12-504(A); Templer v. Zele, 803 P.2d 111, 112 (Ariz. App. 1990).

Accordingly, defendant's motion will be granted. An appropriate order will be entered.

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O R D E R

AND NOW, this                    day of November, 2001, upon  
consideration of defendant's Motion to Dismiss and plaintiff's  
response thereto, consistent with the accompanying memorandum, **IT**  
**IS HEREBY ORDERED** that said Motion is **GRANTED** and accordingly the  
above action is **DISMISSED** without prejudice.

BY THE COURT:

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JAY C. WALDMAN, J.