

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

THOMAS GETCHELL	:	CIVIL ACTION
	:	
v.	:	NO. 05-4715
	:	
BARRY-WEHMILLER COMPANIES	:	
INC.	:	

MEMORANDUM AND ORDER

Juan R. Sánchez, J.

December 1, 2005

Thomas Getchell asks this Court to decide whether his employment agreement with Barry-Wehmiller Companies is enforceable and Barry-Wehmiller asks me to decide where it is enforceable. Considering the forum selection clause and weighing the factors of Federal Rule of Civil Procedure 1404(a), I will transfer the case to a federal district court in Missouri.

FACTS

Getchell was hired as a salesman by Pneumatic Scale, a subsidiary of Barry-Wehmiller, on May 29, 2002. On April 30, 2002, Getchell signed a Non-Competition and Confidentiality Agreement with Barry-Wehmiller. Pneumatic Scale terminated Getchell's employment on April 15, 2005, and on June 15, 2005 he was hired by Per-Fil, selling auger filling equipment in the packaging machinery field. On August 4, 2005 Barry-Wehmiller sent Getchell a cease and desist letter alleging his employment with Per-Fil violated the April 2002 non-compete agreement Getchell signed in April 2002.

Getchell states he has complied with the provisions of the non-compete agreement which

prohibit revealing Barry-Wehmiller's confidential information or trade secrets or soliciting other Barry-Wehmiller employees. Getchell argues the non-compete agreement is over-broad because Per-Fil competes only with 1.5 percent of Barry-Wehmiller's total business. Getchell states he has worked most of his adult life in the packaging industry, the industry from which Barry-Wehmiller would exclude him. Getchell argues the agreement is not reasonably necessary to protect Barry-Wehmiller's interests.

Getchell filed a declaratory judgment action in Chester County Court of Common Pleas. Barry-Wehmiller removed the case to this Court and then filed a Motion to Transfer under 28 U.S.C. § 1404(a) on grounds the non-compete agreement could be enforced in Missouri, or any state where Getchell is employed, "at the sole election" of Barry-Wehmiller.

The clause at issue is Paragraph 10 which reads:

Governing Law and Jurisdiction. This Agreement shall be governed by and construed under the laws of the State of Missouri. Barry-Wehmiller and Employee agree that this Agreement may be enforced in any court of competent jurisdiction in the State of Missouri, which is Barry-Wehmiller's principal place of business, or in any state where Employee is employed or can be found, or is subject to jurisdiction, at the sole election of Barry-Wehmiller.

Getchell argued to this Court a declaratory judgment action is not an action to enforce the contract and so was not subject to the forum selection clause. After oral argument, Barry-Wehmiller sought and received permission to file a counterclaim which had the expected effect of bringing the litigation within the ambit of the forum selection clause.

DISCUSSION

Federal law, specifically 28 U.S.C. § 1404(a),¹ governs this Court's decision whether to give effect to the parties' forum-selection clause and transfer this case to a court in Missouri. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988). Section 1404(a) allows this Court to decide motions for transfer according to an "individualized, case-by-case consideration of convenience and fairness." *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964). This Court may transfer a civil case to another district "[f]or the convenience of the parties and witnesses, in the interest of justice..." 28 U.S.C. § 1404(a). This Court also must consider "all relevant factors to determine whether on balance the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum." *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir. 1995).

One of the relevant factors is the forum selection clause. The forum selection clause in *Ricoh* was similar to one in this case in that it selected a forum without specifying personal jurisdiction. When there is a forum selection clause, this Court must consider convenience in the light of the parties' expressed preference for a Missouri venue, the fairness of transfer in light of the forum-selection clause and the parties' relative bargaining powers. *Ricoh Corp.*, 487 U.S. at 29-30.

A forum selection clause is presumptively valid and enforceable by the forum unless the objecting party establishes (1) that it is the result of fraud or overreaching, (2) that enforcement would violate a strong policy of the forum, or (3) that enforcement would in the particular circumstances of the case result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable. *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 202 (3d Cir.), *cert.*

¹ **§ 1404. Change of venue(a)** For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

denied, 464 U.S. 938 (1983).

The effect to be given a contractual forum selection clause is determined by federal law. *Jumara*, 55 F.3d at 877. Under federal law, forum selection clauses “are *prima facie* valid and should be enforced unless the enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.” *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972) (implicitly overruled on other grounds by Rule 1404). “A forum selection clause is ‘unreasonable’ where the defendant can make a ‘strong showing’ either that the forum selection clause is ‘so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court,’ or that the clause was procured through ‘fraud or overreaching.’” *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1219 (3d Cir. 1991) (quoting *Bremen*, 407 U.S. at 15).

Both Missouri and Pennsylvania enforce forum selection clauses under the standard set forth in *Bremen*. See *Foster v. Chesapeake Ins. Co.*, 933 F.2d at 1219; *Sun World Lines, Ltd. v. March Shipping Corp.*, 801 F.2d 1066, 1067 (8th Cir. 1986). In *Bremen*, the Supreme Court held mere inconvenience or expense does not constitute unreasonableness. Thus, courts will enforce a forum selection clause unless it is unreasonable or unjust. See *Foster*, 933 F.2d at 1219; *Williams v. Life Sav. & Loan*, 802 F.2d 1200, 1202 (10th Cir. 1986); *Med. Shoppe Int’l, Inc. v. Browne*, 683 F. Supp. 731, 732 (E.D. Mo. 1988).

A forum selection clause may imply acquiescence to personal jurisdiction. Personal jurisdiction is based on individual liberty interests and may be waived by express or implied consent to jurisdiction. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *Nat’l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964) (holding a party may consent to jurisdiction by designating an agent). A choice of law provision alone does not constitute

sufficient minimum contacts; however, entering into a contract expressly providing which laws would govern disputes may confer personal jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 482 (1985). When a forum selection clause is at issue, “it is the validity and effect of such clause, and not the party’s minimum contacts with the forum, which is determinative.” *Mut. Fire, Marine & Inland Ins. Co. v. Barry*, 646 F. Supp. 831, 833 (E.D. Pa. 1986). When a party is bound by a forum selection clause, the party is considered to have expressly consented to personal jurisdiction. *Res. Ventures, Inc. v. Res. Mgmt Int’l, Inc.*, 42 F. Supp. 2d 423, 431 (D. Del. 1999). To the extent that parties have consented to personal jurisdiction in a certain forum, application of a forum state’s long-arm statute and analysis of a party’s contacts with the forum state are unnecessary. *Elec. Realty Assoc., L.P. v. Vaughan Real Estate, Inc.*, 897 F. Supp. 521, 522-23 (D. Kan. 1995).

Barry-Wehmiller has met its burden under Rule 1404(a). The forum selection clause, freely entered in to by Getchell, outweighs the putative inconvenience of the Missouri forum and provides a basis for Missouri to assert personal jurisdiction. Accordingly, I will enter an appropriate order.

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ORDER

And now this 1st day of December, 2005, Defendant's Motion To Transfer Venue (Document 7) is GRANTED. The Clerk shall transfer this matter to the United States District Court for the District of Missouri pursuant to 28 U.S.C. § 1404(a). The Clerk shall close the file in this case.

BY THE COURT:

Juan R. Sánchez, J.