

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

Basic Fun, Inc. : CIVIL ACTION  
 :  
 v. :  
 :  
 POP Marketing Group, Inc. : No. 06-1129

**MEMORANDUM AND ORDER**

Fullam, Sr. J.

June 12, 2006

Basic Fun filed a petition in this Court to vacate or modify an arbitration award. POP has filed a petition in the Eastern District of Kentucky to confirm the award. Basic Fun has its principal place of business in this District; POP's is in Kentucky. POP has moved to dismiss this action for improper service, lack of jurisdiction, and improper venue.

The parties arbitrated in Kentucky pursuant to the following clause in the contract:

Any dispute that may arise relative to this agreement shall be heard in an arbitration before the American Arbitration Association at its office in Louisville, Kentucky, POP and Basic agree to be subject to the jurisdiction and venue of the State and Federal Courts of the State of Kentucky for the purposes of the enforcement of any finding by the arbitrator. Kentucky is chosen by Basic and POP as a neutral venue for both parties.

Ex. A. to Def.'s Mem (punctuation in original). As a forum-selection clause, the wording leaves something to be desired. Upon reading the entire clause in context I conclude that the choice of forum is permissive, not mandatory. See Koresko v.

Nationwide Life Ins. Co., 403 F. Supp. 2d 394 (E.D. Pa. 2005).

The parties agreed only that the arbitration itself had to take place in Kentucky (and despite that agreement, the arbitration hearings were held in Cincinnati, Ohio).

Without an agreement to litigate exclusively in Kentucky, venue is proper here. The Supreme Court has held that petitions to confirm, vacate, or modify awards may be filed either in the district where the arbitration took place or in any district appropriate under the general venue statute, 28 U.S.C. § 1391. Cortez Byrd Chips, Inc. v. Harbert Constr. Co., 529 U.S. 193, 198 (2000). Basic Fun asserts without contradiction that its performance, a substantial part of the events or omissions giving rise to the claim, occurred in this District. Although venue would be proper, and arguably preferable, in Kentucky, POP has not shown that venue is improper here.

As venue is proper, so is jurisdiction. POP does not argue that it is not subject to personal jurisdiction in Pennsylvania; it had substantial contacts with Basic Fun in Pennsylvania concerning the formation and performance of the contract.

Although venue and jurisdiction lie in this District, Basic Fun has not validly served POP. According to the affidavit of service, service was accepted by "Mike Jones, Floor Manager, POP Marketing" at "11564 Dixie Highway, Walton, KY." An "affidavit of due diligence" by the process server reflects attempted

service at "615 Philadelphia Avenue, Covington KY" (POP was not located there) and at "36 Henry Avenue, Fort Thomas, KY" (although there was mail addressed to POP, no one was there).

POP submits an affidavit from Jeannie Morgan, who states that she is the president of POP and its principal office is at 36 Henry Avenue in Fort Thomas. Ms. Morgan avers that Mike Jones never has been an employee of POP and that POP does not have any employees at 11564 Dixie Highway, a facility owned by A.L. Jones, Inc., which manufactures products for POP. Mike Jones is the brother of A.L. Jones, and according to Mike Jones's affidavit, he was at 11564 Dixie Highway attempting to sell a car and accepted the papers because the process server was interfering with his efforts. He also avers that the process server did not ask if he had authority to accept the papers. The affidavit is silent as to whether Mr. Jones stated that he was a floor manager.

Pursuant to Federal Rule of Civil Procedure 4, because Basic Fun did not seek a waiver of service, service is governed by Pennsylvania law. Basic Fun contends that it acted in accordance with Rule 424 of the Pennsylvania Rules of Civil Procedure, which allows for service upon "the manager, clerk or other person for the time being in charge of any regular place of business or activity of the corporation." Pa. R. Civ. P. 424. The evidence is unclear as to whether 1154 Dixie Highway is a "regular place

of business or activity" for POP. I need not decide that issue, because even if POP could be served at that address, Basic Fun has not established that service on Mike Jones was effective as to POP. Even if Mr. Jones identified himself as the floor manager, as per the affidavit of service, there is no evidence that Mr. Jones identified himself as a person who could accept service or that his authority was apparent. See Grand Entertainment Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476 (3d Cir. 1993) (holding that receptionist in lobby of building, who was not employed by defendants, lacked sufficient connection for service). Plaintiff has the burden to establish proper service, and the affidavit of service, when countered with the affidavits of Ms. Morgan and Mr. Jones, is insufficient. Taylor v. Creditel Corp., 2004 Westlaw 2884208 (E.D. Pa. Dec. 13, 2004).

POP urges dismissal for improper service because the action can proceed in Kentucky. The Court has broad discretion in choosing whether to dismiss the complaint or quash service. Umbenhauer v. Woog, 969 F.2d 25, 30 (3d Cir. 1992). Given that there is reason to believe that proper service could be effected, and jurisdiction and venue are otherwise proper, I will quash service and afford Basic Fun 30 days to effect proper service.

An order follows.

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O R D E R

AND NOW, this 12th day of June 2006, upon consideration of Defendant's Motion to Dismiss and the response thereto, and for the reasons stated in the accompanying memorandum,

IT IS hereby ORDERED that:

1. The Motion to Dismiss is DENIED.
2. Service is QUASHED. Plaintiff shall have thirty (30) days from the date of this Order to effect proper service upon Defendant POP Marketing Group, Inc.

BY THE COURT:

/s/ John P. Fullam  
Fullam, Sr. J.