

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

KEYSTONE HELICOPTER : CIVIL ACTION  
v. :  
TEXTRON INC., AVCO CORP. :  
TEXTRON LYCOMING TURBINE ENGINE DIV. :  
AMER. EUROCOPTER CORP., MBB : No. 97-257  
HELICOPTER CORP., ALLIEDSIGNAL INC.

**ORDER-MEMORANDUM**

And Now, this 3rd day of September, 1998 defendants' three motions for partial summary judgment, Fed.R.Civ.P. 56,<sup>1</sup> are ruled upon as follows:

1. Defendants Avco Corp. and Textron Inc. on Count I of the amended complaint (RICO), and on Counts IV and V (breach of express and implied warranty) - denied without prejudice to reassertion. It is a triable issue whether the parties' agreement regarding the statute of limitations defense<sup>2</sup> embodies these claims.

2. Defendant AlliedSignal on Counts II (breach of contract) and VI (breach of contract) - granted without prejudice

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<sup>1</sup> Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The movant has the burden of showing that there is no triable issue. The opposing party must point to specific, affirmative evidence in the record - and not simply rely on allegations or denials in the pleadings - in order to defeat a properly supported motion. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed.2d 265 (1986); Knabe v. Boury Corp. 114 F.3d 407, 410 n.4 (3d Cir. 1997).

<sup>2</sup> See Pl. opp. mot. exhs. 1-2.

to reassertion of these claims in the proper forum. The "Asset Purchase Agreement" between Avco Corp. and Textron, Inc., which is the source of the liability alleged in these counts against defendant AlliedSignal,<sup>3</sup> limits lawsuits arising out of it to courts in the State of Delaware.<sup>4</sup>

A forum selection clause, which is a matter of contract, not venue, will be enforced unless fundamentally unfair. Carnival Cruise Lines v. Shute, 499 U.S. 585, 595, 111 S. Ct. 1522, 1528, 113 L. Ed.2d 622 (1991); see also National Micrographics Systems, Inc. v. Canon U.S.A., Inc., 835 F. Supp. 671, 679 (D.N.J. 1993) (Simandle, J.) (citing Carnival Cruise Lines). Such clauses are also enforceable against a third-party beneficiary.<sup>5</sup> Coastal Steel Corp. v. Tilgham Wheelabrator, Ltd., 709 F.2d 190, 203 (3d Cir. 1983). Here, there is no contention that the provision was a product of fraud or undue means. Instead, according to plaintiff, a procedural waiver or estoppel occurred when AlliedSignal did not challenge venue via a pre-answer motion under Fed.R.Civ.P. 12. Pl. subst. mem. at 5. However, inasmuch as a forum selection clause

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<sup>3</sup> The "product-line successor" theory of liability against AlliedSignal in this count has already been dismissed. See Order of December 1, 1997.

<sup>4</sup> The agreement provides: "Any action to enforce, or which arises out of or in an way relates to, any of the provisions of this Agreement shall be brought and prosecuted in such court or courts located within the State of Delaware as provided by law..." See def. mem. at 2-3.

<sup>5</sup> As noted by defendant AlliedSignal, the question of whether plaintiff is an intended third-party beneficiary of the Asset Purchase Agreement is itself a question "arising out of" that agreement and therefore subject to the forum selection clause.

does not involve venue, the defense was properly raised in AlliedSignal's answer to the complaint.

As to Counts III (promissory estoppel), IV (express warranty) and V (implied warranty) - denied without prejudice to reassertion since it is unclear on the present record whether the theory of liability against AlliedSignal depends in toto on the "Asset Purchase Agreement."<sup>6</sup>

A Rule 16 conference shall be held on Thursday, October 1, 1998 at 4:30 p.m. to discuss trial scheduling and resolution.

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Edmund V. Ludwig, J.

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<sup>6</sup> According to AlliedSignal: "[These counts] include AlliedSignal in their titles but do not contain any allegations that AlliedSignal made the underlying representations or warranties." Def. mem. at 4.