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NO. COA06-112

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

AKIMA CORPORATION,
Plaintiff-Appellant

v.

Mecklenburg County
No. 05 CVS 340

SATELLITE SERVICES, INC.,
Defendant-Appellee

Appeal by plaintiff from order entered 3 October 2005 by Judge Timothy Lee Patti in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 August 2006.

Smith, Cooksey & Vickstrom, P.L.L.C., by Neil C. Cooksey, for plaintiff-appellant.

Troy & Watson, P.A., by Christian R. Troy and Amy M. Watson, for defendant-appellee.

CALABRIA, Judge.

Akima Corporation ("plaintiff") appeals from an order granting defendant's motion to dismiss the case for lack of subject matter jurisdiction and personal jurisdiction. We reverse.

On 21 April 2003, plaintiff, an Alaskan corporation with a business office in Charlotte, North Carolina, entered into a Teaming Agreement ("the agreement") with Satellite Services, Inc. ("defendant"), a Michigan corporation. The parties agreed to form a team on an exclusive basis to obtain a contract to provide "base operating support services" to the United States Air Force ("the

government") for services at March Air Reserve Base ("the project"). Pursuant to the terms and conditions of the agreement, defendant was required to submit the bid as prime contractor and plaintiff would perform the subcontract work, if the government awarded the contract for the project. The last clause of the agreement contained a forum selection clause for any disputes that arose. Specifically, the clause stated, "[a]ny dispute arising from . . . or relating to this Agreement shall be subject to adjudication by a court of competent jurisdiction in the State of Michigan unless otherwise agreed upon by the Parties."

In September of 2003, plaintiff proposed to defendant the minimum price to perform subcontracting work for the project was the aggregate price of approximately \$1.2 million. Defendant, allegedly without plaintiff's consent, submitted an offer to the government that reduced the value of plaintiff's subcontract to approximately \$1.02 million. In July of 2004, the government awarded the contract to defendant who, several months later, offered to subcontract the project to plaintiff for less money than plaintiff's original proposal. Plaintiff refused defendant's offer, and on 6 January 2005, plaintiff filed a complaint in Mecklenburg County, North Carolina. The complaint alleged breach of contract, unfair and deceptive trade practices, and *quantum meruit*. On 2 February 2005, defendant filed a motion to dismiss alleging, *inter alia*, the forum selection clause deprived the trial court of both subject matter jurisdiction and personal jurisdiction. On 3 October 2005, the trial court granted

defendant's motion to dismiss, concluding that the forum selection clause in the agreement was valid. Plaintiff appeals.

Plaintiff argues the trial court erred in granting defendant's motion to dismiss. Plaintiff contends the forum selection clause is not a mandatory forum selection clause and, thus, the trial court maintained subject matter jurisdiction over the dispute. We agree.

A forum selection clause "designates a particular state or court jurisdiction as the one in which the parties will litigate any disputes arising out of their contract or contractual relationship." *Cable Tel Serv., Inc. v. Overland Contr'g, Inc.*, 154 N.C. App. 639, 641, 574 S.E.2d 31, 33 (2002) (citations omitted). Importantly, "the interpretation of a contract is governed by the law of the place *where the contract was made*." *Szymczyk v. Signs Now Corp.*, 168 N.C. App. 182, 187, 606 S.E.2d 728, 733 (2005) (emphasis added). In determining where the contract was made, we look to "the place at which the *last act* was done by either of the parties." *Id.* (emphasis added) (citations omitted). See also, *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 785 (1986) ("Under North Carolina law, a contract is made in the place where the last act necessary to make it binding occurred.").

"We employ [an] abuse-of-discretion standard to review a trial court's decision concerning clauses on venue selection." *Mark Grp. Int'l, Inc. v. Still*, 151 N.C. App. 565, 566, 566 S.E.2d 160, 161 (2002). An abuse of discretion standard is appropriate "because

the disposition of such cases is highly fact-specific[.]” *Cox v. Dine-A-Mate, Inc.*, 129 N.C. App. 773, 776, 501 S.E.2d 353, 355 (1998). When reviewing a determination of the trial court for an abuse of discretion, we consider “whether [the trial court’s] decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision.” *Mark Group*, 151 N.C. App. at 566, 566 S.E.2d at 161.

In the case *sub judice*, defendant’s Vice President of Business Development, Roy Varner, executed the agreement in Michigan on 23 April 2003, two days after plaintiff’s Vice-President, W.J. Brinkman, executed the agreement in North Carolina. Pursuant to *Szymczyk*, the state of Michigan is the state where the “contract was made,” and therefore, Michigan law governs the enforceability of the forum selection clause. *Szymczyk*, 168 N.C. App. at 187, 606 S.E.2d at 733.

The Supreme Court of Michigan has noted that section 600.745 of the Michigan Compiled Laws “expressly permits parties to contractually agree, in advance, to personal jurisdiction[.]” *Omne Fin., Inc. v. Shacks, Inc.*, 596 N.W.2d 591, 595 (Mich. 1999). Specifically, parties to a contract may agree that disputes arising under the contractual agreement may be brought in a Michigan court. See Mich. Comp. Laws Ann. § 600.745(2) (1996). Furthermore, if “the agreement provides the only basis for the exercise of jurisdiction,” a Michigan court “shall entertain the action,” but only if the following requirements are satisfied:

- (a) The court has power under the law of this state to entertain the action.

(b) This state is a reasonably convenient place for the trial of the action.

(c) The agreement as to the place of the action is not obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means.

(d) The defendant is served with process as provided by court rules.

Id.

Section 600.745 has received scant attention in Michigan state courts, and consequently, federal courts faced with interpreting the statute have been forced "to construe the statute in a manner most consistent with the approach Michigan courts would be likely to take." *First Nat'l Monetary Corp. v. Chesney*, 514 F. Supp. 649, 655 (E.D. Mich. 1980). Interpreting section 600.745, the United States District Court for the Eastern District of Michigan stated that "Michigan's statute requires that all four of its conditions be met in order for a court to exercise jurisdiction over these nonresidents." *Id.* at 656. The court did not say, however, that *only* a Michigan court may exercise jurisdiction if the four conditions are met. Indeed, such an interpretation would appear to contradict the plain language of the statute, which requires that "the agreement provide[] the *only basis* for the exercise of jurisdiction" before a Michigan court must exercise jurisdiction. Mich. Comp. Laws Ann. § 600.745(2) (1996) (emphasis added).

In the case *sub judice*, the forum selection clause provides that "[a]ny dispute arising from . . . or relating to this Agreement shall be subject to adjudication by a court of competent jurisdiction in the State of Michigan unless otherwise agreed upon by the Parties." The courts of Michigan have not addressed the

impact of such a contractual provision, but the weight of authority indicates that the mere use of the word "shall" does not make this forum selection clause "exclusive." The parties here agreed that disputes shall be *subject to* adjudication in Michigan; in other words, Michigan shall have personal jurisdiction over the parties. The parties did not agree, however, that disputes *must* be adjudicated in Michigan or that Michigan would have exclusive jurisdiction.

Courts typically require additional, clear language to render jurisdiction appropriate only in a selected forum. *See, e.g., TH Agric. & Nutrition, L.L.C. v. Ace Euro. Group Ltd.*, 416 F. Supp. 2d 1054, 1074 (D. Kan. 2006) ("Where the forum selection clause only specifies jurisdiction, the clause generally is not mandatory absent some further language indicating the parties' intent to make venue exclusive."). In fact, this Court has held that "'when a jurisdiction is specified in a provision of contract, the provision generally will not be enforced as a mandatory selection clause without some further language that indicates the parties' intent to make jurisdiction exclusive.'" *Cable Tel Servs., Inc. v. Overland Contracting, Inc.*, 154 N.C. App. 639, 644, 574 S.E.2d 31, 34 (2002) (quoting *Mark Group Int'l, Inc. v. Still*, 151 N.C. App. 565, 568, 566 S.E.2d 160, 162 (2002)).

Consequently, language identical to that used in the case *sub judice* has been found not to be exclusive. Although this contract is governed by Michigan law, and our precedent thus has no direct bearing on interpretation of this contract, we find it instructive

that in *Cable Tel*, we noted that "mandatory forum selection clauses 'have contained words such as "exclusive" or "sole" or "only" which indicate that the contracting parties intended to make jurisdiction exclusive.'" *Id.* at 644, 574 S.E.2d at 34-35 (quoting *Mark Group*, 151 N.C. App. at 568, 566 S.E.2d at 162). The forum selection clause in that case "provide[d] that the contract 'shall be subject to the . . . jurisdiction of the State of Colorado . . . ' but d[id] not indicate that the state courts in Colorado . . . have 'sole' or 'exclusive' jurisdiction." *Id.* at 645, 574 S.E.2d at 35. Similarly, the United States District Court for the Northern District of Alabama was presented with a forum selection clause that provided "that any dispute relating to the services sold hereunder *shall be subject to* the jurisdiction of the courts within the State of New York." *Skyline Steel Corp. v. RDI/Caesars Riverboat Casino, LLC*, 44 F. Supp. 2d 1337, 1338 (N.D. Ala. 1999). The court noted that "[t]he words 'subject to' . . . are conceptually identical to the words 'consents and submits,'" and that such forum selection clauses "d[o] not provide that jurisdiction in the courts of another state was 'exclusive' or 'mandatory.'" *Id.*

Based on the weight of authority, the forum selection clause in the case *sub judice* is not exclusive, and thus, Michigan courts are not the only courts where disputes arising under the contract between plaintiff and defendant may be resolved. According to the language of the contract, disputes "shall be subject to adjudication . . . in Michigan," and thus, Michigan courts have

jurisdiction and the parties *may* bring their disputes in Michigan. They are not *required*, however, to bring their disputes in Michigan, and the forum selection clause does not divest other courts – including North Carolina courts – of jurisdiction. Thus the trial court abused its discretion in granting defendant's motion to dismiss.

Reversed.

Judges GEER and JACKSON concur.

Report per Rule 30(e).