

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

T. HENLEY GRAVES
RESIDENT JUDGE

**SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947**

November 30, 2007

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**Re: Sun Piledriving Equipment, LLC v. Avxa, Inc., T/A Avxa Freight Logistics
C.A. No. 07C-01-010**

Date Submitted: August 24, 2007

Dear Counsel:

Pending before the Court is Avxa, Inc.'s Motion to Dismiss. The motion is granted without prejudice because, pursuant to the parties' agreement, the courts of Pinellas County, Florida, have exclusive jurisdiction over any claims arising under the contract and the proper forum for the adjudication of this dispute lies in Pinellas County, Florida.

Factual and Procedural Background

When testing a complaint against a Motion to Dismiss, all well-pleaded allegations are accepted as true. *See Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978). Applying that principle, the Court adopts the facts alleged in the Complaint; and those facts are as follows.

Sun Piledriving Equipment, LLC (hereinafter, "Sun"), a Delaware limited liability company, and Avxa, Inc. (hereinafter, "Avxa"), a Florida corporation, entered into a contract ("the Contract") whereby Avxa agreed to retrieve and transport from Sun's place of business in Delaware to Alberta, Canada, a piledriving rig. Specifically, the Contract provided that a carrier furnished by Avxa would

pick up the piledriving rig at Sun's place of business in Frankford, Delaware, and deliver the rig to Sun's customer's place of business in Red Deer, Alberta, Canada, for the total cost of \$25,660.00. In July of 2006, the carrier picked up the piledriving rig in Frankford.¹ Upon reaching the United States border with Canada, the driver discovered the tractor he was using to transport the piledriving rig could not transport the rig on Canadian roads. As a consequence, the driver asked Sun to arrange for a different tractor trailer to pick up the rig at the United States border and transport it from there to its final destination in Red Deer, Alberta. Sun complied with the driver's request and arranged forthwith for a driver to take a truck to the border to pick up the rig. Upon arriving, Sun's driver discovered the carrier's driver had not made appropriate arrangements to clear customs at the United States border. Sun's driver was then forced to return to Delaware with an empty load. Ultimately, the carrier's driver was able to clear customs and Sun, again at its own cost, arranged for other transportation to transport the rig to Red Deer.

Sun argues it suffered damages as a result of Avxa's breach of contract and that it is entitled to reimbursement for those damages. Avxa has filed a Motion to Dismiss the Complaint. The bases for the Motion are threefold. First, Avxa argues the Complaint should be dismissed because Delaware is the improper venue. Second, Avxa asserts it lacks sufficient contacts with Delaware for this Court to exercise personal jurisdiction over Avxa. Third, Avxa asserts insufficiency of process and service of process.

¹ Sun paid Avxa one half of the total cost prior to the Contract's date of performance and paid the remaining amount due shortly after the carrier picked up the rig from Frankford.

Of particular relevance to the Court's examination of the pending motion is the following language, contained in the Contract²:

Shipper agrees the laws and regulations of [sic] United States of America and the State of Florida have sole jurisdiction regarding the execution of this agreement and that the venue for all legal proceedings concerning this invoice and associated services shall be in Pinellas County, Florida.

I find that this court has personal jurisdiction over Avxa; but, due to the existence of a valid and enforceable forum selection clause that establishes Florida as the exclusive venue for these proceedings, Sun's Complaint must be dismissed. Because I reach this conclusion, I decline to address Avxa's third argument alleging insufficient process and service of process.

Discussion

Standard of Review

In a motion to dismiss, the record must be viewed in a light most favorable to the non-moving party and all reasonable inferences are considered most strongly in favor of the plaintiff. *See Greenly v. Davis*, 486 A.2d 669, 670 (Del. 1984). A motion to dismiss will not be granted if the plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint. *Daystar Sills, Inc. v. Anchor Invs., Inc.*, 2007 WL 1098129, at *1 (Del. Super. Apr. 12, 2007).

Merits

² The Contract is comprised of three pages. The first page is a generic "Dear Customer" cover letter on Avxa letterhead. The letter directs the customer (in this case, Sun) to fill out and/or correct the forms attached thereto. The following pages are also on Avxa letterhead. The second page details the shipping information and shipment description. The third, and final page, includes the "booking information", the customer's credit card information used to secure the reservation, and a paragraph of boilerplate language that describes the rights and liabilities of the contracting parties. It is within this final paragraph that the forum selection clause cited here appears.

Avxa seeks dismissal for improper venue pursuant to Superior Court Civil Rule 12(b)(3) because the Contract contains a forum selection provision that states the parties agree to litigate disputes in Pinellas County, Florida. Avxa also seeks dismissal of the Complaint because the Delaware courts do not have personal jurisdiction over Avxa. Sun disagrees and asserts this Court has personal jurisdiction over Avxa pursuant to 10 *Del. C.* § 3104(c). Sun also defends its filing in Delaware by maintaining that, although the forum selection clause creates a permissive venue in Florida, the forum selection clause does not *require* that Sun file its Complaint in Florida.

In Personam Jurisdiction

I first turn to the question of personal jurisdiction. Avxa argues that it lacks sufficient contacts with the State of Delaware for this Court to exercise properly jurisdiction over it. In support of this contention, Avxa notes that it provides brokerage services from its offices in Florida but that it does not provide the actual carrier service to its customers. On the other hand, Sun argues both subsections (1) and (2) of 10 *Del. C.* § 3104(c) identify bases for exercising personal jurisdiction over Avxa. Sun also maintains that the assertion of jurisdiction over Avxa is consistent with constitutional due process. The Court finds Sun's position persuasive.

In order for the Court to exercise personal jurisdiction over a non-resident, the Court must conclude: (1) that the defendant's actions fall under either the general or specific jurisdictional criteria of a statute; and (2) that exercising personal jurisdiction over the defendant does not offend constitutional due process. *Sheer Beauty v. Mediderm Pharms. & Labs.*, 2005 WL 3073670, at *1 (Del. Super. Oct. 27, 2005). Sun argues the Court has statutory personal jurisdiction over Avxa pursuant to 10 *Del. C.* § 3104 (c).

Section 3104 reads, in pertinent part:

As to a cause of action brought by any person arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident, or a personal representative, who in person or through an agent:

- (1) Transacts any business or performs any character of work or service in the State;
- (2) Contracts to supply services or things in this State;....

10 *Del. C.* § 3104(c). The Court may exercise one of two types of *in personam* jurisdiction over a non-resident; general or specific. *Kane v. Coffman*, 2001 WL 914016, at *2 (Del. Super. Aug. 10, 2001). Sub-sections 3104(c) (1) and (2) subject a non-resident to specific jurisdiction; “[s]pecific jurisdiction is at issue when the plaintiff’s claims arise out of acts or omissions that take place in Delaware.” *Id.*, at *3. The Delaware Supreme Court has observed:

Where personal jurisdiction is asserted on a transactional basis, even a single transaction is sufficient if the claim has its origin in the asserted transaction. Thus, if the claim sought to be asserted arose from the performance of business or the discharge of the contract, no further inquiry is required concerning any other indicia of the defendant’s activity in this state.

LaNuova D & B, S.p.A. v. Bowe Co., Inc., 513 A.2d 764, 768 (Del. 1986) (citations omitted).

Construing the facts in the manner most favorable to Sun, Sun has made a *prima facie* showing that Avxa contracted to supply services in Delaware. Although the service provided by Avxa was a brokerage service, it was nevertheless a service.³ Sun’s claim arose from the

³ Avxa cites *A..A. R. Realty Corp. v. U.S. Fire Insurance Co.*, 335 A.2d 271 (Del. Super. 1975), for the proposition that a broker does not provide services as contemplated by 10 *Del. C.* § 3104(c). The facts of that case are distinguishable. In *A.A.R. Realty*, the defendant was an insurance broker based in New York. The plaintiff engaged the defendant to obtain general liability protection with respect to a property located in Delaware. The defendant procured what purported to be such coverage from an insurance company (that was also a named defendant in the action). The defendant had no contact with the plaintiff in Delaware. The defendant had not solicited business in Delaware. The defendant had not sent employees into Delaware for the purpose of conducting its business. The sole basis for alleging Delaware courts had *in personam* jurisdiction over the defendant was that one of the locations provided for under the insurance package assembled by the defendant was located in Delaware.

performance of business or the discharge of the Contract. In light of the above-cited language, this Court finds that §§ 3104 (c)(1) and (2) confer jurisdiction over Avxa.

The second step of a personal jurisdiction inquiry requires this Court to determine whether Avxa had “sufficient minimum contacts with the State so that jurisdiction over [Avxa] does not offend traditional notions of fair play and substantial justice.” *Kane*, 2001 WL 914016, at * 2 (internal quotation marks and citations omitted). Generally speaking, communications sent by mail or fax are not sufficient minimum contacts to confer jurisdiction. *Bank of America Nat’l Trust & Sav. Ass’n v. GAC Props. Credit, Inc.*, 389 A.2d 1304, 1310 (Del. Ch. 1978). The defendant’s contacts with Delaware must “rise to such a level that it should ‘reasonably anticipate’ being required to defend itself” in the Delaware court system. *LaNuova*, 513 A.2d at 769 (citation omitted).

Avxa transacted business in Delaware by contracting for the transportation of a piledriving rig from Frankford, Delaware, to Alberta, Canada. Avxa sent the Contract to Sun’s offices in Delaware. Sun made payment directly to Avxa for the services provided by the carrier. Avxa sent a carrier into the State for retrieval of the truck. Although Avxa only brokered the deal between Sun and the actual carrier, there was no separate contract between Sun and the actual carrier. Indeed, Sun did not even know the identity of the actual carrier until the carrier arrived to pick up the rig. Avxa’s presence in Delaware was thus intentional and consumer-directed. Minimum contacts with the State, as required by due process, were satisfied. As such, the Court finds it may permissibly exercise personal jurisdiction over Avxa.

The Forum Selection Clause

I now turn to the question of whether the forum selection clause is permissive or exclusive. Sun argues that the language of a forum selection clause must unequivocally state that the forum

identified therein is intended to be the *sole* forum in which the parties may litigate their dispute. In order to properly analyze this question, the Court must first decide whether it is appropriate to apply Florida or Delaware law.

Then Vice Chancellor Steele considered this very issue in *Fitzgerald v. Cantor*, 1998 WL 842304 (Del. Ch. Nov. 5, 1998). In that case, the Chancery Court determined that the question of whether a forum selection clause was permissive or exclusive in nature should be analyzed pursuant to the law of the forum so selected. *Id.* at *1. In accordance with his opinion, I will use Florida law to analyze the substance of the Contract's forum selection clause.

In Florida, as in Delaware, "contracting parties are permitted to agree that any litigation stemming from their contract must be heard in a specific forum." *Weisser v. PNC Bank, N.A.*, 2007 WL 2848118, at *2 (Fla. 3d Dist. Ct. App. Oct. 3, 2007); *see also Health Trio, Inc. v. Margules*, 2007 WL 544156 (Del. Super. Jan. 16, 2007) ("Delaware courts have held that, if there is a forum selection clause in a contract, even when venue where the suit is filed is proper, the court should decline to proceed when the parties freely agreed that litigation should be conducted in another forum."). Florida recognizes a distinction between permissive and exclusive, or mandatory, forum selection clauses. *Weisser*, 2007 WL 2848118, at *2. A permissive forum selection clause merely indicates the parties' consent to jurisdiction and venue in the named forum; in contrast, a mandatory forum selection clause exclusively limits the place for future litigation to the named forum. *Id.* The question of whether a particular forum selection clause is permissive or exclusive raises the issue of contract interpretation. *Golf Scoring Sys. Unlimited, Inc. v. Remedio*, 877 So.2d 827, 828-29 (Fla. 4th Dist. Ct. App. 2004). When interpreting a contract, a reviewing court "should give effect to the plain and ordinary meaning of its terms". *Id.*; *see also Granados Quinones v. Swiss Bank Corp.*, 509 So.2d 273, 275 (Fla. 1987).

A forum selection clause is presumptively valid, absent an allegation that the Contract was not a “freely negotiated agreement” or that the forum selection clause is “unreasonable or unjust”. *See Health Trio*, 2007 WL 544156, at *3; *Corsec, S.L. v. VMC Int’l Franchising, LLC*, 909 So.2d 945, 946-47 (Fla. 3d Dist. Ct. App. 2005) . Sun has not made any such allegation here; accordingly, I do not find any problem with enforcing the clause as written. Applying Florida law to the question of the scope of the forum selection clause, I conclude the clause contains “words of exclusivity”. *See Shoppes L.P. v. Conn*, 829 So.2d 356, 358 (Fla. 5th Dist. Ct. App. 2002). The forum selection clause reads as follows:

Shipper agrees the laws and regulations of [sic] United States of America and the State of Florida have sole jurisdiction regarding the execution of this agreement and that *the* venue for *all* legal proceedings concerning this invoice and associated services *shall be* in Pinellas County, Florida.

(emphases added). For clarification, the first part of this sentence sets forth the parties’ choice of Florida as the governing law. The second part of this sentence is the forum selection clause. This clause uses the magic word “shall”. *See Golf Scoring*, 877 S.2d at 829. Moreover, the clause clearly indicates it is mandatory in nature with the use of the phrase “*the* venue”.

‘The’ is a definite article ‘used as a function word with a noun modified by an adjective or by an attributive noun to limit the application of the modified noun to that specified by the adjective or the attributive noun <[the] right answer>.’ As such, ‘the’ limits that to which it refers to only one, to the exclusion of all others.

Id. (quoting *Webster’s New Collegiate Dictionary* 1199 (1980 ed.)). Finally, the use of the phrase “shall be” as opposed to “may be” supports the conclusion that the forum selection clause is mandatory. *See Prof’l Planning Servs., Inc. v. Sunshine Staff Leasing, Inc.*, 695 So.2d 883, 884 (Fla. 5th Dist. Ct. App. 1997) (finding provision where parties “agreed that venue and jurisdiction shall be the Circuit Court, County of Highlands, Florida” to be mandatory); *Mercedes Homes, Inc. v. Osborne*, 687 So.2d 840, 840 (Fla. 2d Dist. Ct. App. 1996) (treating forum selection clause providing

“[v]enue for any action arising herein or related hereto shall be in Brevard County, Florida” as mandatory).

In sum, the language of the forum selection clause clearly indicates the parties intended to limit the forum for litigation arising out of the Contract to the courts of Pinellas County, Florida.

Conclusion

For the reasons set forth above, Sun Piledriving Equipment’s Complaint is dismissed without prejudice.

IT IS SO ORDERED.

Very truly yours,

T. Henley Graves

cc: Prothonotary