IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

KEYSTONE ADVERTISING SPECIALTIES, LLC, Plaintiff, vs. ANTERA SOFTWARE USA, INC., Defendant.	: NO. 20 - 0127 : : : CIVIL ACTION : : : *Preliminary Objections*

ORDER

AND NOW, following argument held May 8, 2020, on *Defendant's Preliminary Objections to Plaintiff's Complaint*, the Court hereby issues the following ORDER.

Background

Plaintiff Keystone Advertising Specialties, Inc. ("Plaintiff") initiated this action on January 24, 2020, by the filing of a Complaint alleging breach of a written contract ("Software Contract") by Defendant Antera Software USA, Inc. ("Defendant"). The parties entered into the Software Contract on September 8, 2018, pursuant to which Plaintiff purchased the software design, installation, and maintenance services of the CRM Customer Relationship Management Software package from Defendant. On February 18, 2020, Defendant filed Preliminary Objections seeking that this case be dismissed on two bases.

First, Defendant objects pursuant to Pa.R.C.P. 1028(a)(1) that this case should be dismissed due either to this Court's lack of jurisdiction over this action or improper venue, or both. Specifically, Defendant objects that the Software Contract contains a forum selection clause that provides:

> **GOVERNING LAW, VENUE and ATTORNEY'S FEES.** This MSA is governed by and construed in accordance with the substantive laws of the State of Texas without regard to its choice of law rules. The parties hereby irrevocably (i) submit to the exclusive jurisdiction of the courts of Collin County, Texas, U.S.A., and (ii) waive any objections that they may now or hereafter have as to the venue of any such action or proceeding brought in such court or that such court is an inconvenient forum. The Parties agree that service of process upon either Party may be made by certified

> or registered mail, return receipt requested, at such party's address as provided herein. Nothing in this MSA shall affect the right of either party to serve process in any other manner permitted by law. (Emphasis added).

Next, Defendant objects pursuant to Pa.R.C.P. 1028(a)(6), which authorizes objections to a pleading on the basis of the existence of an agreement for alternative dispute resolution. Defendant asserts that the subject contract contains a mediation clause that provides the following:

> **Dispute Resolution.** If a dispute arises out of or relates to this MSA, or the breach thereof, which cannot be settled through correspondence and mutual consultation of the Parties hereto, the Parties shall submit the dispute to a sole mediator selected by the Parties or, if the Parties are unable to agree to the sole mediator, the Parties shall submit the dispute to mediation. If not thus resolved after the conclusion of mediation, the Parties shall be proceed at law or equity in a court of competent jurisdiction as necessary to protect their interests. (Emphasis added).

In accordance with the Court's mandated briefing scheduling, Defendant filed a Brief of Support of Preliminary Objections on March 4, 2020, after which Plaintiff filed a Brief in Opposition on March 19, 2020. Defendant filed a Reply Brief to Plaintiff's Brief in Opposition on May 1, 2020.

In Plaintiff's Brief in Opposition, Plaintiff asserts that the forum selection clause should not apply because the written contract is a contract of adhesion and the forum selection clause is unconscionable as unreasonably favorable to Defendant. In support of this argument, Plaintiff notes that the contract was entirely drafted by Defendant without Plaintiff's input, that the forum selection clause is provided in boilerplate language not directly tailored to the parties, and that the clause is buried near the end of the contract in small-print. Plaintiff further contends that it has no direct contacts with Collin County, Texas and asserts that Lycoming County, where Plaintiff has its principal place of business, would provide a more logical forum, as seven of Plaintiff's key witnesses are located within Pennsylvania. Plaintiff further argues that enforcement of the forum selection clause would thwart Plaintiff's attempts to obtain judicial relief for the contract breach by making the issue too expensive to litigate.

Plaintiff alternately argues that the contract contains conflicting terms, as the mediation provision states that "the parties shall be free to proceed at law or equity in a court of competent jurisdiction as necessary to protect their interests." Plaintiff asserts that the Court should interpret the conflicting clauses in a contract in a way as to give effect to both provisions, rather than choosing between them. Plaintiff argues that these two provisions read together would empower the parties to proceed within a court of any competent jurisdiction, which would include, but not be limited to, Collin County, Texas.

Defendant's Reply Brief to Plaintiff's Brief in Opposition asserts that the forum selection clause is not unconscionable as the clause is not unreasonably favorable to the drafter, nor did Plaintiff lack in this case any meaningful choice but to acquiesce to the clause. Defendant further avers that a forum selection clause between two business entities will be presumptively valid and may only be found unenforceable under limited circumstances, not applicable to this case.

Analysis

The Court will first address the applicability of the Software Contract's forum selection clause. The Pennsylvania Supreme Court established in *Central Contracting Co. v. C.E. Youngdahl & Co.* that the courts will honor a freely agreed upon forum selection clause so long as the clause is not unreasonable at the time of litigation.[1] The Pennsylvania Superior Court has since elaborated that:

> [A] forum selection clause in a commercial contract between business entities is presumptively valid and will be deemed unenforceable only when: 1) the clause itself was induced by fraud or overreaching; 2) the forum selected in the clause is so unfair or inconvenient that a party, for all practical purposes, will be deprived of an opportunity to be heard; or 3) the clause is found to violate public policy.[2]

As Plaintiff does not claim that the Software Contract's forum selection clause was induced by fraud or overreaching, the Court will first address the forum selection clause's unfairness or inconvenience to Plaintiff. A forum selection clause may be avoidable in instances where the amount in controversy is so minimal that requiring a

[1] *Cent. Contracting Co. v. C. E. Youngdahl & Co.*, 209 A.2d 810, 816 (Pa. 1965).
[2] *Patriot Com. Leasing Co. v. Kremer Rest. Enters., LLC*, 915 A.2d 647, 651 (Pa. Super. 2006).

party to litigate in the selected forum would result in that party defaulting or choosing not to pursue the case in order to avoid unreasonable costs.[3] In the instant matter, for its counts of breach of contract Plaintiff seeks judgment of an unliquidated sum in excess of the $50,000.00 mandatory limitation for arbitration, along with an unliquidated sum in excess of the $50,000.00, treble damages, and attorney's fees for its claim of breach of the Unfair Trade Practices and Consumer Protection Law. The Court determines that this amount is not so nominal as to foreclose Plaintiff from litigating the action in another forum.[4] Similarly, while the fact that Plaintiff's key witnesses reside in Pennsylvania will likely create additional inconvenience and cost if this matter is removed to Collin County, Texas, the Court finds this alone will not "seriously impair" Plaintiff's ability to litigate its claim given modern technology's ability to facilitate the remote presentation of testimony and evidence.[5] The Court therefore concludes that enforcing the Software Contract's forum selection clause would not effectively preclude Plaintiff from litigating this matter.

The Court next addresses whether the forum selection clause violates public policy. The crux of Plaintiff's argument on this issue is that the Software Contract is a contract of adhesion that Plaintiff had no part in drafting. Further, in emphasizing the forum selection clause's inclusion in small print on the last page of the Software Contract, Plaintiff appears to suggest, although never explicitly argued, that it was unaware of the forum selection clause when signing the Software Contract, suggesting it would not have knowingly agreed to such a clause.

"An adhesion contract is a standard-form contract prepared by one party, to be signed by the party in a weaker position, usu[ally] a consumer, who adheres to the

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[3] *See Patriot*, 915 A.2d at 651-52; *see also Churchill Corp. v. Third Century Inc.*, 578 A.2d 532, 536 (Pa. Super. 1990) (holding that a forum selection clause relating to a breach of contract for less than $2,000 was unenforceable, as the amount was so minimal that it would force defendants to default rather than litigate the case).

[4] *See Patriot*, 915 A.2d at 652 (holding that an amount in controversy exceeding $15,000 was not so minimal as to force appellants to default rather than litigate on the merits).

[5] *See id.* In Patriot the Court affirmed the trial court's ruling, in an action involving a breach of a leasing contract, that the contract's forum selection clause requiring Appellants, variously located in Missouri, Wisconsin, and Alabama, to litigate in Pennsylvania was not unduly burdensome, even if most of the evidence and witnesses were located in other jurisdictions. The Court reasoned that, "in this age of advanced electronic transmission of information, the testimony and evidence that Appellants seek to introduce in defense of the leases can be introduced without extensive travel."

contract with little choice about the terms."[6] A form contract is not *per* se a contract of adhesion. Rather, whether a contract will be regarded as an adhesion contract depends upon the "particular circumstances and parties involved."[7] Even in situations where a court determines that a contract is an adhesion contract, a contract term in an adhesion contract will only be unenforceable when the court finds that term unconscionable. The party pleading unconscionability bears the burden of establishing first, that it lacked meaningful choice in accepting the challenged provision, and second, that the challenged provision is unreasonably favorable to the opposing party.[8]

At the outset, the Court notes that both parties to this action are business entities with extensive prior business-contracting experience. Further, the parties were involved in negotiations over the Software Contract's terms over a period of months prior to entering into the contract in September of 2018. The facts of record do not suggest that the parties were at an unequal bargaining position, that Plaintiff lacked the ability or opportunity to counter Defendant's proposed terms with its own proposed terms or, if the parties were unable to reach mutually agreeable terms, that Plaintiff lacked the meaningful ability to reject the proposed Software Contract outright and to initiate negotiations with other software providers. Additionally, even if the Software Contract's forum selection clause was a "hidden" term included in small print at the end of the contract, given Plaintiff's presumed sophistication as a business entity, its failure to closely read the Software Contract before signing does not weigh in favor of a finding of unconscionability.[9]

As Plaintiff is a sophisticated party with relatively equal bargaining power to Defendant, the Court finds the Software Contract is not an adhesion contract. Further, even if *arguendo* the Software Contract were an adhesion contract, the Software Contract is not unconscionable as there is no evidence that Plaintiff lacked any meaningful choice but to accept Defendant's proposed terms, including the forum

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[6] *Chepkevich v. Hidden Valley Resort, L.P.*, 2 A.3d 1174, 1190 (Pa. 2010) (citations omitted).
[7] *Am. S. Ins. Co. v. Halbert*, 203 A.3d 223, 228 (Pa. Super. 2019) (quoting *Denlinger, Inc. v. Dendler*, 608 A.2d 1061, 1067 (Pa. Super. 1992)).
[8] *Id.*
[9] *See Standard Venetian Blind Co. v. Am. Empire Ins. Co.*, 469 A.2d 563, 566 (Pa. 1983) (citations omitted) ("[I]n the absence of proof of fraud, failure to read [the contract] is an unavailing excuse or defense and cannot justify an avoidance, modification or nullification of the contract or any provision thereof.").

selection clause. "Absent fraud or unconscionability, courts should not set aside terms on which sophisticated parties agreed."[10,11]

Finally, the Court addresses Plaintiff's argument that reconciling the conflicting language in the Software Contract's forum selection clause and mediation clause results in a finding that the parties can bring an action within any forum of competent jurisdiction. "Clauses of a contract . . . which seem to conflict will be construed, if possible, as consistent with one another."[12] However, in situations where conflicting clauses are wholly irreconcilable, the Pennsylvania courts have traditionally held that the more general provision must give way to a special provision covering the same subject matter.[13]

In this instance, the Court does not find anything contradictory in the forum selection clause's provision that the parties "submit to the exclusive jurisdiction of Collin County, Texas" to litigate contract disputes, and the mediation clause's provision that should mediation fail, the parties proceed "in a court of competent jurisdiction." Instead, the clauses can be reconciled to mean that the parties shall proceed in a court of competent jurisdiction, and that said jurisdiction will be in Collin County, Texas. Conversely, to interpret the mediation clause in the manner asserted by Plaintiff, as allowing litigation to proceed within any competent jurisdiction, would render the mediation clause contradictory to the forum selection clause, which provides for exclusive jurisdiction within Collin County, Texas. Such a reading would be contrary to the maxim that contradictory clauses should be reconciled with each other, if possible. Lastly, even if *arguendo* the clauses could not be reconciled, the more specific jurisdictional provision within the forum selection clause would control.

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[10] *John B. Conomos, Inc. v. Sun Co. (R&M)*, , 831 A.2d 696, 708 (Pa. Super. 2003).

[11] Within its Brief in Opposition, Plaintiff also raises an objection as to the jurisdiction of the Collin County, Texas court over Plaintiff as a party. However, "[i]t is well-settled that a court's jurisdiction over the person may be conferred by consent or agreement." *Reco Equip., Inc. v. John T. Subrick Contracting, Inc.*, 780 A.2d 684, 687 (Pa. Super. 2001) (citations omitted). Plaintiff consented to jurisdiction in Collin County, Texas by entering into the Software Contract, and further agreed to waive any objections to personal jurisdiction, so Plaintiff's objection on this matter is moot.

[12] *In re Binenstock's Tr.*, 190 A.2d 288, 293 (Pa. 1963) (citing 3 Corbin, Contracts § 547 (3d ed. 1960)).

[13] *See Harrity v. Cont'l-Equitable Title & Tr. Co.*, 124 A. 493, 495 (Pa. 1924); *see also Burlington Coat Factory of Pennsylvania, LLC v. Grace Const. Mgmt. Co., LLC*, 126 A.3d 1010, 1022 (Pa. Super. 2015)

Conclusion

Pursuant to the foregoing, the Court finds that the Software Contract's forum selection is controlling. Therefore, Plaintiff's objection as to the applicability of the forum selection clause is SUSTAINED, JURISDICTION IS RELINQUISHED, and this matter is DISMISSED WITHOUT PREJUDICE to proceed in the appropriate forum. As the Court has relinquished jurisdiction over this matter, it will not address Defendant's objection regarding the applicability of the mediation clause.

IT IS SO ORDERED this 15th day of May 2020.

BY THE COURT,

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Eric R. Linhardt, Judge

cc: William Carlucci, Esq.
Thomas Marshall, Esq.
Gary Weber, Lycoming Reporter

("Since Appellants drafted a contract with two conflicting indemnity provisions, we will enforce only the narrower of the two[.]").