NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Daidone Electric, Inc. Plaintiff, v. Peter K. Tully, et. al. Defendants.	Civil Docket No. 04-196 Hon. Faith S. Hochberg, U.S.D.J. **Opinion** Dated: March 29th, 2004

HOCHBERG, District Judge:

Introduction

This Matter calls upon the Court to determine whether to grant the Motion to Dismiss brought by the Defendants for improper venue pursuant to Fed. R. Civ.12(b)(3) and for lack of personal jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(2). The Defendants contend that 1) the forum selection clause in the subcontract between Daidone and the Yonkers/Tully/Pegno Joint Venture ("YTP" or "Joint Venture") precludes Daidone from bringing this action in New Jersey; and 2) the individual defendants are not subject to personal jurisdiction in this forum.

Factual Background

This action arises from a dispute over construction and electrical work performed on the Downtown PATH train Restoration Project in the wake of the September 11, 2001 disaster. The PATH is an acronym for the Port Authority Trans Hudson, an authority controlled jointly by New York and New Jersey to govern their ports. The Project involves the reconstruction of the

Exchange Place Station, the restoration of the PATH train system between Exchange Place in Jersey City and the World Trade Center site, and the construction of the new temporary PATH station. Daidone, a subcontractor in the project, has asserted various claims, including breach of contract, RICO, and tort claims, against the Joint Venture, the companies comprising the Joint Venture, and individual Defendants John Pegno and Peter Tully. The Joint Venture consists of Tully Construction Co., Inc., A.J. Pegno Construction Corp., and Yonkers Contracting Co., Inc. Individual Defendant Peter Tully is officer and owner of Tully Construction Co., Inc., and individual Defendant John Pegno is officer and owner of A.J. Pegno Construction Corp.

On February 1, 2002, the Port Authority of New York and New Jersey entered into a contract with the Yonkers/Tully/Pegno Joint Venture for the restoration of the PATH system and construction of the temporary station at the WTC site (the "Prime Contract"). This Contract required YTP to submit to jurisdiction in both New York and New Jersey if a dispute arose between the PATH (a quasi-governmental transit authority of New York and New Jersey) and YTP. Daidone is not a party to the Prime Contract. On February 8, 2002, YTP and Daidone entered into a subcontract ("the Subcontract") for the performance of electrical work. The Subcontract requires that work performed under the Subcontract be performed in accordance with the terms of the Prime Contract.

The Subcontract between YTP and Daidone includes an exclusive forum selection clause that applies to Daidone and YTP. It narrows the jurisdictional provision in the Prime Contract as it applies to YTP and Daidone, requiring the parties to bring any action at law or equity on causes of action arising under the Subcontract in the Supreme Court of the State of New York, County

of Westchester.[1] On January 12, 2004, YTP commenced an action for breach of the Subcontract against Daidone in New York Supreme Court, County of Westchester. Four days later, on January 16, 2004, Daidone filed the instant action involving many of the same issues and parties in New Jersey.

Analysis

I. Validity of the Forum Selection Clause:

A. Legal Standard:

Forum selection clauses such as the one in the Subcontract are prima facie valid. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10, 92 S.Ct. 1907, 1913 (1972); Caspi v. Microsoft Network, LLC, 323 N.J. Super 118, 122-123 (N.J. Super. Ct. App. Div. 1999)(holding that forum selection clauses are prima facie valid and enforceable in New Jersey); General Engineering Corp. v. Martin Marietta Alumina Inc., 783 F.2d 352, 259-360 (3d Cir. 1986)(holding that the action filed in the District of the Virgin Islands must be dismissed based on the forum selection clause contained in the construction contract which specified that all actions "arising out of" the

[1]The Prime Contract provides: "The Contractor hereby irrevocably submits himself to the jurisdiction of New York and to the jurisdiction of the Courts of the State of New Jersey in regard to any controversy arising out of, connected with, or in any way concerning the Proposal or this Contract." Prime Contract, para. 56.

The Subcontract provides: "The interpretation of this Subcontract, including any alleged breach hereof, shall be governed by the laws of the State of New York. Any action at law or equity commenced by Subcontractor or Contractor on causes of action arising under this Subcontract shall be filed, and venue shall lay exclusively in the Supreme Court of the State of New York, County of Westchester, before a Justice of said Court, and Subcontractor by entering into and executing this Subcontract, expressly agrees to confer jurisdiction upon the courts of the State of New York to finally adjudicate any and all claims arising out of or stemming from this Subcontract. The Parties hereto hereby waive the right to trial by jury." Subcontract, "Governing Laws & Venue."

construction contract were to be brought in the courts of the State of Maryland); Air Economy Corp. v. Aero-flow Dynamics, Inc., 122 N.J. Super. 456, 457 (N.J. Super. Ct. App. Div. 1973)(affirming the trial court's dismissal of the complaint so that the action could be re-filed in New York, pursuant to a forum selection clause providing for the application of New York law and requiring the parties to submit to the jurisdiction of the Courts of New York). In order to deny enforcement of a forum selection clause, the Court must determine that: 1) the clause was a result of fraud or overreaching; 2) enforcement of the clause would violate a strong public policy of New Jersey; or 3) enforcement of the clause would be so seriously inconvenient such that the objecting party would be effectively denied his day in court. Hoffer v. InfoSpace.com, Inc., 102 F.Supp.2d 556, 563 (D.N.J 2000); Wilfred MacDonald, Inc. v. Cushman, Inc., 256 N.J. Super. 58, 63 (App. Div.) certif. denied 130 N.J. 17 (1992).[2] None of these factors is are present in this case.[3]

B. There is No Conflict Between the Prime Contract and the Forum Selection Clause:

Daidone's main argument is that the Prime Contract, in which the PATH of New York and New Jersey requires YTP to submit to jurisdiction in both New York and New Jersey,

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[2]This Court applies New Jersey state law to determine whether to enforce the forum selection clause. According to the governmental-interest analysis, in the absence of conflict between the laws of the respective states, New Jersey law applies. Hoffer, 102 F.Supp.2d at 562. In this case, there is no conflict between New York and New Jersey law, as both apply substantially the same test to determine the enforceability of a forum selection clause. See, e.g., Hunt v. Landers, 766 N.Y.S.2d 384, 385, 309 A.D..2d 900, 901 (N.Y. 2d Dept. 2003).

[3]Daidone does not even attempt to argue that the third factor applies. Under the circumstances of this case, Daidone cannot set forth such an argument: Daidone can easily travel to New York; Daidone performed a substantial part of the work on the project in New York; Daidone will be defending itself in the action YTP has already brought in New York State Supreme Court.

precludes enforcement of the more narrow clause in the Subcontract between Daidone and YTP, which requires that all causes of action arising from the Subcontract be brought in Westchester County, New York. This argument fails because there is no conflict between the two clauses. Therefore, the Court must give effect to both. Seabury Const. Corp. v. Jeffrey Chain Corp., 289 F.3d 63, 69 (2d Cir. 2002)("where two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect"); Keystone Fabric Laminates, Inc. v. Federal Ins. Co., 407 F.2d 1353, 1356 (3d Cir. 1969)("it is axiomatic in contract law that two provisions of a contract should be read so as not to be in conflict with each other if it is reasonably possible"); Halderman by Halderman v. Pennhurst State School and Hosp., 901 F.2d 311, 319 (3d Cir. 1990); Silverstein v. Dohoney, 108 A.2d 451, 454 (N.J. Super. Ct. App. Div. 1954)(holding that several parts of a contract should be construed to avoid conflict in its terms). The Subcontract simply narrows the Prime Contract's jurisdictional provision as to disputes between the subcontractor (Daidone) and YTP, requiring their respective actions against each other to be brought in New York. The Subcontract does not prevent the Port Authority from suing YTP in New Jersey (or New York), and vice versa. Nor is there any pending suit by the PATH in New Jersey arising out of the same occurrences, such that it would cause a hardship to Daidone to litigate in New York. Thus, it is perfectly feasible to give effect to both clauses.[4]

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[4]This Court has considered the cases cited by Daidone, in which courts have incorporated forum selection clauses into contracts. However, in those cases, the contracts into which the forum selection clauses were incorporated did not contain their own forum selection clauses. Kessman and Associates, Inc. v. Barton-Aschman Associates, Inc., 10 F. Supp.2d 682, 690 (S.D. Tex. 1997); Scott Co. of California v. U.S. Engineering Co., No. C. 94-1963, 1994 WL 519493, at * 3-4 (N.D.Cal. Sept. 19, 1994). In this case, where it is the Subcontract that contains the forum selection clause, the Court is required to give effect to both the permissive jurisdictional provision in the Prime Contract and the exclusive forum selection clause in the Subcontract.

C. The Forum Selection Clause Was Not the Product of Fraud or Overreaching:

Daidone argues that in seeking to enforce the forum selection clause, YTP points to "some boilerplate language buried at the bottom of the 'Standard Terms and Conditions' of its form subcontract." Having reviewed the Subcontract, the Court rejects this argument. The entire Subcontract is only four pages long. The forum selection clause is clearly labeled under the heading "Governing Laws and Venue," in bold and capital letters. There is no indication that Daidone, a prominent electrical company, was a victim of fraud or overreaching in agreeing to this clearly stated term in the Subcontract.

D. The Forum Selection Clause Does Not Violate Public Policy:

Daidone also asserts that enforcement of the exclusive forum selection clause violates the public policy of New Jersey. Daidone argues that it would be contrary to the interests of the State of New Jersey, which has a strong interest in the PATH restoration project, to require that disputes between Daidone and YTP be adjudicated in New York. The Port Authority of New York and New Jersey Compact, N.J.S.A. §§ 32:1-1 et. seq., is based on the fundamental premise that all Port Authority projects should be undertaken with full cooperation between New York and New Jersey. N.J.S.A. § 32:1-2. Daidone fails to persuade this Court that enforcing a forum selection clause among the parties to a subcontract that calls for a New York forum undermines this cooperation. There is no reason stated to support an inference that the New York State Supreme Court will not be sufficiently mindful of the pact between the two states. Moreover, Daidone's Complaint alleges violations of New York's Lien Law, State Finance Law, and Public Contracts Law, claims as to which New York courts have substantial interest and knowledge.

New York courts can capably decide the dispute in an unbiased manner.[5]

II. Application of the Forum Selection Clause to the Individual Defendants:

Individual defendants, Peter Tully and John Pegno, are not signatories to the Subcontract. To determine whether a non-signatory is bound by a forum selection clause, the appropriate test is whether the party is so closely related to the dispute that it becomes forseeeable that the party will be bound by the forum selection clause. Hugel v. Corporation of Lloyd's, 999 F.2d 206, 210 n. 7 (7th Cir. 1993); Cinema Laser Technology, Inc. v. Hampson, Civ. A. No. 91-1018, 1991 WL 90913, at * 3 (D.N.J 1991); Drucker's Inc. v. Pioner Electronics (USA), Inc., Civ. A. No. 91-1931, 1993 WL 431162 (D.N.J. 1993). Tully and Pegno are the presidents of two of the corporate defendants that are parties to the Subcontract. Daidone cannot avoid the forum selection clause simply by naming the Presidents of the corporations involved in the Subcontract. American Patriot Ins. Agency v. Mutual Risk Mgmt. Ltd., 248 F.Supp.2d 779, 785-786 (N.D.Ill. 2003)(holding that the plaintiffs could not avoid the forum selection clause by joining parties who did not sign the contract, but who were closely related to the dispute).

The decisions in Cinema Laser Technology, 1991 WL 90913, at * 3 and Drucker's, 1993 WL 431162, at * 7-8 are instructive. In Cinema Laser Technology, the court applied the forum selection clause to defendants who, though not signatories to the contract, were directors of the defendant corporation that was a party to the agreement. Cinema Laser Technology, 1991

[5]Baltimore Bank for Cooperatives v. Farmers Cheese Cooperative, 583 F.2d 104 (3d Cir. 1978), cited by Daidone, is totally inapposite. That case involved a question of whether the district court appropriately abstained in favor of a state regulatory scheme involving a hearing before the Milk Marketing Board. In holding that abstention was not warranted, the Third Circuit considered that the Milk Marketing Board had actually intervened as a defendant, and had indicated hostility to and virtual prejudgment of the plaintiff's claim. Id. at 112. No such factor is remotely present here.

WL 90913, at * 3. Similarly, in Drucker's, the Court rejected an argument by the Plaintiff that he should not be bound to the forum selection clause because he was not a party to the contract. Drucker's, 1993 WL 431162, at * 7-8. The Court reasoned that the individual plaintiff's presence in the action was derivative of the agreement, and held that the individual plaintiff's relationship to the corporate plaintiff made the forum selection clause applicable to his claims.[6]

III. Application of the Forum Selection Clause to Daidone's Statutory and Tort Claims:

Daidone asserts that the forum selection clause does not apply to claims other than those for breach of the Subcontract. However, this argument is contrary to the plain language of the clause. The clause provides that all causes of action arising out of the Subcontract will be filed in the Supreme Court of New York State, County of Westchester. All of Daidone's claims, including its tort and statutory claims, arise out of the Subcontract. For example, Daidone alleges that the Joint Venture misappropriated public money by failing to use funds provided by the Port Authority to pay Daidone for the work it completed. The attempt to cast such an allegation as not arising out of the Subcontract is not persuasive. In Crescent Int'l, Inc. v. Avatar Communities, Inc., 857 F.2d 943 (3d Cir. 1988), the Third Circuit affirmed dismissal of an action

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[6]Even if the forum selection clause did not apply to the individual defendants, this Court would nevertheless be inclined to dismiss the claims against Tully and Pegno for forum non conveniens. "Forum non conveniens presupposes the existence of two judicial forums each possessing jurisdiction and venue over the action, but posits that one forum may resist invocation of its jurisdiction when trial of the action would more appropriately proceed in another forum." Dahl v.United Technologies Corp., 632 F.2d 1027, 1030 (3d Cir. 1980). It would be inefficient and wasteful of judicial resources to adjudicate the claims against Tully and Pegno in New Jersey, when the integral and related claims against the corporate defendants are being litigated in New York in a previously-filed action involving the same parties and related claims. The factors set forth in Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S. Ct. 839, 843 (1947) would apply in this case. See also, Gross v. Owen, 221 F.2d 94 (D.C.Cir. 1955)(dismissing an action on forum non conveniens so that suit could be maintained in Maryland state court).

in which the agreement between the parties required any litigation based on the agreement to be maintained in Miami, Florida. The Court held that although the complaint included allegations other than breach of contract, such as RICO violations, all of the claims arose out of the contract, and the forum selection clause applied. Id. at 944-945. See also, American Patriot Ins. Agency, 248 F.Supp.2d at 785 (holding that alleged fraud, negligent misrepresentation, or RICO violations occurred because the Agreement was in place and were subject to the forum selection clause); Cinema Laser Technology, 1991 WL 90913, at * 2 (holding the forum selection clause in the joint venture agreement covered claims for RICO, fraud, negligence, and conversion because these claims were based on the joint venture agreement).

Conclusion:

The exclusive forum selection clause in the Subcontract between Daidone and the Yonkers/Tully/Pegno Joint Venture requires dismissal of this action; it can be filed in the Supreme Court of the State of New York, Westchester County.[7] The clause fairly applies to all parties in this action and does not conflict with the Prime Contract. There is no support for the contention that the clause violates New Jersey public policy. An appropriate order will issue.

/s/ Faith S. Hochberg

Hon. Faith S. Hochberg, U.S.D.J.

[7]Because the forum selection clause provides for exclusive jurisdiction in New York, this Court does not reach the question of personal jurisdiction over the individual defendants.