STATE OF MICHIGAN

COURT OF APPEALS

ACUTUS INDUSTRIES, INC. and AG INDUSTRIES, INC.,	UNPUBLISHED September 17, 2002
Plaintiffs-Appellants,	
v	No. 232483 Oakland Circuit Court
AK STEEL CORPORATION,	LC No. 00-026841-CB
Defendant-Appellee.	

Before: Smolenski, P.J., and Neff and Bandstra, JJ.

PER CURIAM.

In this contract action, plaintiffs appeal by right from a judgment dismissing their case. This appeal is being decided without oral argument pursuant to MCR 7.214(E). We affirm.

Defendant concisely sets forth the facts of this case in its brief as follows.[1] Defendant owns and operates a steel mill in Ashland, Kentucky, known as the "Ashland Works." At Ashland Works, iron ore is combined and heated with other metals to produce molten steel. The molten steel is then poured into a caster, a downward-sloping machine in which the molten steel is cooled and shaped into slabs. The caster at Ashland Works is comprised of seventeen individual segments.

In July 1995, defendant contracted with plaintiff Acutus Industries, Inc ["Acutus Industries"][2] for the maintenance and repair of the caster segments at Ashland Works. The Contractors and Service Providers Master Agreement ["Acutus Industries CMA"] provided the terms and conditions for purchase orders issued by defendant for caster segment maintenance work and repairs. The Acutus Industries CMA also contained a forum selection clause. Acutus Industries maintained an inventory of spare parts for the caster segments in order to quickly repair and complete service on the caster. Defendant eventually terminated this contract with Acutus Industries when it decided to use another vendor for maintenance and repair of the caster.

[1] We have supplemented the factual history where necessary and eliminated conclusory or argumentative statements.

[2] Acutus Industries is an indirect, wholly-owned subsidiary of plaintiff AG Industries, Inc ["AG Industries"], also known as the Gladwin Corporation.

As a result, Acutus Industries had an inventory of unused spare parts for the Ashland Works caster.

In 1998, defendant decided to increase the maximum width of the steel slabs produced by the Ashland Works caster. The "caster widening project" entailed modification to each segment of the caster. Defendant selected Mannesmann Demag Corp ["Demag"], which had originally designed the Ashland Works caster, as its contractor. Defendant and Demag agreed that AG Industries would be the primary subcontractor. AG Industries was to perform most of the actual modification work, while Demag was to provide engineering and supervisory expertise. On September 29, 1998, defendant and Demag entered into a formal contract ["Demag CMA"] regarding the caster widening project. In June 1998, in anticipation of the Demag CMA, AG Industries and Demag executed a contract ["Demag-AG Industries Cooperation Agreement"], which outlined the duties and rights of each company.

The Demag CMA contained operational and performance guarantees by Demag, and provided for liquidated damages in the event these guarantees were not met. At the end of the caster widening project, defendant concluded that some of the guarantees were not met and, therefore, withheld certain payments from Demag. In turn, Demag withheld payment from AG Industries. Acutus Industries also provided services on the caster widening project.

Subsequently, plaintiffs filed this action in Oakland County alleging promissory estoppel and unjust enrichment (counts I and II) based on defendant's refusal to pay for the inventory of caster spare parts which Acutus Industries possessed at the time the Acutus Industries CMA was terminated, and unjust enrichment and fraud (counts III and IV) based on non-payment for services performed in connection with the caster widening project. Defendant filed a motion to dismiss and/or strike, and argued that the forum selection clause in the Acutus Industries CMA and the Demag CMA required that plaintiffs bring suit in Ohio. The trial court agreed and dismissed plaintiffs' suit. Plaintiffs appealed.

Plaintiffs first argue that the forum-selection clause in the Acutus Industries CMA does not apply to their complaint's counts I and II, which involve the inventory of spare parts for the Ashland Works caster. We disagree. Contract interpretation represents a question of law, which we review de novo. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000).

The Acutus Industries CMA's forum selection clause reads as follows:

> This contract shall be governed by and interpreted in accordance with the laws of the State of Ohio, and any action or other legal proceeding of any kind, civil or criminal, legal or equitable, based upon or in any way related to the subject matter of this contract shall be brought exclusively in an appropriate court of competent jurisdiction (state or federal) located in Butler County, Ohio (if the action is brought in state court) or in the Southern District of Ohio (if the action is brought in federal court). Any action brought within such courts shall not be transferred or removed to any other state or federal court. It is further understood and agreed by the parties that, by this clause, they consent to the exercise of jurisdiction by the above-named courts as their freely negotiated choice of forum for all actions arising out of or in any way related to the subject-matter of this contract.

In their complaint, plaintiffs acknowledged that the inventory of spare parts for the Ashland Works caster was a "prerequisite to obtaining maintenance work at Ashland Works." In other words, if Acutus Industries did not maintain the inventory, defendant would not issue a purchase order for the performance of maintenance or repair work.

Plaintiffs argue that the forum selection clause is inapplicable because defendant never issued a purchase order. However, this fact is irrelevant. The language of the forum selection clause is clear. It applies to all actions "based upon, … arising out of, or in any way related to the subject-matter" of the contract. According to its terms, the subject-matter of the Acutus Industries CMA is "all purchase orders which *may* in the future be issued from [defendant] to [Acutus Industries]" regarding maintenance and repair of the Ashland Works caster. The inventory kept by Acutus Industries is clearly related to purchase orders which "may in the future" be issued. In fact, plaintiffs admit that the inventory was held for future work.

Furthermore, there is no merit to plaintiffs' arguments that the forum selection clause is not applicable because the Acutus Industries CMA (1) only applies to work done on defendant's premises, and (2) its terms and conditions only apply if they could be linked to an actual, issued purchase order. The forum selection clause contains no such restrictions. Therefore, the forum selection clause of the Acutus Industries CMA applied to plaintiffs' counts I and II.

Plaintiffs next argue that the forum-selection clause in the Demag CMA[3] does not apply to their claims involving the caster widening project (counts III and IV). Plaintiffs first note that they were not a party to the Demag CMA. However, this is not conclusive of whether plaintiffs are bound by the terms of the Demag CMA. First, the contract to which plaintiffs were a party, the Demag-AG Industries Cooperation Agreement, provides that Demag was the sole contractor with defendant, and that, subject to certain limitations, Demag's negotiated terms with defendant were binding on AG Industries.

Second, ¶ 10.8 of the Demag CMA, which the Demag-AG Industries Cooperation Agreement gave Demag express powers to negotiate, provides that

> [Demag] shall make all the terms and conditions of this Contract (so far as they are applicable) the terms and conditions of any permitted subcontract, except where [Demag] decides that it is advantageous to use any other terms and conditions; provided, however, that no such variance shall relieve [Demag] of its duties and obligations herein.

Therefore, the issue is whether the forum selection clause of the Demag CMA was incorporated into the Demag-AG Industries Cooperation Agreement.

The Demag-AG Industries Cooperation Agreement was signed several months before the Demag CMA was executed. Therefore, plaintiffs assert, the exception to the rule—that Demag could vary the terms and conditions in subcontracts where advantageous—was specifically negotiated by Demag because it had already entered into the Demag-AG Industries Cooperation Agreement which did not contain a forum selection clause.

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[3] This forum selection clause is almost identical to the one in the Acutus Industries CMA.

However, there is no indication that Demag considered, or had a reason to consider, the lack of a forum selection clause regarding disputes between a subcontractor and defendant advantageous to it. Therefore, it would appear that the forum selection clause was incorporated into the Demag-AG Industries Cooperation Agreement.

Furthermore, contrary to plaintiffs' contention, plaintiffs were aware that the terms of the Demag CMA would apply to them. The Demag-AG Industries Cooperation Agreement acknowledged that it was being executed in anticipation of the Demag CMA, and specifically provided that the Demag CMA "shall be an integral part of this Cooperation Agreement" and that revisions be made to the Demag-AG Industries Cooperation Agreement, if necessary, to comport with the terms of the Demag CMA. When one writing refers to another instrument for additional contractual terms, the two writings should be read together. *Forge v Smith*, 458 Mich 198, 207; 580 NW2d 876 (1998). Because the forum selection clause was in addition to, and did not conflict with, the terms of the Demag-AG Industries Cooperation Agreement, there was no need to revise the contract.[4] We conclude that the forum selection clause in the Demag CMA was incorporated into the Demag-AG Industries Cooperation Agreement. Therefore, plaintiffs' counts III and IV are subject to the forum selection clause.

Lastly, plaintiffs argue that dismissal of their case was not required pursuant to MCL 600.745(3).[5] Plaintiffs assert that the trial court's determination that Ohio was not a substantially less convenient forum to litigate the claims was in error. We disagree. A trial court's findings of fact are reviewed for clear error. *Sands Appliance Services, supra* at 238.

MCL 600.745(3) provides, in pertinent part:

> If the parties agreed in writing that an action on a controversy shall be brought only in another state and it is brought in a court of this state, the court shall dismiss or stay the action, as appropriate, unless any of the following occur:
>
> (c) The other state would be a substantially less convenient place for the trial of the action than this state.

In concluding that Ohio was not a "substantially less convenient" location for the parties to litigate this suit, the trial court noted that all plaintiffs' claims involved work performed by plaintiffs at Ashland Works, in Kentucky just over the Ohio border, and that many potential witnesses lived in Ohio, near defendant's headquarters. The trial court further stated the record reflected that most of the work "at issue" was performed at plaintiffs' facility in Ohio, and some in Pennsylvania; while only a portion of the work was done at plaintiffs' facility in Michigan.

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[4] The Demag-AG Industries Cooperation Agreement contained a binding arbitration clause and a choice of law clause. However, the contract is clear that these provisions only applied to the "parties" to the contract, which were defined as Demag and AG Industries.

[5] Plaintiffs also argued that the statute was inapplicable because the forum selection clause did not apply to their claims. However, having decided to the contrary above, plaintiffs' argument has no merit.

Plaintiffs argue that, in regards to their claims involving inventory for the Ashland Works caster, a substantial portion of the work manufacturing the inventory parts was performed in Michigan. Also, because the inventory was never installed in the caster, it had no connection with Ohio. However, we believe that the physical location of the inventory's manufacture and storage is irrelevant. Plaintiffs' claims allege that defendant should pay for the inventory, citing certain promises made by defendant over a series of meetings which appear to have taken place in Ohio or at Ashland Works. The persons who might need to testify are employees of defendant, all located in Ohio and Kentucky, and plaintiffs' management, who presumably are in Michigan. Thus, we cannot say that Ohio would be a "substantially less convenient" forum.

With regard to their claims arising from the caster widening project, plaintiffs assert that while some work was done in Ohio and Pennsylvania, the work performed in Michigan was substantial. However, the test is whether Ohio is a "substantially less convenient" forum. Plaintiffs admit on appeal that Michigan and Ohio are both "appropriate forums for this litigation." Therefore, we conclude that the trial court's finding was not clearly erroneous, and dismissal of plaintiffs' claims was proper.

Affirmed.

/s/ Michael R. Smolenski
/s/ Janet T. Neff
/s/ Richard A. Bandstra