IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

AVETA INC., MMM HOLDINGS, INC., and PREFERRED MEDICARE CHOICE, INC.,	)	
Plaintiffs,	)	
	)	C.A. No. 07C-11-119 MMJ
v.	)	
CARLOS LUGO OLIVIERI and ANTONIO MARRERO,	)	
Defendants.	)	

Submitted: April 16, 2008
Decided: July 28, 2008

On Motion to Dismiss of Defendants Olivieri and Marrero

DENIED

MEMORANDUM OPINION

Richard L. Horwitz, Esquire, Brian C. Ralston, Esquire, Kirsten A. Zeberkiewicz, Esquire, Potter Anderson & Corroon LLP, Wilmington, DE; David L. McClenahan, Esquire, Patrick J. McElhinny, Esquire (argued), Paul C. McCaffrey, Esquire, Kirkpatrick & Lockhart Preston Gates Ellis LLP, Pittsburgh, PA, Attorneys for Plaintiffs.

Richard L. Renck, Esquire (argued), Andrew D. Cordo, Esquire, Ashby & Geddes, Wilmington, Delaware; Manuel A. Pietrantoni, Esquire, Casellas Alcover & Burgos, P.S.C., Hato Rey, PR, Attorneys for Defendants.

JOHNSTON, J.

STATEMENT OF FACTS

Plaintiff Aveta Inc., a Delaware corporation, is the parent company of subsidiaries that provide health care benefits for elderly and chronically ill Medicare beneficiaries through local provider networks. Subsidiaries MMM Holdings, Inc. ("MMM") and Preferred Medical Choice, Inc, ("PMC") are Puerto Rico corporations, with exclusive places of business in San Juan, Puerto Rico.

On May 4, 2006, Aveta, through MMM, entered into an Agreement and Plan of Merger and Stock Purchase (the "Purchase Agreement") with PMC. MMM acquired all of PMC's Class B stock from PMC's Class B shareholders, including Olivieri and Marrero. The Purchase Agreement provides for the possibility of additional "earn out" payments to PMC shareholders, contingent upon MMM's post-acquisition performance.

In late 2006, Olivieri and Marrero were notified that there would be no "earn out" payments. Olivieri and Merrero filed suit in Puerto Rico seeking strict performance and alleging that the earn out payment obligation had been triggered. In an attempt to settle the dispute, Aveta, MMM and PMC shareholders executed a new agreement titled Total Proposal for PMC/PHM Business and Equity Incentive/Medical Management Program (the "Total Proposal Agreement").

Plaintiffs Aveta, MMM and PMC filed this action seeking declaratory judgment. Plaintiffs claim they do not owe "earn out" payments to defendants under the terms of the Purchase Agreement.

Defendants have moved to dismiss this declaratory judgment action on two grounds: (1) lack of personal jurisdiction; and (2) *forum non conveniens*.

ANALYSIS

Personal Jurisdiction

When personal jurisdiction is challenged by a motion to dismiss, the plaintiff bears the burden of showing the basis for the court's jurisdiction over the nonresident defendant.[1] The court may look beyond the complaint to affidavits and other discovery when deciding a motion to dismiss for lack of personal jurisdiction.[2] Factual inferences must be viewed in the light most favorable to the plaintiffs.[3]

Defendants argue that the PMC shareholders did not consent to jurisdiction in the Delaware courts. Plaintiffs' sole basis for personal jurisdiction is the forum selection clause in the Purchase Agreement.

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[1] *McKamey v. Vander Houten*, 744 A.2d 529, 531 (Del. Super. 1999).

[2] *Amaysing Technologies Corp. v. Cyberair Communications, Inc*., 2005 WL 578972, at *3 (Del. Ch.).

[3] *Wright v. American Home Products Corp*., 768 A.2d 518, 526 (Del. Super. 2000).

> Any action or proceeding arising out of or relating to this Agreement or any transaction contemplated hereby may be brought in the federal and state courts located in the State of Delaware, and each of the parties irrevocably submits to the exclusive jurisdiction of such courts in any such Action or Proceeding,…and agrees not to bring any action or proceeding arising out of or relating to this Agreement or any transaction contemplated hereby in any other court.

Defendants counter that the transaction in question relates to the Total Proposal Agreement, and not to the Purchase Agreement. The Total Proposal Agreement contains no choice of law provision.

Thus, personal jurisdiction is determined by which agreement controls. The Court initially must decide whether the Total Proposal Agreement arises out of or relates to the Purchase Agreement.

Controlling Document

This Court may exercise jurisdiction if: (1) the Purchase Agreement's forum selection clause is controlling; and (2) exercising jurisdiction over Defendants would be constitutionally permissible. Delaware requires a separate and independent analysis for each of these two prongs.[4]

Section 2708(b) of title 6 of the Delaware Code states:

> Any person may maintain an action in a court of competent jurisdiction in this State where the action or proceeding arises out of or relates to any contract, agreement or other undertaking for which a choice of Delaware law has been made in whole or in part….

[4] *Id.*

The Purchase Agreement confers Delaware jurisdiction on "any action or proceeding arising out of or relating to this Agreement." The Total Proposal Agreement does not contain a choice of law provision. In determining whether Delaware may exercise personal jurisdiction, three issues must be resolved: (a) whether the Purchase Agreement or the Total Purchase Agreement is controlling; (b) whether the Total Proposal Agreement is enforceable; and (c) whether the Total Proposal Agreement arises out of or relates to the Purchase Agreement.

Defendants argue that all obligations with respect to earn out payments ended upon payment or denial of the earn out fee. Thus, Defendants reason that this action is governed by the Total Proposal Agreement, not the Purchase Agreement. Defendants claim that the earn out payment in question was not contemplated by the Purchase Agreement, but by the Total Proposal Agreement, making the choice of law provision inapplicable. Defendants' version of the parties' course of dealing is supported by the Affidavits of Olivieri and Marrero, email correspondence, and the Total Proposal Agreement.

Plaintiffs assert that while the Total Proposal Agreement contains details of an earn out settlement, the parties continued to negotiate. Plaintiffs argue that the Total Proposal Agreement became just one of a

number of proposals and counterproposals, and that the parties never conducted themselves as if the Total Proposal Agreement were complete and binding. These arguments are supported by the affidavits of the CEO and of the former President of Aveta, correspondence, an unexecuted settlement agreement and general release, and other documents.

These opposing positions present sharply-disputed questions of fact. The relationship between the lawsuit and one of the agreements must be tangible, and not subject to speculation.[5] At this time, the Court cannot resolve which agreement controls. Viewing the facts in the light most favorable to Plaintiffs, the Purchase Agreement controls and the parties have agreed that Delaware may exercise personal jurisdiction. Therefore, the Court must deny Defendants' Motion to Dismiss.

Forum Non Conveniens

The Court may decline to hear a case, despite having jurisdiction over the subject matter and the parties,[6] if "considerations of convenience, expense, and the interests of justice dictate that litigation in the forum

[5] *Green Isle Partners, Ltd. S.E. v. Ritz-Carlton Hotel Co. L.L.C.*, 2000 WL 1788655, at *5 (Del. Ch.)

[6] *Chrysler First Bus. Credit Corp. v. 1500 Locust Ltd. P'ship*, 669 A.2d 104, 106 (Del. 1995).

selected by the plaintiff would be unduly inconvenient, expensive or otherwise inappropriate."[7]

To evaluate whether Defendants have made a showing of overwhelming hardship, the Court must consider the following factors:

(1) the applicability of Delaware Law;
(2) the relative ease of access of proof;
(3) the availability of compulsory process for witnesses;
(4) the pendency or nonpendency of a similar action or actions in another jurisdiction;
(5) the possibility of a need to view the premises; and
(6) all other practical considerations that would make the trial easy, expedition, and inexpensive.[8]

Defendants need not demonstrate all or a majority of factors. Defendants must establish that one or more of these factors would actually cause significant hardship and inconvenience.[9]

Defendants argue that Delaware law does not apply and that the law of Puerto Rico governs the dispute under Delaware's "most significant relationship" test.[10] Although Defendants concede that this Court is able to interpret and apply Puerto Rico law, there would be substantial expense in translating from Spanish to English the applicable caselaw and treatises.

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[7] *Monsanto Co. v. Aetna Cas. and Surety Co.*, 559 A.2d 1301, 1304 (Del. Super. 1988).

[8] *Id.* At 1304-1305; *General Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 684 (Del. 1964).

[9] *Chrysler*, 669 A.2d at 107-108.

[10] *Edelist v. MBNA America Bank*, 790 A.2d 1249, 1256 (Del. Super. 2001).

The Total Proposal Agreement was negotiated and executed in Puerto Rico. The place of contract performance is Puerto Rico. The contract subject matter is in Puerto Rico. Defendants are citizens of Puerto Rico.

Defendants claim that most of the potential witnesses and documents are in Puerto Rico, resulting in overwhelming hardship to Defendants to absorb travel and lodging expenses. Conversely, according to Defendants, Plaintiffs would not be harmed by litigating in Puerto Rico because of "their considerable financial size and strength."[11] Defendants urge that Puerto Rico would have the ability to compel more witnesses than Delaware. There currently is pending in Puerto Rico an action that Defendants argue will necessarily decide the issues in the action before this Court.

Plaintiffs vehemently disagree. Plaintiffs argue that the Purchase Agreement controls, and contains an unambiguous choice of law provision in favor of Delaware law. Plaintiffs assert that as often happens in corporate litigation, all of the documents and potential witnesses are located outside of Delaware.[12] Plaintiffs argue that Defendants have failed to make a particularized showing that specific witnesses, documents, or other evidence

[11] *See Williams Natural Gas Co. v. Amoco Production Co.*, 1990 WL 13492, at *9 (Del. Ch).

[12] *See Berger v. Intelident Solutions, Inc.*, 906 A.2d 134, 136 (Del. 2006).

necessary to defend the allegations in the Delaware complaint cannot be produced in Delaware without overwhelming hardship.

Plaintiffs have provided affidavit support listing potential witnesses as residing in New York, New Jersey, Connecticut, Nevada, Colorado and California, and relevant documents located in New Jersey and Minnesota. Plaintiffs dispute that Delaware does not have the ability to compel witnesses, who would not otherwise appear voluntarily. Additionally, Puerto Rico allegedly lacks the power to compel almost all of Plaintiffs' witnesses. Plaintiffs assert that most of the documents and written communications, relevant to the interpretation of the agreements and the parties' course of dealing, are in English. Judicial proceedings in Puerto Rico are conducted in Spanish.

This action was filed on November 14, 2007. Defendants initiated litigation in Puerto Rico on January 23, 2008, seeking specific performance of the Total Proposal Agreement. The parties agree that the Puerto Rico action essentially seeks to resolve the same earn out dispute at issue in the Delaware case.

In *Aveta, Inc. v. Colon*,[13] the Delaware Court of Chancery addressed the issue of *forum non conveniens* in a case involving the same plaintiffs as

[13] 2008 WL 323255 (Del. Ch.).

in this action. Defendant Colon, a physician practicing in Puerto Rico, was a PMC shareholder. On May 3, 2007, the plaintiffs filed in the Court of Chancery, seeking compensatory damages and a permanent injunction specifically enforcing a non-competition agreement. On September 6, 2007, Colon filed a declaratory judgment action against the plaintiffs in Puerto Rico, requesting that the non-competition agreement be declared unenforceable. The agreement provided that Delaware was the proper forum for "any action or proceeding arising out of or relating to [the] agreement."[14]

The Chancellor began his opinion by emphasizing that "Delaware's courts frequently repeat the adage that only in rare cases can a defendant successfully defeat a plaintiff's choice of forum.[15] It is even rarer that a defendant can defeat a plaintiff's choice of forum that is mandated by a contractual forum selection clause." Nevertheless, the Chancellor found the action "precisely the sort of rare case for which the doctrine of *forum non conveniens* exists."

> This is not a dispute implicating *any* aspect of the substantive law of Delaware. It is not a dispute where *any* of the relevant evidence or witnesses are located in Delaware. It is not a dispute between Fortune 500 companies incorporated in Delaware, and it is not a dispute between corporations at all. In

[14] *Id.* at *1.

[15] *See, e.g., Berger v. Intelident Solutions, Inc.,* 906 A.2d at 135; *Rapaport v. Litig. Trust of MDIP Inc.,* 2005 WL 3277911, at *2 (Del. Ch.); *Sun-Times Media Group, Inc. v. Royal & SunAlliance Ins. Co. of Can.,* 2007 WL 1811266, at *5 (Del. Super.).

> fact, it is not even a dispute that can be explained by the primary actors in English. This is a dispute in which a Delaware-incorporated but New Jersey-based Medicare provider sues an individual physician who does not speak fluent English and who lives and works in Puerto Rico. This is a dispute that centers on the enforceability of a contract executed in Puerto Rico under Puerto Rican law. This is a dispute in which nearly all evidence is located in Puerto Rico. Finally, this is a dispute that implicates the public policy of Puerto Rico towards contractually imposed restraints on the doctor/patient relationship.[16]

In contrast, viewing the facts in the light most favorable to Plaintiffs, this action involves at least certain aspects of Delaware substantive law, the relevant evidence and witnesses are in both the United States and Puerto Rico, documentary evidence is in English, and the underlying issues to not implicate public policy issues relating to doctor/patient relationships.

Having considered the six *Cryo-Maid* factors, the Court finds that Defendants have failed to demonstrate with particularity that litigation in Delaware would present an overwhelming hardship.

CONCLUSION

It would indeed be unfortunate if after expensive and time-consuming discovery, and even a trial on the merits, the Court would determine that the relevant agreement was the Total Proposed Agreement and that this Court lacked personal jurisdiction. However, that cannot be avoided. When the

[16] *Aveta, Inc. v. Colon*, 2008 WL 323255, at *8 (Del. Ch.) (Emphasis in original).

facts are viewed in the light most favorable to the non-moving party, the Purchase Agreement, with its Delaware forum selection provision, controls.

THEREFORE, Defendants' Motion to Dismiss on the grounds of lack of personal jurisdiction is hereby **DENIED.**

Further, Defendants have failed to demonstrate with particularity that litigation in Delaware will cause them or their case significant and overwhelming hardship and inconvenience.

THEREFORE, Defendants' Motion to Dismiss or Stay on *Forum Non Conveniens* Grounds is hereby **DENIED.**

IT IS SO ORDERED.

/s/ *Mary M. Johnston*
The Honorable Mary M. Johnston