IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ANTONIO LOVEMAN,	)	
	)	
Plaintiff,	)	
	)	**C.A. No. 08C-08-223 MJB**
	)	
v.	)	
	)	
THE NUSMILE, INC., a Florida Corporation, and CHAIM TOVIA, individually,	)	
	)	
Defendants.	)	

Submitted: December 5, 2008
Decided: March 31, 2009

Upon Consideration of Defendants' Motion to Dismiss.

The Motion to Dismiss is GRANTED.

OPINION AND ORDER

Sean T. O'Kelly, Esquire, Ryan M. Ernst, Esquire, Wilmington, Delaware, Attorneys for Plaintiff.

David L. Finger, Esquire, Wilmington, Delaware, Attorney for Defendants.

BRADY, J.

INTRODUCTION

This is the Court's decision on Defendants' Motion to Dismiss this action on the ground of improper venue pursuant to Superior Court Civil Rule 12(b)(3). Defendants argue that venue is improper in Delaware as the parties contractually agreed to submit to the exclusive jurisdiction of the federal and state courts of the State of Florida located in Broward County. The Court concludes that the parties entered into a contractual agreement providing for exclusive jurisdiction and venue in Florida, therefore the Motion to Dismiss is GRANTED.

FACTS

On August 25, 2008, Plaintiff Antonio Loveman ("Loveman"), a Delaware resident, filed a four count action against Defendants The NuSmile, Inc. ("NuSmile"), a Florida corporation, and Chaim Tovia ("Tovia"), a Florida resident and President of NuSmile (Tovia and NuSmile together, "Defendants"). According to the Complaint, NuSmile markets and sells oral hygiene products that whiten teeth.

In the spring of 2008, Loveman discussed with Tovia the possibility of purchasing the franchise rights to two NuSmile kiosks (the "Kiosks") operated in local area malls. Loveman alleges that during the discussions and negotiations

related to the purchase of the Kiosks, Defendants represented to him that each Kiosk makes no less than $3,000 per week in sales, and that each Kiosk needs to make at least $2,500 per week in sales to be profitable. Defendants allegedly provided Loveman with the Kiosks' daily sales receipts and manager-written daily reports via e-mail, showing that the Kiosks were profitable. Loveman alleges that this information showed sales figures for Christiana Mall that far exceeded $3,000 per week.

According to Tovia's sworn Affidavit and the copy of the Agreement provided by Defendants, it appears that Tovia faxed a copy of the Agreement from Florida to Loveman in Delaware at 2:14 p.m. on July 1, 2008. Tovia avers that he signed the document prior to it being faxed to Delaware. [1] The copy of the Agreement provided to the Court indicates that the Agreement was faxed back to Defendants from a Delaware Staples location at 11:32 a.m. on July 2, 2008. At or around that time, Loveman tendered a deposit of $20,000 to Defendants. The are two clauses in the Agreement pertinent to the resolution of this case. Those provisions state that:

> 18. This Agreement will in all respects be governed by and interpreted, construed and enforced in accordance with the laws of the State of Florida, and the parties hereto agree to submit to the exclusive

[1] The copy of the Agreement provided by Defendants is signed by Tovia and Loveman. The parties dispute whether Tovia signed the Agreement contemporaneously with Loveman. Loveman argues that the copy he received by facsimile from Tovia was not signed by Tovia. Tovia argues that he signed the Agreement before faxing it to Loveman.

jurisdiction of the federal and state courts of the State of Florida located in Broward County.

19. This Agreement is intended by the parties hereto as a complete and final expression of their agreement and understanding with respect to the subject matter hereof. This Agreement may not be changed or modified, or any covenant or provision hereof waived, except by an agreement in writing, signed by the party against whom enforcement of the change, modification or waiver is sought, and not otherwise.

After submitting the deposit and signing and faxing the Agreement to Defendants, Loveman visited the Christiana Mall and White Marsh Mall locations several times. Fewer customers than expected patronized the Kiosks. Loveman approached the Kiosks' managers and sought information regarding the volume of sales. According to Loveman, the managers informed him that the Kiosks did not earn $3,000 per week in sales, and that most weeks sales totaled $2,000 or less. Loveman contacted Defendants and requested the original receipts from the cash register and the original manager's weekly reports for the two sites. Defendants presented this information; it matched exactly the weekly sales sent via e-mail to Loveman previously by Defendants. Loveman then presented the receipts and reports to the Kiosks' managers. The managers indicated that they did not write the reports, and neither manager recognized the handwriting on the reports.

On August 25, 2008, Loveman filed suit against Defendants alleging: (1) Fraud, (2) Consumer Fraud, (3) Breach of Contract and (4) Unjust Enrichment. Loveman seeks the return of his $20,000 deposit plus interest.

THE PARTIES' ARGUMENTS

Loveman submits that there was an oral side-agreement whereby the parties agreed that he would tender the deposit to Defendants and that Defendants would afford him reasonable time to perform due diligence research on the franchises. According to the purported agreement, Loveman was not obligated to consummate a final purchase if he was not satisfied with the representations made by Defendants during negotiations. Loveman argues that Defendants never indicated that the Deposit would not be refunded if he decided not to consummate a deal. Loveman contends that the Agreement was not signed by Defendants when he received the original facsimile of the Agreement, and argues that there is no agreement because Defendants did not sign. According to Loveman, the first time he received a copy of the Agreement with Defendant's signature was when it was attached as an Exhibit to Defendants' Motion to Dismiss.

Defendants rely upon Paragraph 19 in support of their position that the rights of the parties are determined solely by the contractual language and not by any external discussions. Defendants argue that the exclusive jurisdiction and venue provision applies to contract claims *and* tort claims that grow out of that contractual relationship, therefore the parties' contractual agreement to litigate these claims in Broward County, Florida should be respected.

STANDARD OF REVIEW

Superior Court Civil Rule 12(b)(3) governs a motion to dismiss for improper venue. The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to resolve disputed issue of material facts or decide the merits of the case.[2] In reviewing a motion to dismiss, the court must assume as true all the facts pled in the complaint and view those facts and all reasonable inferences drawn from them in the light most favorable to the plaintiff.[3] However, the Court "is not shackled to the plaintiff's complaint and is permitted to consider extrinsic evidence from the outset."[4] The Court can "grant a dismissal motion before the commencement of discovery on the basis of affidavits and documentary evidence if the plaintiff cannot make out a *prima facie* case in support of its position."[5] The Court should "give effect to the terms of private agreements to resolve disputes in a designated judicial forum out of respect for the parties' contractual designation."[6]

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[2] *Belfint, Lyons, and Shuman v. Potts Welding & Boiler Repair, Co., Inc.,* 2006 WL 2788188 at *2 (Del. Super. Aug. 28, 2006).
[3] *Anglo American Sec. Fund, L.P. v. S.R. Global Intern. Fund,* L.P., 829 A.2d 143, 148-9 (Del. Ch. Aug. 4, 2003).
[4] *Halpern Eye Associates, P.A. v. E.A. Crowell & Associates, Inc.,* 2007 WL 3231617 (Del. Com. Pl. Sept. 18, 2007) (citation and internal quotations omitted).
[5] *Simon v. Navellier Series Fund,* 2000 WL 1597890 at *4 (Del. Ch. Oct. 19, 2000).
[6] *Halpern Eye Associates,* 2007 WL 3231617 at *1 (citation omitted).

ANALYSIS

A Contract Was Formed Between the Parties

In Delaware, in order to form a contract, "there must be an offer made by one person to another and an acceptance of that offer by the person to whom it is made."[7] An offer "means the signification by one person to another of his willingness to enter into a contract with him on the terms specified in the offer."[8] The subjective intention of the parties is not the test of whether a contract has been formed.[9] Rather, as the Delaware Supreme Court has stated, the "overt manifestation of assent-not subjective intent-controls the formation of a contract; that the only intent of the parties to a contract which is essential is an intent to say the words or do the acts which constitute their manifestation of assent."[10] The Court's inquiry is an objective one that determines, "whether a reasonable man would, based upon the objective manifestation of assent and all of the surrounding circumstances, conclude that the parties intended to be bound by contract."[11] "It is when all of the terms that the parties themselves regard as important have been negotiated that a contract is formed."[12]

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[7] *Salisbury v. Credit Service, Inc.,* 199 A. 674, 681 (Del. Super. Nov. 23, 1937).
[8] *Id.*
[9] *Leeds v. First Allied Connecticut Corp.,* 521 A.2d 1095, 1101 (Del. Ch. Dec. 8, 1986).
[10] *Industrial America, Inc. v. Fulton Industries, Inc.*, 285 A.2d 412, 415 (Del. 1971) (citations internal quotations omitted).
[11] *Leeds,* 521 A.2d at 1101. (citations omitted).
[12] *Id*.

In the case at bar, Loveman disputes whether a contract was formed, and specifically, claims that the contract was not signed by Defendants at or around the time Loveman signed it, and therefore, there is no agreement. The Court is satisfied that Loveman accepted Defendants' offer when he signed the Agreement, faxed it back to Defendants and tendered the Deposit, regardless of whether the contract was contemporaneously signed by Tovia. Loveman's current contention that his subjective intent was not to be bound by the Agreement - one that he signed and tendered a deposit thereunder - is irrelevant. In this case, a reasonable man must conclude, based upon Loveman's objective manifestations of assent, that the parties intended to be bound by the terms of the terms of the Agreement. Further, the Court will not consider claims that any oral agreement modified the terms of the Agreement. Paragraph 19 of the Agreement is unambiguous and demonstrates that the parties intended the Agreement to be fully integrated.[13] Given that the contract is unambiguous, the parole evidence rule bars extrinsic evidence that would be used to interpret the intent of the parties or add terms to the written contract.[14] Likewise, the acceptance of the Deposit by Defendants indicates that they intended to be bound by the Agreement. Therefore, it is the holding of the Court that the Agreement is valid and binding.

[13] *See I.U. North America, Inc. v. A.I.U. Insurance Company,* 896 A.2d 880 (Del. Super. May 2, 2006) (citing *Husband (P.J.O.) v. Wife (L.O.),* 418 A.2d 994 (Del. 1980)).
[14] *Id*. (citing *Eagle Indus., Inc. v. DeVilbiss Health Care,* 702 A.2d 1228, 1232 (Del. 1997)).

Forum Selection Clause

Delaware Courts generally "give effect to the terms of private agreements to resolve disputes in a designated judicial forum out of respect for the parties' contractual designation."[15] Deference is not afforded where either of the following exceptions exists: (1) if enforcement would be unreasonable and unjust under the circumstances; or (2) the forum selection clause was procured by fraudulent inducement."[16] "An agreement is only unreasonable when its enforcement would seriously impair Plaintiff's ability to pursue its cause of action. Mere inconvenience or additional expense is not the test of unreasonableness."[17] "If a forum selection clause validly limits a plaintiff to a single forum, that clause operates to divest a court that otherwise has jurisdiction of its status as a proper venue for the plaintiff to sue."[18]

Loveman has not demonstrated that the enforcement of the forum selection clause would impair his ability to pursue his causes of action. NuSmile is a Florida corporation and Loveman contractually agreed to litigate these claims in Florida.[19]

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[15] *Prestancia Management Group, Inc. v. Virginia Heritage Foundation, II LLC,* 2005 WL 1364616 at *7 (Del. Ch. May 27, 2005).
[16] *Id*.
[17] *Halpern Eye Associates,* 2007 WL 3231617 at *4 (citation omitted).
[18] *Id.* (citing *Simon,* 2000 WL 1597890, at *6).
[19] Under Florida law, "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.*, 967 So. 2d 327, 330 (Fla. 3d Dist. Ct. App. Oct. 3, 2007)(citation omitted). The first step in the Court's

Secondly, Loveman is not arguing that he was fraudulently induced to sign the contract.[20] Loveman sets forth common law fraud and consumer fraud claims, not a claim for fraud in the inducement, therefore no grounds exist to prevent the enforcement of the forum selection clause on that basis. Given these facts and the language of "exclusivity" used in the forum selection clause, the Court is satisfied that the objective intent of the parties was to establish exclusive venue and jurisdiction in the federal and state courts of the State of Florida located in Broward County.

In an effort to escape the mandatory forum selection clause, Loveman argues that his non-contract claims can only be brought in Delaware because the actionable conduct occurred in this State. The Court disagrees with Loveman's assertion. Authority from this and other jurisdictions provides that "where the relationship between the parties is contractual, the pleading of alternative non-contractual theories of liability should not prevent enforcement of such a

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analysis is determining whether the forum selection clause is permissive or mandatory. *Id.* "Permissive forum selection clauses constitute nothing more than a consent to jurisdiction and venue in the named forum and do not exclude jurisdiction in any other forum." *Id.* (citing *Quinones v. Swiss Bank Corp.*, 509 So.2d 273, 274-5 (Fla. 1987)). "In contrast, mandatory forum selection clauses provide for a mandatory and exclusive place for future litigation." *Id.* (citing *Quinones*,509 So.2d at 274). In the present case, the pertinent clause in the Agreement states that the parties "agree to submit to the exclusive jurisdiction of the federal and state courts of the State of Florida located in Broward County." (emphasis added). A forum selection clause is mandatory, not permissive, where the language is unambiguous and contains words of exclusivity. *Id.* at 331.

[20] At oral argument, Loveman's counsel clearly stated that Loveman is not alleging fraud in the inducement of the contract. *Loveman v. Nusmile*, at 15:22 – 16:16 (Del. Super. Dec. 9, 2008) (Transcript from Motion to Dismiss Oral Argument).

bargain."[21] In *Double Z Enterprises, Inc. v. General Marketing Corp.*, this Court enforced a forum selection clause as to all the claims asserted, even those that did not sound in contract, where the claims all arose from the contractual relationship between the parties.[22] In this case, the Court is satisfied that Loveman's tort claims stem from the contractual relationship between the parties, and, therefore, should be litigated in Florida pursuant to the Agreement.

CONCLUSION

The parties entered into a valid and binding contractual agreement. The Agreement provides for exclusive jurisdiction of the Florida courts, therefore the Motion to Dismiss is GRANTED.

IT IS SO ORDERED.

/s/

M. Jane Brady
Superior Court Judge

[21] *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 203 (3rd. Cir.1983*); See also, Halpern Eye Associates*, 2007 WL 3231617 at *3 (holding that "any tort action would arise from the contractual relationship between the parties, therefore, the contractual clause that establishes venue in North Carolina would control the tort action as well.").
[22] *Double Z Enterprises, Inc. v. General Marketing Corp*., 2000 WL 970718 (Del. Super. June 1, 2000).