

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

LEAF FINANCIAL CORP.,)
)
 Plaintiff,)
)
 v.)
)
 ACS SERVICES, INC.,)
)
 and)
)
 WILLIAM J. ADAMS,)
)
 Defendants,)
)
 v.)
)
 N-ABLE TECHNOLOGIES, INC.,)
)
 Third-Party Defendant.)

C.A. No. 07C-02-003 MJB

Submitted: May 25, 2010
Decided: August 31, 2010

Upon Third-Party Defendant's Motion to Dismiss for Lack of Personal Jurisdiction.
GRANTED.

OPINION AND ORDER

Ronald J. Drescher, Esquire; Drescher & Associates, P.A.; Wilmington, Delaware, Attorney for Plaintiff.

Douglas A. Shachtman, Esquire; Douglas A. Shachtman & Associates; Wilmington, Delaware. Attorney for Defendants.

Jennifer M. Becnel-Guzzo, Esquire; Saul Ewing LLP; Wilmington, Delaware. Attorney for Third-Party Defendant.

BRADY, J.

INTRODUCTION

Before the Court is Third-Party Defendant N-Able Technologies, Inc.’s (“N-Able”) Motion to Dismiss. Upon reviewing the Motion, responses thereto, and additional submissions filed subsequent to oral argument, this Court is fully advised on the matter and is prepared to issue its decision.

FACTUAL & PROCEDURAL BACKGROUND

In January 2006, Plaintiff Leaf Financial Corporation’s (“Leaf”) and Defendant ACS Services, Inc. (“ACS”), a Massachusetts company, contracted for Leaf to purchase a “managed service program” system, consisting of software and hardware, from N-Able. Leaf leased the system to ACS in exchange for a monthly lease payment. The transaction and subsequent sale of the software and hardware to ACS was based upon telephonic communications and a series of emails between N-Able and ACS. The contract was signed by N-Able in Canada and ACS in Massachusetts. The products were shipped from N-Able in Canada to ACS in Massachusetts. Upon receiving the system, ACS maintained that the system did not function properly and, therefore, did not make any payments under the Lease.

Leaf filed a breach of contract action in this Court against Defendants ACS and personal guarantor, William Adams (“Adams”). Subsequently, Leaf filed a Motion for Summary Judgment against ACS arguing there was no genuine issue of material fact regarding two main issues: (1) ACS and Adams defaulted on the

Lease, and (2) ACS and Adams are responsible to Leaf for monies resulting from the default. In opposition to the Motion, ACS and Adams argued that (1) under the Uniform Commercial Code, Article 2A, they were relieved from all obligations under the transaction due to defective merchandise; (2) Leaf was not entitled to assert a finance lease under Article 2A because the relationship between N-Able and Leaf was a partnership relationship; and (3) ACS did not accept the goods, but instead revoked acceptance. On April 30, 2010, this Court granted Leaf's Motion for Summary Judgment. The Court held that the contract between Leaf and ACS was a finance lease, that a partnership relationship was not formed between Leaf and N-Able, and that Defendants' promises under the Lease became irrevocable after accepting the goods.¹

On April 25, 2008, N-Able filed this Motion to Dismiss the Third-Party Complaint for Lack of Personal Jurisdiction against ACS. N-Able argued that the Motion should be dismissed because the parties and the contract between N-Able and ACS have no connection to Delaware. N-Able further argues that the Court's recent decision affects the Motion because the arguments raised in ACS's opposition, (1) N-Able is bound by Leaf's forum selection clause because the parties created a partnership; and (2) there is a risk of inconsistent verdicts if the

¹ C.A. No. 07C-02-003 (MJB) Opinion at 17, issued April 30, 2010, amended May 27, 2010.

dispute between Leaf and ACS is litigated in Delaware, while the dispute between ACS and N-Able is litigated in Canada, are rendered moot by the Court's decision.

ACS first requested that the Court defer the Motion until the completion of discovery.² In opposition to the Motion, ACS contended that (1) N-Able was amenable to the jurisdiction of a Delaware court because N-Able registered another corporate entity with a similar name, N-able Technologies International, Inc. in Delaware, sold at least one product in Delaware, designated an account executive and partner development specialist within their company to service accounts in Delaware; (2) N-Able is not bound by the forum selection clause in Section 12.11 of the Agreement entered into between N-Able and ACS,³ but instead bound by the choice of forum clause in the contract between Leaf and ACS⁴ because "N-Able's actions were so integrally related to the dispute between Leaf and ACS,"⁵ and (3) there is a risk of inconsistent verdicts if the dispute between Leaf and ACS is permitted to be litigated in Delaware while the dispute between N-Able and ACS is litigated in Canada.

The forum selection clause in the contract entered into between ACS and N-Able, contained in Section 12.11 of the General Terms and Conditions, provides that any dispute regarding the agreement between N-Able and ACS would be

² At a hearing on May 22, 2008, this Court deferred decision on the Motion until the completion of discovery.

³ The forum selection clause in Section 12.11 of the Agreement entered into between N-Able and ACS provides that "the Agreement shall be governed by and construed in accordance with the laws of the Province of Ontario."

⁴ The forum selection clause in the Leaf agreement provides that "the lease will be governed by, enforced in and interpreted according to the laws of the State of Delaware."

⁵ ACS's Supplemental Response at ¶ 6.

governed and construed by the laws of the Province of Ontario. In addition, pursuant to that same provision, ACS consented to the jurisdiction of the courts of the Province of Ontario for any legal action arising out of the Agreement or the performance of the obligations thereunder.”⁶

On May 25, 2010, N-Able filed a letter with this Court requesting that the Court address the pending Motion to Dismiss for Lack of Personal Jurisdiction against Third-Party Plaintiff ACS that it had previously deferred.⁷ ACS did not file a response to the letter filed by N-Able. This is the Court’s opinion on the matter.

STANDARD OF REVIEW

In a motion to dismiss for lack of *in personam* jurisdiction, the plaintiff bears the burden of making a prima facie case to establish the basis for jurisdiction.⁸ This burden is satisfied if the plaintiff shows that Delaware’s long-arm statute confers jurisdiction.⁹ The court first determines if jurisdiction is appropriate under the long-arm statute; the court then determines if asserting such jurisdiction would offend the Due Process Clause.¹⁰ In making its determination, the court must view all factual disputes in a light most favorable to the plaintiff.¹¹

⁶ Section 12.11 of Agreement.

⁷ This Court deferred decision on the Motion to Dismiss pending its decision upon Leaf’s Motion for Summary Judgment.

⁸ *Greenly v. Davis*, 486 A.2d 669 (Del. 1984).

⁹ *Boone v. Oy parteck Ab*, 724 A.2d 1150 (Del. Super. 1997).

¹⁰ *Palmer v. Moffat*, 2001 WL 1221749 (Del. Super. 2001).

¹¹ *Id.*

ANALYSIS

The consideration whether a court has personal jurisdiction over a defendant is a two-step process. First, the court must determine whether the defendant's actions fall within any provisions of the long-arm statute and, second, the court must determine whether exercising jurisdiction is constitutionally permissible. Delaware's long-arm statute, 10 *Del. C.* §3104, allows a court to exercise personal jurisdiction over any non-resident or a personal representative who, in person or through an agent:

- (1) Transacts any business or performs any character of work or service in the State;
- (2) Contracts to supply services of things in this State;
- (3) Causes tortious injury in the State by an act or omission in this State;
- (4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if the person regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from services, or things used or consumed in the State;
- (5) Has an interest in, uses or possesses real property in the State; or
- (6) Contracts to insure or act as surety for, or on, any person, property, risk, contract, obligation or agreement located, executed or to be performed within the State at the time the contract is made, unless the parties otherwise provide in writing.¹²

If a defendant is found to be within the reach of the long-arm statute, the court must determine whether exercising personal jurisdiction comports with due process. The Due Process clause of the Fourteenth Amendment requires that a

¹² 10 *Del. C.* § 3104(c).

nonresident defendant have such minimum contacts with the forum state so that “maintenance of the suit does not offend traditional notions of fair play and substantial justice.”¹³ Also, a defendant’s conduct and connection with the forum state must be such that a defendant should “reasonably anticipate being haled into court there.”¹⁴

Pursuant to this Court’s Opinion, dated April 30, 2010, this Court held that a partnership relationship was not formed.¹⁵ Therefore, there is no basis for ACS to be concerned regarding inconsistent verdicts, as judgment has been entered in favor of Leaf upon Leaf’s Motion for Summary Judgment. This Court finds that the arguments raised by ACS, that N-Able is bound by Leaf’s forum selection clause because the parties created a partnership, and that there is a risk of inconsistent verdicts if the dispute between Leaf and ACS is litigated in Delaware, while the dispute between ACS and N-Able is litigated in Canada, are both moot.

ACS argues that jurisdiction is proper in Delaware because N-Able admitted that it made at least one sale in Delaware.¹⁶ In support of this argument, ACS cites *Wright v. American Home Products Corp.*, 768 A.2d 518 (Del. Super. 2000) and *LaNuova D & B, S.P.A. v. Bowe Co. Inc.*, 513 A.2d 764 (Del. Super. 1986). In

¹³ *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945).

¹⁴ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

¹⁵ C.A. No. 07C-02-003 (MJB) Opinion at 11, issued April 30, 2010, amended May 27, 2010.

¹⁶ ACS’s Supplemental Response to Motion to Dismiss ¶ 4. ACS provided a list of dates corresponding to a particular state and zip code. There is an entry on January 17, 2007 which corresponds to the State of Delaware and zip code 19711. Although it is unclear to the Court what the document actually signifies, ACS depends on the document to assert that N-Able made at least one sale in Delaware. N-Able does not address the document in its Opening Brief or Reply Brief.

Wright, the court held that it had jurisdiction over a French company when the prescriptions written in Delaware comprised 0.19% of its total U.S. prescriptions. In *LaNuova*, the court held that, under the stream of commerce rationale, an Italian defendant subjected itself to jurisdiction even though it only sold two warranties in Delaware. It is, therefore, clear that the sale of one product in the state of Delaware may subject a party to *in personam* jurisdiction in Delaware.

Those two cases are distinguishable from the instant matter, however, because in both of those cases, the court did not exercise *in personam* jurisdiction over a defendant that had a direct contractual relationship with the plaintiff, and in which another forum had been selected to govern the contractual relationship.

In the instant matter, ACS had a written agreement in place with N-Able that required any and all legal claims to be litigated in Canada. ACS's claims arise out of its contract with N-Able. Delaware courts have held that, "if there is a forum selection clause in a contract, even when venue where the suit is filed is proper, the court should decline to proceed when the parties freely agreed that litigation should be conducted in another forum."¹⁷ In *HealthTrio Inc. v. Margules*, 2007 WL 544156 (Del. Super. 2007), the Court held that if there is a forum selection clause in a contract, the court should decline to proceed when the parties freely agree that litigation should be conducted in a specific forum. In *M/S Bremen v. Zapata Off-*

¹⁷ *Eisenmann Corp. v. General Motors Corp.*, 2000 WL 140781 (Del. Super.).

Shore Company, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), the U.S. Supreme Court held that, “forum selection clauses are *prima facie* valid and should be enforced unless the clause is shown by the resisting party to be unreasonable under the circumstances.”¹⁸ In *Eisenmann Corp. v. General Motors Corp.*, 2000 WL 140781 (Del. Super.), the Court held that “mere inconvenience or additional expense is not the test of unreasonableness. In light of present commercial realities, a forum clause should control absent a strong showing that it should be set aside.”¹⁹ The Court finds there is no reason not to enforce the forum selection clause in this matter. Thus, even if this Court finds that *in personam* jurisdiction is proper in Delaware because of the sales transaction in Delaware, the Ontario, Canada forum selection clause must apply so as not to offend traditional notions of fair play and justice.

Even if the forum selection clause was not dispositive of the Motion, this Court would still find that N-Able is not subject to personal jurisdiction in Delaware. ACS argues that N-Able is subject to personal jurisdiction because the stockholders of N-Able registered N-Able Technologies International, Inc. in Delaware. However, this argument fails because N-Able and N-Able Technologies International, Inc. are two completely distinct corporate entities. The mere fact that a non-Delaware corporation owns a Delaware subsidiary is not

¹⁸ See also *HealthTrio Inc. v. Margules*, 2007 WL 544156 (Del. Super. 2007).

¹⁹ *Eisenmann Corp. v. General Motors Corp.*, 2000 WL 140781 (Del. Super.).

sufficient in itself to justify this State's exercise of personal jurisdiction over the non-Delaware parent.²⁰ Furthermore, no evidence has been provided to this Court that any of N-Able Technologies International, Inc.'s business operations relate in any way to the claims in this action against N-Able.

ACS further argues that Delaware is a proper forum because N-Able, through an online website hosted out of Ottawa, Canada, designated an Account Executive and Partner Development Specialist to service accounts in Delaware, as well as the other forty-nine states and other countries.²¹ The website discusses N-Able's global sales strategy, and there is no indication that Delaware is excluded from the strategy. However, this argument also fails. In the instant matter, all communications regarding the sale of the software and hardware was by internet or telephone. The mere fact that N-Able designated a Canadian agent to service accounts in the continental United States, including Delaware, is not enough to subject N-Able to jurisdiction in Delaware. Instead, this Court must examine whether N-Able's conduct and connection with the forum state, Delaware, was such that N-Able should have reasonably anticipated being required to litigate in a Delaware court.²²

²⁰ *Applied Biosys. Inc. v. Cruachem Ltd.*, 772 F. Supp. 1458 (D. Del. 1991).

²¹ The Account Executive is assigned to service regional accounts, in both New Jersey and Delaware. The Partner Development Specialist services accounts in Delaware and Washington, D.C.

²² *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

No evidence has been provided to this Court that N-Able had requisite minimum contacts with Delaware, or that asserting jurisdiction over it would be fair and reasonable.²³ The test is a determination of whether the defendant had a “fair warning” that its activities would subject it to a suit brought in Delaware.²⁴ This Court finds that it did not. Thus, exercising jurisdiction over N-Able would offend “traditional notions of fair play and justice.”²⁵

CONCLUSION

The contract between N-Able and ACS has no connection to Delaware, and ACS has not established that this Court has *in personam* jurisdiction over N-Able. Even if this Court determined that personal jurisdiction could be exercised in Delaware, there is a written agreement between the parties that requires any legal claim to be submitted to courts in Ontario, Canada. Since ACS’s claims arise out of its contract with N-Able, the forum selection clause in that contract must apply, and this Court declines to proceed when the parties freely agreed that litigation should be conducted in that forum.

Based on the foregoing, Third-Party Defendant N-Able’s Motion to Dismiss is **GRANTED**.

IT IS SO ORDERED.

²³ *Wright v. American Home Products Corp.*, 768 A.2d 518 (Del. Super. 2000).

²⁴ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

²⁵ *Id.*

M. Jane Brady
Superior Court Judge