UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

NASCENT WINE COMPANY, INC.; and INTERNATIONAL FOOD SERVICE SPECIALISTS, INC.,

Plaintiffs,

vs.

PASANI, S.A. DE C.V.; ECO PAK DISTRIBUTING, LLC; ONE SEVEN PROPS, INC.; ALEJANDRO GUTIERREZ PEDERZINI; and LETICIA GUTIERREZ PEDERZINI,

Defendants.

CASE NO. 10cv1349 JM(BGS)

ORDER GRANTING MOTION TO DISMISS FOR IMPROPER VENUE

Defendants Pasani, S.A. de C.V.; Eco Pak Distributing, LLC; One Seven Props, Inc.; Alejandro Gutierrez Pederzini; and Leticia Gutierrez Pederzini move to dismiss this action for improper venue pursuant to Fed.R.Civ.P. 12(b)(3) based upon a contractual forum selection provision or, alternatively, to dismiss for lack of personal jurisdiction or for a convenience venue transfer to the District Court for the Western District of Texas. Plaintiffs Nascent Wine Company, Inc. and International Food Service Specialists, Inc. oppose all motions. Pursuant to Local Rule 7.1(d)(1), this matter is appropriate for decision without oral argument. For the reasons set forth below, the court grants the motion to dismiss for improper venue and denies the remainder of the motions as moot.

BACKGROUND

On June 25, 2010, Plaintiffs commenced this diversity action alleging claims for breach of contract, breach of implied covenant of good faith and fair dealing, breach of fiduciary duty, unjust

enrichment, conversion and specific performance. (Ct. Dkt. 1). Plaintiffs' claims arise from a series of agreements entered into between the parties from May 2007 through June 30, 2008, the date that the parties entered into a Settlement Agreement ("SA"), purportedly to resolve all disputes amongst the parties. (First Amended Complaint, "FAC" ¶23, Def. Exh. 1). The SA contains a forum selection and choice of law provision:

> **3.3 Choice of Law.** For all related to the interpretation, fulfillment, validity, controversy and/or execution of the present agreement, the parties submit to the laws and jurisdiction of the courts of Mexico, Distrito Federal expressly waiving any other jurisdiction which may now or in the future be entitled for any reason.

(Def. Exh.1, ¶3.3). In broad brush, Plaintiffs allege "Defendants never intended to fully perform the acquisition transaction of the Settlement." (FAC ¶25).

Parties to the Action

Nascent Wine Company, Inc. ("Nascent"), and its wholly-owned subsidiary, International Food Service Specialists, Inc. ("IFSS"), are Nevada corporations with their principal places of business located in San Diego, California. (FAC ¶¶1, 2). Defendant Pasani S.A. de C.V. ("Pasani"), a corporation organized under the laws of Mexico with corporate headquarters located in San Diego and San Antonio, Texas, is in the business of buying consumer goods in the United States and distributing and selling them in Mexico. (FAC ¶3). Nascent, a distributor of food and wine products, had sold goods to Pasani who, in turn, imported them for distribution and sales into Mexico. (FAC ¶11). Defendant Eco Pak Distributing LLC ("Eco Pak") is a Texas limited liability company with corporate headquarters in San Diego, California, is also in the business of purchasing consumer goods in the United States and distributing and selling them in Mexico. (FAC ¶4). Defendant One Seven Props, Inc. ("One Seven"), incorporated and maintaining its principal place of business in Texas, is wholly owned by Defendant Mr. Pederzini. One Seven owns the trademarks used by Eco Park and Pasani in connection with the importation, distribution and sale of consumer products. (FAC ¶5).

Plaintiffs allege that Mr. Pederzini is a resident of San Antonio, Texas and Ms. Pederzini a resident of Mexico. Plaintiffs allege that, at all relevant times, the Defendants Pederzini were the controlling officers and directors of Eco Pak and Pasani. (FAC ¶¶ 5-7). The Pederzini Defendants are the alleged alter egos of the corporate entities, Pasani and Eco Pak, and "exercise such dominion

and control over [the corporate entities and share] such a unity of interest with them that the separateness of the business entities do not in reality exist." (FAC ¶8).

The Agreements

In May 2007 Nascent agreed to purchase Pasani and Eco Park in order to expand its brands and operations in Mexico. After six months of negotiations, on May 10, 2007 the parties executed several agreements, including a Stock Purchase Agreement ("SPA"). (Def. Exh. 2). The agreement contains choice of law and forum selection provisions identifying the applicability of Mexican law to any dispute and designating Mexico City as the exclusive forum for resolving any dispute. On the same day, the parties also executed a Pledge on Shares Agreement ("PSA") in order to transfer ownership interests from Pasani to Nascent in exchange for a promissory note to be executed by Nascent. This agreement also contains the same choice of law and forum selection provisions, (Def. Exh. 3). On the same day, Nascent executed a promissory note for $1.5 million, payable to Defendants Pederzinis. The note identifies both Texas and Mexico as appropriate forums for resolving any dispute. (Def. Exh. 4). In connection with the SPA, Nascent and Eco Pak entered into a Membership Interest Purchase Agreement ("MIPA") whereby Nascent purchased all issued and outstanding stock for $100,000. The MIPA does not contain any choice of law or forum selection provision.

Three other agreements are pertinent to the parties' contractual relationship. On May 11, 2007 Nascent and One Seven entered into a Trademark License and Purchase Agreement ("TLPA") whereby Nascent would acquire use of Pasani's trademarks in Mexico. This agreement does not contain either a choice of law or forum selection provision. In connection with the SPA, on May 17, 2007 Nascent and Mr. Pederzini entered into an Employment Agreement ("EA") to define the conditions of employment during the transitional period in which Nascent intended to completely take over Pasani's operations in Mexico. This agreement contains a choice of law provision identifying the applicability of the laws of the State of California and a forum selection provision compelling the parties to arbitrate any and all disputes before the American Arbitration Association in San Diego. (FAC, Exh. D ¶21.00).

The final agreement at issue is the SA, executed on June 30, 2008. "Defendants proposed

unwinding the entire transaction by paying back over time a portion of the funds to Plaintiffs in return for" the Pederzinis reacquisition of ownership of Eco Pak and Pasani. The SA required Pasani to initially repay $997,451 in working capital and $113,888 for inventory which Plaintiffs had contributed to Pasani. (FAC ¶23). Plaintiffs, as a part of the settlement, agreed to sign over their ownership interests in the corporate entities to the Pederzinis. The SA contains choice of law and forum selection provisions identifying the applicability of Mexican law to any dispute amongst the parties and designating Mexico City as the exclusive forum to resolve any dispute. The Pederzini Defendants made the initial payment of $120,000 and Plaintiffs transferred ownership of Pasani and Eco Pak back to the Pederzinis. The Pederzinis thereafter failed to make any further payments as contemplated by the SA.

Plaintiffs generally allege that "Defendants never intended to perform any of the terms of the" SA beyond the initial exchange. (FAC ¶25). Plaintiffs further allege that defendants "intended to and did take approximately $3,500,000 USD from Plaintiffs for essentially nothing." Id.

DISCUSSION

Legal Standards

A Rule 12(b)(3) motion to dismiss is the appropriate procedural vehicle to challenge improper venue pursuant to a forum selection provision. Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 324 (9th Cir. 1996). In ruling on the motion, the court may consider facts outside the pleadings and need not accept the complaint's allegations as true. Id. The court must also draw all reasonable inferences and resolve all factual conflicts in favor of the party seeking to avoid enforcement of the provision. Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133, 1139 (9th Cir. 2004). In the event genuine issues of material fact prevent granting the motion to dismiss, the court may stay the Rule 12(b)(3) motion, conduct an evidentiary hearing pursuant to Rule 12(i), and then weigh the facts, assess credibility and make the factual findings necessary to resolve the Rule 12(b)(3) motion. Id.

The Rule 12(b)(3) Motion

Federal law governs the validity of a forum selection clause. Argueta, 87 F.3d at 824; The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). In Bremen the Supreme Court held that forum selection provisions are presumptively valid and should not be set aside "absent some compelling and

countervailing reason." Id. at 12. A forum selection clause is unreasonable and not enforceable where (1) its incorporation into the contract was the result of fraud, undue influence, or overwhelming bargaining power; (2) enforcement of the provision is "so gravely difficult and inconvenient" such that the complaining party will "for all practical purposes be deprived of its day in court;" or (3) enforcement of the clause would contravene a strong public policy of the forum in which the suit is brought." Argueta, 87 F.3d at 325 (citations omitted).

Here, Plaintiffs argue that they were induced by fraud to enter into the various agreements, including the SA. In order to prevail on their fraud in the inducement claim, Plaintiffs must show (1) that Defendants made a material representation or omission; (2) that it was false; (3) that Defendants knew it was false, or made recklessly, without any knowledge of its truth and as a positive assertion; (4) that it was made with the intention that it should be acted upon by Plaintiffs; (5) that Plaintiffs acted in reliance upon it; and (6) that Plaintiffs thereby suffered injury. See In re Cheryl E., 161 Cal.App.3d 587, 599-600 (1984).

Plaintiffs argue that "Defendants never intended to perform their obligations under the contracts, didn't perform them beyond the initial exchange, and instead forced Plaintiffs into a settlement agreement that they never intended to honor." (Oppo. at p.11:12-14). In conclusory fashion, Plaintiffs argue:

> With the benefit of hindsight, there can be little doubt that Mr. Gutierrez on his own behalf and on behalf of his companies defrauded Plaintiffs and induced them to sign contracts that resulted in personally netting the Gutierrez's almost $3.5 million and leaving Plaintiffs with nothing. Defendants' conduct entitled Plaintiffs to rescind the contracts and in so doing, the forum selection clauses relied upon by Defendants are invalidated, warranting a California resolution of these California torts.

(Oppo at p. 12-10).

The court concludes that the FAC's allegations, in combination with the evidence submitted by the parties, fail to establish fraud in the inducement with respect to either the forum selection provisions or the contracts as a whole. The scope of the SA is broad, providing for the "full settlement and discharge of all claims." (FAC Exh. E, ¶B). Mr. Piancone, an officer of Nascent, declares that the parties began negotiating for the sale of Pasani and Eco Park in late 2006 or early 2007 and, after nearly six months of negotiations, the parties closed on the transaction on or about May 10, 2007.

Pursuant to the parties' agreements, Plaintiffs provided working capital and "$500,000 on the note and $2 million to One Seven for the trademark license" and Mr. Pederzini operated the businesses in Mexico. (Piancone Decl. ¶6). The operational decisions for both Pasani and Eco Pak were made at Nascent's corporate headquarters in San Diego. The day-to-day invoicing and collection for the companies were handled by Mr. Pederzini and staff, and corporate accounting was handled in San Diego by processing information provided by Mr. Pederzini. (Piancone Decl. ¶7).

After several months, friction developed between the parties when Mr. Pederzini "refused to provide access to the underlying records, accounts and offices so that the account[ants] could complete the audits of Eco Pak and Pasani." Id. Mr. Piancone explains that Nascent is a fully reporting public corporation with the obligation to fully account for its acquisitions of Eco Pak and Pasani. Id. By late June 2008 the parties agreed to settle their disputes by "unwinding the entire acquisition transaction by paying back over time a portion of the funds to Plaintiffs in return for Mr. and Mrs. Gutierrez's reacquisition of ownership of Eco Pak and Pasani." (Piancone Decl. ¶8). Defendants, represented by counsel, determined that it was in their best interests to settle all disputes. Id. Pursuant to the SA, the Pederzinis made the requisite initial payments of $120,000 and Defendants transferred the stock in Eco Pak and Pasani to the Pederzinis. Id. After making the initial payments, the Pederzinis have failed to make any more payments as required by the Settlement Agreement.

In opposing the motion, Plaintiffs raise essentially two arguments.[1] First, Plaintiffs argue that the SA was offered on a take-it or lose-it basis and that "Nascent [had] no viable choice but to take it." Id. This unequal bargaining power argument is not persuasive as Nascent is a corporate entity with sophisticated corporate officers. Moreover, it appears from the parties' submissions that Plaintiffs were represented by counsel at all material times. Consequently, Plaintiffs fail to show that the SA should be set aside on account of unequal bargaining power.

Second, Plaintiffs broadly argue that they were fraudulently induced to enter into the SA containing the forum selection provision because Mr. Piancone "do[es] not believe Defendants ever

[1] The court notes that Plaintiffs' argument of fraud in the inducement is very broad. Plaintiffs do not specifically argue that the forum selection provision was fraudulently incorporated into the SA. Rather, Plaintiffs argue, despite the parties' course of conduct, that all the agreements were the product of fraud.

intended to fully perform the acquisition transaction or the terms of the SA beyond the initial signing and performance required at the time of signing the contracts." (Piancone Decl ¶10). This burden falls short of demonstrating that Plaintiffs were fraudulently induced to enter into the SA. Neither the FAC's allegations nor the evidence submitted by Plaintiffs, seen in the best light to them, see Murphy, 362 F.3d at 1139, makes a prima facie showing such that Plaintiffs were fraudulently induced to enter into the SA. Plaintiff must identify their claim of fraud in the inducement with particularity. Fed.R.Civ.P. 9(b). Allegations or evidence to the effect that Plaintiffs believe that the Pederzinis did not intend to perform under the SA is insufficient to establish fraud in the inducement. Plaintiffs must go beyond identifying their belief that Defendants intentionally breached the SA. Plaintiffs must specifically identify the materially false and misleading statements, omissions, or conduct of Defendants; scienter; reliance; and resulting injury. See In re Cheryl E., 161 Cal.App.3d 599-600. The failure to sufficiently establish that Plaintiffs were fraudulently induced to enter into the SA is fatal to their claim that the forum selection provision is not enforceable.

In light of the presumptive validity of the forum selection provision, Bremen, 407 U.S.12, and Plaintiffs' failure to state a claim for fraud in the inducement, the court grants the motion to dismiss for improper venue. Pursuant to the parties' agreement, the only proper venue to bring Plaintiffs' claims is in the courts of Mexico, Distrito Federal. The motion for change of venue is granted. The Clerk of Court is instructed to close the file.

IT IS SO ORDERED.

DATED: March 9, 2011

Hon. Jeffrey T. Miller
United States District Judge

cc: All parties