

**NOT DESIGNATED FOR PUBLICATION**

**ATM'S OF THE SOUTH, INC.,** \* **NO. 2003-CA-0056**  
**GREGORY P. MURO AND** \*  
**KATHY B. MURO** \* **COURT OF APPEAL**  
  
**VERSUS** \* **FOURTH CIRCUIT**  
  
**JOEL DIEJOIA AND KING** \* **STATE OF LOUISIANA**  
**ROGERS SEAFOOD, INC.** \*

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APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 2001-2545, DIVISION "N-8"  
Honorable Ethel Simms Julien, Judge

\* \* \* \* \*  
**Judge Dennis R. Bagneris, Sr.**  
\* \* \* \* \*

(Court composed of Judge Dennis R. Bagneris Sr., Judge Edwin A. Lombard, and Judge Leon A. Cannizzaro, Jr.)

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## **COUNSEL FOR APPELLANT**

### **AFFIRMED**

#### **STATEMENT OF THE CASE AND PROCEDURAL HISTORY:**

Appellee, ATM's of the South, Inc., (ATM) entered into a contract to place an automatic teller machine at the business known as King Rogers Seafood, Inc., (King Rogers) located in New Orleans. Under the terms of the contract, King Rogers was to load the machine with cash, and would receive consideration in the form of a percentage of the fees received by ATM.

On October 25, 1998, appellant, Jack Henry and Associates, Inc., (JHA) and ATM entered into a contract whereby JHA agreed to provide ATM with certain data processing services for ATM's automated teller machines. The processing services included processing withdrawals from the machine, accounting for the charges and advising a bank (Chasewood Bank located in Texas) regarding the settlement account.

The original lawsuit instituted by ATM against King Rogers for breach of contract and conversion alleged that King Rogers stopped loading the machine with cash on March 15, 2000. At that time, ATM accepted responsibility for loading cash into the machine. The petition was amended

on September 11, 2000, adding JHA and the Chasewood Bank as defendants. The amendment alleged that on or about March 20, 2000, ATM instructed JHA to change the settlement account from the account of King Rogers to the account of ATM. It is further alleged that JHA negligently failed to notify Chasewood Bank of the account change, resulting in the misapplication and loss to ATM of approximately \$60,940.00.

Chasewood Bank filed an exception objecting to the personal jurisdiction for lack of minimum contacts, and was dismissed from the suit. No appeal was taken from that ruling.

JHA filed an exception of no cause of action, seeking to be dismissed from the suit based on the forum selection clause. The forum selection clause, contained in paragraph 25 of the contract, reads as follows:

Controlling Law—This Agreement shall be construed, interpreted, and enforced in accordance with the laws of the State of Texas. The jurisdiction and venue for any legal proceeding to interpret or enforce this Agreement shall be in Harris County, Texas.

The trial court denied JHA's exception but found that the exception of no cause of action should have properly been styled an exception of venue.

JHA has appealed, and argues that the denial of the exception of venue is incorrect, and will cause irreparable harm

**ARGUMENT:**

JHA assigns as error the trial court's failure to enforce the forum selection clause executed by JHA and ATM. It is asserted that the forum selection clause unambiguously requires ATM to bring any claim against JHA in Harris County, Texas.

JHA submits that forum selection clauses are legal and binding under Louisiana law, and that the party seeking to have a forum selection clause set aside bears a heavy burden of proof. Digital Enterprises, Inc. v. Arch Telecom, Inc., 95-30 (La. App. 5 Cir. 6/28/95), 658 So. 2d 20. JHA also cites Pique'-Weinstein-Pique' Architects, Inc. v. New Orleans Aviation Board, 99-1231 (La. App. 5 Cir 4/25/00), 762 So. 2d 76, 78. The Fifth Circuit Court in Pique' held that forum selection clauses are prima facie valid and should be enforced unless it is shown that the clause arises out of fraud or that the enforcement would be unreasonable or unjust.

In opposition to this appeal, ATM argues that since there is no question of fraud, the issue is whether enforcement of the forum selection clause would be unreasonable or unjust or whether enforcement would contravene public policy. ATM contends that given the lack of minimum contacts with the state of Texas, enforcement would be unreasonable. In support of this argument, ATM asserts that its business is limited solely to the ownership of automated teller machines in the greater New Orleans area.

It does not ship or deliver products anywhere. It does not conduct business in Texas or own assets in Texas. It does not advertise or solicit business in Texas. With respect to JHA, however, ATM submits that JHA's business is not limited to its home state of Texas. ATM points out that JHA both solicits and conducts business in Louisiana. ATM argues that in the absence of minimum contacts, parties to a contract cannot agree that a particular court will have jurisdiction to decide a contractual dispute. Tulane Industrial Laundry Inc. v. Quality Lube & Oil Inc., 2000-0610 (La. App. 4 Cir. 1/24/01), 779 So. 2d 99.

ATM further argues that a forum selection clause can be invalidated if enforcement is unjust. M/S Bremen v. Zapata off-shore Co., 407 U.S. 1, 92 S. Ct. 1907, 32 L.Ed. 2d 513 (1972). Under Bremen, the Supreme Court established that enforcement is considered unreasonable if trial in the contractual forum would be so gravely difficult and inconvenient that a party will, for all practical purposes, be deprived of his day in court. In this case, ATM points out that the plaintiff, all other defendants and all witnesses are domiciled in Louisiana, and that enforcement of the forum selection clause would have the unjust effect of dismissing JHA from the suit.

ATM also asserts that enforcement of the forum selection clause would contravene public policy. ATM relies on this court's holding in

Tulane, wherein it was stated that it is against the public policy of Louisiana to allow waiver of jurisdiction and venue in advance of the filing of an action.

### **DISCUSSION:**

The jurisprudence has clearly established that forum selection clauses are legal and binding, and that a party seeking to set aside such a clause has a heavy burden. Digital Enterprises; Pique’; Pitts, Inc. v. ARK-La. Resources, L.P., and Muirfield Management, Inc., 30,836-30,837 (La. App. 2 Cir. 8/19/98), 717 So. 2d 268.

As stated by the U.S. Supreme Court in Bremen, “such clauses are prima facie valid and should be enforced unless the resisting party clearly proves that enforcement would be unreasonable and unjust, or that the clause arises from fraud or overreaching, or that enforcement would contravene a strong public policy for the forum where the suit is brought.” Although Bremen dealt with maritime employment contracts, our Louisiana courts have consistently applied this analysis to forum selection clauses outside of the maritime context. Pitts; Pique’; Calahan v. Haspel, 1999-44 (La. App. 3 Cir. 5/5/99), 732 So. 2d 796.

We find that the forum selection clause, establishing Harris County, Texas as the proper venue for any litigation between the parties, is clear and

unambiguous. Additionally, there is no allegation that it arises from fraud or overreaching. Accordingly, the question before this court is whether enforcement would be unreasonable or contrary to the public policy of this state.

This court has looked to minimum contacts to determine whether a forum selection clause is unreasonable or against public policy. In Tulane, this court struck down a forum selection clause, and held that “in the absence of minimum contacts, parties to a contract cannot agree that a particular court will have jurisdiction to decide a contractual dispute.” 779 So. 2d at 102. Tulane, additionally discussed La. R.S. 51:1407, concerning the protection of Louisiana residents from out-of-state solicitors. This Court found that the broad statement of public policy in the statute is “expansive, and appears to leave no question that it is against the public policy of Louisiana to allow waiver of jurisdiction and venue in advance of the filing of an action.”

We find that there are insufficient minimum contacts with the state of Texas to warrant enforcement of the forum selection clause. The facts presented in this case reveal that ATM has absolutely no business connection with the state of Texas. Its business is not advertised, solicited or conducted in Texas. Further, other than JHA, all parties and witnesses to

this action reside in Louisiana. Accordingly, in the absence of minimum contacts, we find that to enforce the forum selection clause in this instance would be unreasonable and unjust.

**CONCLUSION:**

The judgment of the trial court denying JHA's exception of venue is affirmed.

**AFFIRMED**