STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: April 6, 2021)

NACR LEASING, LLC	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PC-2020-01905**
	:	
ADENA CORPORATION	:	
Defendant.	:	

DECISION

STERN, J. Before this Court is Defendant Adena Corporation's Motion to Dismiss pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(3) of the Rhode Island Superior Court Rules of Civil Procedure, G.L. 1956 § 7-16-54, and *forum non conveniens*. Plaintiff NACR Leasing, LLC objects to the motion. Jurisdiction is pursuant to G.L. 1956 § 8-2-14.

I

Facts and Travel

This action arises out of a contract dispute between Plaintiff NACR Leasing, LLC (NACR) and Defendant Adena Corporation (Adena). (Compl. ¶ 1.) On October 17, 2019, the parties entered into a Lease Agreement (Lease) whereby NACR was to lease a crane to Adena for a project at SeaWorld® in Orlando, FL. *Id.* ¶¶ 1, 7-8. NACR alleges that "[d]ue to state permitting issue[s] beyond [its] control," it was unable to deliver the crane on the contract delivery date of October 22, 2019. *Id.* ¶¶ 1, 7-9, 11. When NACR offered Adena a substitute crane, of equal or better value, and a free crane operator, Adena refused to accept the substitute, and when the original crane arrived at SeaWorld® on October 25, 2019, Adena refused to accept the crane. *Id.* ¶¶ 1, 12-14.

NACR alleges that its obligations under the Lease were hindered by state permitting issues and thus suspended due to Section 15(e) of the Lease, which provides that: "[t]he obligations of [NACR] shall be suspended to the extent hindered or prevented because of . . . governmental regulations . . . not within the sole control of [NACR]." *Id.* ¶¶ 10-11. Subsequently, NACR filed this action for breach of contract seeking damages and for wrongful rejection of goods seeking remedies under the Uniform Commercial Code, G.L. 1956 § 6A-2.1-523. *Id.* ¶¶ 15-19.

Adena filed a Motion to Dismiss claiming that this Court lacks subject matter and personal jurisdiction and that venue is improper.[1] On December 16, 2020, the Court held a hearing on the motion; this decision follows.

II

Subject Matter Jurisdiction

Adena argues that the Court lacks subject matter over the action because NACR is a Florida limited liability company and is not registered to do business in Rhode Island; thus, it is an unregistered foreign limited liability company that may not maintain an action in any court in this state. (Def. Mem. at 12.) NACR contends that because it is a wholly owned subsidiary of North American Crane and Rigging, LLC (North American), which is registered to do business in Rhode Island, this Court has subject matter jurisdiction. (Pl. Obj. at 5-6.)

Whether a court has subject matter jurisdiction over a cause of action is a question of law and one which may be raised at any time. *Long v. Dell, Inc.*, 984 A.2d 1074, 1078 (R.I. 2009). The Superior Court's subject matter jurisdiction, which is whether the court has the power to hear

[1] Adena provided exhibits, including: (1) the parties' Lease; (2) NACR's Articles of Organization as a Florida Limited Liability Company; and (3) North American Crane & Rigging LLC's (North American) Certificate of Organization in the Commonwealth of Massachusetts. (Def. Mem., Exs. B, C, D).

the case and not whether it has jurisdiction over the parties, is statutorily granted to it. Sections 8-2-13 and 8-2-14. "'The Superior Court of Rhode Island is a trial court of general jurisdiction. It is granted subject-matter jurisdiction over all cases unless that jurisdiction has been conferred by statute upon another tribunal[.]'" *Gallop v. Adult Correctional Institutions*, 182 A.3d 1137, 1143 (R.I. 2018) (quoting *Chase v. Bouchard*, 671 A.2d 794, 796 (R.I. 1996)).

Subject matter jurisdiction is relative to the type of case, not the type of party. Pursuant to §§ 8-2-13 and 8-2-14, this Court has exclusive original jurisdiction of suits in equity unless otherwise provided by law, original jurisdiction over all actions at law, and exclusive original jurisdiction of all actions at law in which the amount in controversy exceeds ten thousand dollars. For instance, "[i]t is a well-established principle that 'no action of the parties can confer subject-matter jurisdiction upon a . . . court' where the court has no authority to act." *Sidell v. Sidell*, 18 A.3d 499, 508 (R.I. 2011) (quoting *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982)). This is due to the very fact that the question of whether a court has subject matter jurisdiction is determined by the case at hand, not the party at hand.

Adena asserts that the following provision of the Rhode Island Limited Liability Company Act (Act) effectively disables this Court's subject matter jurisdiction: "[a] foreign limited-liability company transacting business in this state may not maintain any action, suit, or proceeding in any court of this state until it has registered in this state." Section 7-16-54. Contrary to Adena's argument, the Act that requires a foreign limited-liability company to register before bringing an action may affect that party's ability to bring and maintain an action but does not refer to, nor affect, this Court's subject matter jurisdiction. Adena cites no case law to support, nor could this Court find case law to support, its proposition likely because subject matter jurisdiction concerns the subject matter of the action, not the party.

In addition, § 7-16-54(b) of the Act provides that "[t]he failure of a foreign limited-liability company to register in this state does not impair the validity of any contract or act of the foreign limited-liability company[.]" Because this Court has jurisdiction over actions at law and in equity, including contract disputes, and this jurisdiction has not been statutorily granted to any other tribunal, the Court maintains subject matter jurisdiction. *See Gallop*, 182 A.3d at 1143.

NACR's argument—that it can assume its parent corporation's state registration as its own—is equally without merit. Just because NACR is wholly owned by North American does not mean NACR is not an entity separate and apart from its parent corporation, and NACR, as a separate entity, must follow the laws of this state in order to transact business within this state. The Act provides no exception for a subsidiary whose parent company is registered to do business in the state. *See generally* § 7-16. In addition, the Lease is between Adena as Lessee and NACR as Lessor, and nowhere on the Lease is the name of NACR's parent company, North American. Although NACR asserts that "[a]ny and all leasing in Rhode Island is done by the parent company," North American is not a party to the Lease. (Pl. Obj. at 6.)

Furthermore, NACR asserts in its Objection to Adena's motion that NACR's "ties" to Rhode Island "are the very reason for the choice of law and forum selection clauses" which provide that Rhode Island law governs and its courts are the exclusive forum. *Id.* at 5. These Rhode Island ties include: NACR's sole employee—Mr. Izzo, the administrator and manager—operates out of Providence, Rhode Island; the Lease was executed and invoice generated in Rhode Island by Mr. Izzo; the Lease states that it "shall be deemed to have been made and delivered in the State of Rhode Island"; NACR's "in-house counsel is . . . located in" Rhode Island; and the crane "was dispatched from Rhode Island." *Id.* From NACR's stated "ties," it appears that all of NACR's operations take place in or arise out of the state of Rhode Island. More importantly, NACR's

Complaint states that "[i]t is a Florida, LLC with is [*sic*] principal place of business in Providence, Rhode Island." (Compl. ¶ 2.) NACR is transacting business in the state of Rhode Island and, as a result, must register in the state in order to maintain this action.[2] Section 7-16-54.

NACR's assertions that "it leases cranes to customers in the South" and "all leasing in Rhode Island is done by [North American]" do not preclude it from the registry requirement. (Pl. Obj. at 6.) In this case, North American's Florida employee solicited Adena for crane work and negotiated an agreement. (Def. Mem. at 2.) NACR's sole employee, from its principal place of business in Rhode Island, sent the lease agreement to Adena, which both Adena and NACR executed and which provided that "[t]he lease shall be deemed to have been made and delivered in the State of Rhode Island[.]" (Def. Mem., Ex. D, ¶ 15(b).) The Court reads the terms of the Lease "made and delivered" to include accepted and executed in Rhode Island, and thus, NACR's activities specific to the transaction at issue constituted transacting business which require it to register in the state.

In summary, § 7-16-54 has no bearing on this Court's subject matter jurisdiction; however, it does require NACR to register with the state before maintaining this action.

III

Personal Jurisdiction

Adena argues that the forum-selection clause is ambiguous and that NACR failed to demonstrate that Adena is subject to personal jurisdiction under Rhode Island's long-arm statute and due process requiring minimum contacts with the state. (Def. Mem. at 5-6.) NACR argues

[2] Section 7-16-54(e) provides a non-exclusive list of several activities that are not considered to be transacting business in the state for which a foreign limited liability company would need to register.

that the forum-selection clause in the Lease is unambiguous and controlling on the issue of personal jurisdiction. (Pl. Obj. at 1.)

To determine if a prima facie showing of personal jurisdiction has been made, the court "'draw[s] the facts from the pleadings and the parties' supplementary filings, taking facts affirmatively alleged by plaintiff as true and viewing disputed facts in the light most advantageous to plaintiff.'" *Pullar v. Cappelli*, 148 A.3d 551, 554 (R.I. 2016) (quoting *Cerberus Partners, L.P. v. Gadsby & Hannah, LLP*, 836 A.2d 1113, 1117 (R.I. 2003)). Personal jurisdiction is a question of law. *See id.*

Unlike subject matter jurisdiction, personal jurisdiction can be waived. *See Sidell*, 18 A.3d at 507 ("[B]ecause the notion of personal jurisdiction 'represents a restriction on judicial power . . . as a matter of individual liberty[,]' 'it can, like other such rights, be waived.'") (quoting *Insurance Corp. of Ireland, Ltd.*, 456 U.S. at 702, 703). "A party may waive his or her right to a personal-jurisdiction challenge 'by entering into a contract that contains a forum selection clause.'" *Id.* (quoting *American Biophysics Corp. v. Dubois Marine Specialties*, 411 F. Supp. 2d 61, 62 (D.R.I. 2006)).

Adena entered into a contract with a forum selection clause which assigns jurisdiction to the courts in the state of Rhode Island. The Lease, ¶ 15(b), states that:

> "The Lease shall be deemed to have been made and delivered in the State of Rhode Island and shall be governed in all respects by the laws of such state. Lessee agrees to exclusive personal jurisdiction and venue in the state and federal courts located in the State of Rhode Island."

According to the principle set forth by our Supreme Court in *Sidell*, Adena waived its right to challenge personal jurisdiction of this Court by entering into the Lease that maintains that Rhode

Island is the parties' chosen forum so long as the forum selection clause is valid and enforceable. *Sidell*, 18 A.3d at 507.

Adena argues that the clause is ambiguous because "there is no stated purpose or reason set forth as to why Adena allegedly consent[ed] to the jurisdiction and venue of a Rhode Island court" and does not state that "any litigation to enforce or to resolve a dispute can **only** be brought in a Rhode Island Court." (Def. Mem. at 8.)

In interpreting forum selection clauses, "unless the terms of a written contract are ambiguous, it should be interpreted as a matter of law in accordance with its plain terms." *Rhode Island Depositors Economic Protection Corp. v. Coffey and Martinelli, Ltd.*, 821 A.2d 222, 226 (R.I. 2003). "'In determining whether a contract is clear and unambiguous, the document must be viewed in its entirety and its language be given its plain, ordinary and usual meaning.'" *Rotelli v. Catanzaro*, 686 A.2d 91, 94 (R.I. 1996) (quoting *Paradis v. Greater Providence Deposit Corp.*, 651 A.2d 738, 741 (R.I. 1994)). "[A] contract is ambiguous only when it is reasonably and clearly susceptible of more than one interpretation." *Id.* (citing *W.P. Associates v. Forcier, Inc.*, 637 A.2d 353, 356 (R.I. 1994)).

Adena's contention—that because the provision lacks a stated purpose and lacks the language that any dispute can "only be brought in the" courts of Rhode Island, the forum selection provision is ambiguous and open to more than one interpretation—is misguided. The language that Adena "agrees to *exclusive* personal jurisdiction and venue in the state and federal courts located in the State of Rhode Island," is clear and unambiguous. (Lease, ¶ 15(b).) (Emphasis added.) This very provision means that Adena consented to personal jurisdiction and venue in Rhode Island and nowhere else, and has, therefore, waived its right to challenge personal jurisdiction in the state of Rhode Island. *See Sidell*, 18 A.3d at 507. The Court is going to "'refrain

from engaging in mental gymnastics or from stretching the imagination to read ambiguity [into a contract] where none is present.'" *Young v. Warwick Rollermagic Skating Center, Inc.*, 973 A.2d 553, 559 (R.I. 2009) (quoting *Mallane v. Holyoke Mutual Insurance Company in Salem*, 658 A.2d 18, 20 (R.I. 1995)).

Adena asserts that the validity of the forum selection clause further depends upon its fundamental fairness. (Def. Mem. at 9-10.) In addition, Adena suggests that even with a forum selection clause, the Court should engage in a due process analysis. *Id.* at 4. "Forum selection clauses have been held *prima facie* valid[.]" *Tateosian v. Celebrity Cruise Services, Ltd.*, 768 A.2d 1248, 1250 (R.I. 2001) (citing *M/S Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1, 10 (1972)). However, forum selection clauses "are subject to judicial scrutiny for fundamental fairness[,]" and "[a] party claiming that the fundamental fairness standard has not been met bears 'a heavy burden of proof.'" *Id.* (citing and quoting *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 592, 595-97 (1991)).

To begin, Rhode Island's long-arm statute extends to persons so long as in compliance with due process. Rhode Island General Laws 1956 § 9-5-33(a) provides that:

> "Every foreign corporation . . . that shall have the necessary minimum contacts with the state of Rhode Island, shall be subject to the jurisdiction of the state of Rhode Island, and the courts of this state shall hold such foreign corporations and such nonresident individuals or their executors or administrators, and such partnerships or associations amenable to suit in Rhode Island in every case not contrary to the provisions of the constitution or laws of the United States."

"[T]he Due Process Clause 'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit[.]'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297

(1980)). In considering the specific jurisdiction over a litigant, the United States Supreme Court established in *Burger King* that:

> "because the personal jurisdiction requirement is a waivable right, there are a variety of legal arrangements by which a litigant may give express or implied consent to the personal jurisdiction of the court. For example, particularly in the commercial context, parties frequently stipulate in advance to submit their controversies for resolution within a particular jurisdiction. Where such forum-selection provisions have been obtained through freely negotiated agreements and are not unreasonable and unjust, their enforcement does not offend due process." *Id.* at 472 n.14 (citations and internal quotations omitted).

Therefore, in this case, so long as the forum selection clause in the Lease was obtained through freely negotiated agreements and is not unreasonable or unjust, the enforcement of the forum-selection of Rhode Island does not offend due process. *See id.* The party seeking to escape the contract provision bears the burden of establishing that the provision was not "obtained through freely negotiated agreements and . . . [is] unreasonable and unjust[.]" *Id.*

Because NACR established that there is a forum selection clause that grants this state exclusive personal jurisdiction over Adena and Adena agreed to the terms of the Lease, Adena must demonstrate that the Lease was not freely negotiated and is unreasonable and unjust. *See Tateosian*, 768 A.2d at 1250 (considering that forum selection clauses are prima facie valid). Rather than demonstrate that the Lease was not freely negotiated and is both unreasonable and unjust, Adena argued that it is subject to neither specific nor general jurisdiction and NACR failed to plead facts in its complaint to establish either. However, NACR alleged that the Lease's forum selection clause establishes that Rhode Island has exclusive personal jurisdiction over Adena. The forum selection clause is prima facie valid and as established by this Court, *supra*, is unambiguous.

Adena, then, bore the heavy burden of establishing that "the fundamental fairness standard has not been met[.]" *Tateosian*, 768 A.2d at 1250. There is no evidence to doubt the sophistication

of the parties in this case or that this was something other than a freely-negotiated, arms-length deal. However, Adena argues that it "would be fundamentally unfair and pose a serious inconvenience to Adena" to maintain the action in Rhode Island. (Def. Mem. at 10.)

Even if freely bargained for, a forum-selection clause may be "'unreasonable' and unenforceable if the chosen forum is seriously inconvenient for the trial of the action." *M/S Bremen*, 407 U.S. at 16. The party claiming that the clause is unreasonable bears a heavy burden of proof and must establish that "the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Id.* at 17-18.

The Court finds that Adena has not met this heavy burden of proof. Adena pointed to reasonableness factors that the United States District Court of Rhode Island looked to and balanced in totality of the circumstances to determine whether a forum selection clause was unreasonable. (Def. Mem. at 10 (citing *D'Antuono v. CCH Computax Systems, Inc.*, 570 F. Supp. 708 (D.R.I. 1983)). The factors include:

> "1. [I]dentity of the law which governs the construction of the contract[;]
> "2. [P]lace of execution of contract[;]
> "3. [P]lace where the transactions . . . are to be performed[;]
> "4. [A]vailability of remedies in the designated forum[;]
> "5. [P]ublic policy of the initial forum state[;]
> "6. [L]ocation of the parties, the convenience of prospective witnesses, and the accessibility of evidence[;]
> "7. The relative bargaining power of the parties and the circumstances surrounding their dealings[;]
> "8. The presence or absence of fraud, undue influence or other extenuating (or exacerbating) circumstances[; and]
> "9. The conduct of the parties." *D'Antuono*, 570 F. Supp. at 712. (Citations and quotations omitted).

The first and second factors weigh in favor of finding the forum-selection clause to be reasonable, as the Lease, ¶ 15(b), provides that:

> "The Lease shall be deemed to have been made and delivered in the State of Rhode Island and shall be governed in all respects by the laws of such state. Lessee agrees to exclusive personal jurisdiction and venue in the state and federal courts located in the State of Rhode Island."

According to the terms "made and delivered," Rhode Island law governs the construction of the contract and is deemed to be the place of execution of the contract. Although Adena contends that the Lease was executed in Florida, the Lease provides otherwise. In addition, there is no reason to believe or evidence presented that suggests that remedies are not available in Rhode Island. Therefore, factor four also weighs in favor of finding the forum-selection clause reasonable.

Rhode Island's public policy of honoring parties' agreed upon terms in freely-negotiated, commercial agreements certainly does not weigh against a finding of reasonableness nor has Adena provided any public policies of the state that would suggest otherwise. Factors seven and eight are equally neutral as there is no evidence to suggest that the agreement was anything but an arms-length transaction, whereby each party had equal bargaining power, and no evidence to suggest fraud, undue influence, or other extenuating circumstances. Similarly, Adena provided no evidence or allegation that the parties' conduct renders the forum selection clause unreasonable. Although Adena asserts that it was solicited by and negotiated with a Florida employee of North American before the terms were passed on to NACR to memorialize into the Lease, Adena did not demonstrate that this conduct supports rendering the forum selection unreasonable.

Moreover, contrary to Adena's assertion that the location of prospective witnesses and accessibility of evidence weigh against the clause's reasonableness, the evidence and witnesses are scattered across the eastern half of the United States. Adena is an Ohio based corporation; NACR is a Florida based limited liability company; North American is a Massachusetts entity and its employee was based in Florida; the crane was delivered from Rhode Island to Florida; and

NACR's permitting issues that delayed delivery were with the state of Virginia. Therefore, the Court cannot agree that the location of the parties, the convenience of the prospective witnesses, and the accessibility of evidence weigh against reasonableness.

Although the delivery, use, and return of the crane was to take place in Florida—and as such, factor three weighs against a finding of reasonableness—one factor weighing against finding that the forum selection clause is reasonable, in the totality of the circumstances, does not win the day for Adena. Because Adena has not met its burden of proof in showing that litigating this dispute in Rhode Island would essentially deprive it of its day in court, the Court finds that the forum selection clause is fundamentally fair, valid, and establishes personal jurisdiction over Adena.

IV

Forum *Non Conveniens*

The Lease provides that Rhode Island is the proper venue. (Lease, ¶ 15(b) ("Lessee agrees to exclusive personal jurisdiction and venue in the state and federal courts located in the State of Rhode Island.").) Nevertheless, Adena argues that due to the "considerations of convenience, efficiency and justice" pursuant to the doctrine of forum *non conveniens*, the Court should dismiss the action. (Def. Mem. at 13 (quoting *Kedy v. A.W. Chesterson Co.*, 946 A.2d 1171, 1178 (R.I. 2008).)

Our Supreme Court has held that "[a]n enforceable forum-selection clause does more than waive a potential challenge to personal jurisdiction—it settles the proper venue for the case and prevents 'a party that has agreed to be bound . . . [from] . . . assert[ing] *forum non conveniens* as a ground for dismissing a suit brought in the chosen forum.'" *Sidell*, 18 A.3d at 507-08 (quoting *American Biophysics Corp.*, 411 F. Supp. 2d at 62).

Not only does this Court find that the forum selection clause is valid and enforceable, but the forum selection clause also contemplates that Rhode Island is the chosen venue. Therefore, Adena's contention that there is an alternative, adequate forum and that private and public interest factors render Rhode Island an inconvenient forum are of no event. If of any relevance, the Court determined, *supra* Section III, that Adena failed to demonstrate this forum's inconvenience.

V

Conclusion

Based on the foregoing, the Court denies Adena's Motion to Dismiss as the Court has determined that it has subject matter jurisdiction over the suit and personal jurisdiction over Adena and that venue is proper. Counsel for NACR shall prepare the appropriate order.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**NACR Leasing, LLC v. Adena Corporation**
CASE NO:	**PC-2020-01905**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**April 6, 2021**
JUSTICE/MAGISTRATE:	**Stern, J.**

ATTORNEYS:

For Plaintiff:	**Joseph S. Larisa, Jr., Esq.** **Giovanni D. Cicione, Esq.**
For Defendant:	**John M. Dupuis, Esq.** **Kendra A. Bergeron, Esq.** **David A. Goldman, Esq.**