



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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October 31, 2016

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Re: *Mohamed R. Hussain v. ImpactOffice, LLC*, CL-2016-9138

Dear Counsel:

This matter came before the Court on Plaintiff Mohamed R. Hussain's ("Mr. Hussain") Motion to Dismiss Counterclaim for Lack of Jurisdiction. The Defendant, ImpactOffice, LLC ("ImpactOffice") opposed the motion. After the submission of briefs and oral argument, the Court took the matter under advisement.

The motion revolved around the following issue:

Can Mr. Hussain enforce a forum selection clause contained in a non-solicitation agreement, and dismiss the Counterclaim for lack of jurisdiction, when he has already brought a Complaint in the Commonwealth of Virginia, under a related employment contract?

After considering the pleadings, case law and oral arguments presented by Counsel, the Court finds that Mr. Hussain waived his right to invoke the forum selection clause as grounds for dismissal by filing his cause of action for Breach of Contract in Virginia. Furthermore, enforcing

OPINION LETTER

the forum selection clause and dismissing the counterclaim would be unfair and unreasonable in these circumstances. As a result, the Court denies the Motion to Dismiss.

I. BACKGROUND

A. Factual Background

ImpactOffice is a Maryland limited liability company which sells and provides office supplies, as well as IT and related services. Mr. Hussain, a Virginia resident, was a “Solutions Architect” at ImpactOffice for four years, where he helped develop technology solutions for clients.

Mr. Hussain’s tenure at ImpactOffice began in 2012, after ImpactOffice purchased Mr. Hussain’s former employer and offered him employment on October 25, 2012, which he accepted on October 31, 2012. Compl. ¶ 4. The offer of employment, in addition to providing a base salary, mileage reimbursement and a smart phone, referenced multiple additional employment documents which needed to be or would be completed subsequently. Ex. 1 of Compl. Namely, the letter offer specifically referenced a bonus opportunity that would be forthcoming, within the “first 90 days of employment,” as well as a “Proprietary and Non-Solicitation Agreement” upon which commencement of employment would remain contingent. *Id.*

Thereafter, a bonus compensation plan, the “Roshan Bonus Plan,” was developed specifically for Mr. Hussain, including an agreement regarding sales commissions. Compl. ¶¶ 5-9. Mr. Hussain also completed the company’s standard Non-Solicitation Agreement, which required Mr. Hussain to avoid employment with any competitors, upon leaving ImpactOffice, for a period of two years. The agreement also contained a choice of law and forum-selection clause, requiring all actions “relating to, arising out of, or in connection with this Agreement” to “be submitted to the *in personam* jurisdiction” of the United States District Court for Maryland, or the Prince George Circuit Court. Ex. 1 of Answer / Counterclaim.

Over the proceeding four years, Mr. Hussain worked out of a Virginia office, and would submit worksheets and receive bonuses in accordance with the compensation plan. Compl. ¶ 7-10. During the First Quarter of 2016, Mr. Hussain alleges he then further earned bonuses of \$10,500; however, just two days before the end of that quarter, he was terminated. Compl. ¶¶ 10-11. Additionally, Mr. Hussain had received a new smart phone from ImpactOffice, also in accordance with his original employment offer, to replace the previous phone he had been given, which had cracked. Compl. ¶¶ 15-16. Mr. Hussain alleges he inadvertently left this phone at the office, and when he sought to recover the phone when terminated shortly thereafter, ImpactOffice allegedly refused. Compl. ¶¶ 16-18. Finally, Mr. Hussain further alleges that ImpactOffice failed to reimburse his mileage travelled in March of 2016.

After termination, it is alleged that Mr. Hussain found and began employment with a competitor of ImpactOffice.

B. Procedural Background

In June of 2016, Mr. Hussain elected to bring a cause of action, for (I) Breach of Contract and (II) Detinue, to recover the earned and unpaid bonuses, mileage reimbursements, and return of the cell phone. As a Virginia resident who performed most of his employment in a Virginia office, Mr. Hussain chose to litigate in the Fairfax County Circuit Court. ImpactOffice timely responded, and filed a counterclaim, alleging Mr. Hussain's breach of the Non-Solicitation Agreement when he accepted employment with a competitor.

Mr. Hussain now seeks to invoke and enforce the forum selection clause in the Non-Solicitation Agreement to dismiss the counterclaim for lack of jurisdiction.

II. STANDARD OF REVIEW

The controlling question is the enforceability of a forum selection clause. In determining enforceability, the Court must accept such clauses as "prima facie valid and should be enforced, unless the party challenging enforcement establishes that such provisions are *unfair or unreasonable...*" *Paul Business Systems, Inc. v. Canon*, 240 Va. 337, 342 (1990) (the Court not only entertained arguments for why the provision itself is unenforceable, but why it should not be enforced in these circumstances) (emphasis added); *see also Aquilent Inc. v. Distributed Solutions, Inc.*, 2012 U.S. Dist. LEXIS 15183, *2 (E.D. Va. 2012) (noting that it may be void, or should not be enforced, for public policy reasons).

III. ANALYSIS

A. Scope of the Forum Selection Clause

The Non-Solicitation Agreement is part of one complete employment package; however, a plain reading of the separate component parts of that employment package indicates that the forum selection clause is applicable to only the Non-Solicitation Agreement, not the whole employment package generally.

In Virginia, "where several instruments are made as part of one transaction, relating to the same subject-matter, they may be read together as one instrument...even when the parties are not the same, if the several instruments were known to all the parties and were delivered at the same time to accomplish an agreed purpose." *Countryside Orthopaedics v. Peyton*, 261 Va. 142, 152 (2001). In *Countryside*, the parties completed four separate agreements as part of one

employment package. One agreement within that package entitled the plaintiff-physician to severance pay, and another required the physician to purchase company stock. The plaintiff did not purchase stock, and when he sought to enforce the agreement granting severance pay, the Circuit Court erred in reading the documents separately. The physician thus breached first, and, under Virginia law, was not entitled to enforce the rest unless his breach was minor. Breach of one agreement was breach of the whole employment package, when all those agreements related to the same subject matter. This Non-Solicitation Agreement likewise is part of a whole employment package, and thus the claim for breach of the employment offer letter is part of the same transaction. Nevertheless, it does not necessarily follow that portions of that agreement cannot self-reference, to the exclusion of other component parts.

A plain reading of the Non-Solicitation Agreement makes the forum selection clause applicable to only its provisions. The offer letter refers to a *standard* Non-Solicitation Agreement. The forum selection clause then states: “All suits, proceedings and other actions relating to...*this Agreement*...” (emphasis added). Hence, the language in the Non-Solicitation Agreement is referring to itself; not to any general, undefined collection of employment documentation, but *this Agreement*. This construction is also evidenced by the choice of law provision. The Non-Solicitation Agreement provides that the “Agreement” shall be governed by and construed “in accordance with the laws of the State of Maryland.” Still, it seems undisputed that Virginia law applies to Hussain’s claims, not Maryland law, because the alleged breach was in Virginia. It would be unreasonable to interpret the forum selection clause to apply to the whole employment package.

B. Enforcement Would Be Unfair and Unreasonable in These Circumstances

Nevertheless, enforcement can be avoided if it would be unfair, unreasonable and/or against public policy, particularly where these documents *do constitute* one employment package. *See Paul Business Systems, Inc. v. Canon*, 240 Va. 337, 342-43 (1990); *see also Electro-Mechanical Corp. v. Riter Engineering Co.*, 2011 U.S. Dist. LEXIS 56674 (U.S.D.C., UT, 2011).

Enforcement here would violate public policy. Mr. Hussain chose to file his cause of action for breach of the employment contract in Virginia. Although that employment contract was not, as a whole, controlled by the forum selection clause in the Non-Solicitation Agreement, the Non-Solicitation Agreement did form part of the employment package which he alleged was breached. By filing this action in Virginia, Mr. Hussain exposed himself to potential counterclaims regarding that employment package, even breaches of the Non-Solicitation Agreement. Holding otherwise would result in judicial inefficiencies, and potential inconsistencies, both of which violate important public policy considerations. It is simply unfair and unreasonable to divide litigation on one employment package, a single set of employment

documents, at the request of a plaintiff who himself elected the forum in which the litigation would commence.

It is conceivable that Mr. Hussain intends to argue that his claim, that he was not paid certain monies and bonuses, would constitute a defense to the enforcement of the Non-Solicitation Agreement. It would be inefficient to litigate the same issue in both the Fairfax County Circuit Court and in Federal Court in Maryland. Moreover, the two different Courts could resolve this very issue in two different manners, leading to further inconsistency.

Other courts have followed a similar logic. See *Electro-Mechanical Corp. v. Riter Engineering Co.*, 2011 U.S. Dist. LEXIS 56674 (U.S.D.C., UT, 2011). In *Electro-Mechanical*, the plaintiff brought an action for conversion; the defendant counterclaimed under the Sales Representative Agreement, which had a forum selection clause. The Court held that the conversion claim *arose* from that agreement, and hence enforcement of the forum selection clause was waived. Although here the forum selection clause is not in some umbrella agreement, and does not control the entire contract, but rather is in a subset of the overarching employment package, the same principle applies. The agreements at issue arise from the same transaction, and were completed for the same purpose: To hire Mr. Hussain. Mr. Hussain then chose a forum, and cannot now avoid the counterclaim by enforcing a forum selection clause contained in an agreement specifically referenced in the offer of employment.

IV. CONCLUSION

For the foregoing reasons, the Court finds denies Mr. Hussain's Motion to Dismiss for Lack of Jurisdiction. An order is consistent with his ruling is attached.

Sincerely,


Daniel E. Ortiz
Circuit Court Judge

Enclosure

OPINION LETTER

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

MOHAMED R. HUSSAIN,

Plaintiff,

v.

IMPACTOFFICE, LLC

Defendants.

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CL-2016-9138

ORDER

THIS CASE came before the Court upon Plaintiff / Counterclaim Defendant's Motion to Dismiss the Counterclaim for Lack of Jurisdiction. For the reasons set forth in the Court's Opinion Letter; it is therefore,

ORDERED that the Motion is denied.

ENTERED this 31st day of October, 2016.



Judge Daniel E. Ortiz

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.