NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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Fairfax, Virginia 22030-4009

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July 22, 2022

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Re: Boxer Advisors, LLC v. Success Business, Inc., et al., CL-2022-0002654

Dear Counsel:

This matter is before the Court on Defendants' Plea in Bar to the Amended Complaint. The key issues presented at the non-evidentiary hearing conducted on July 1, 2022, are as follows: (1) whether a pleading of fraudulent inducement to enter a contract in this case invalidates a forum selection clause within the contract; and (2) whether the contract between Plaintiff and Defendant Success Business, Inc. ("SBI") is unambiguous as to the property that SBI acquired through the contract. The answer to both questions is "no".

The Circuit Court grants SBI's Plea in Bar on Counts I and II since Plaintiff's dispute with SBI must be litigated in a Maryland court. As to Defendant Shadowbox

OPINION LETTER

Consulting Associates, LLC ("Shadowbox"), the Plea in Bar on Counts II and III is denied.

I. Procedural History and Background

Boxer Advisors, LLC ("Boxer" or "Plaintiff") was a prime contractor for a federal government contract. Plaintiff entered into a subcontractor agreement with SBI to assist with completing a scope of work in the prime contract, which includes providing leadership development instructional services. In its Amended Complaint, Plaintiff alleges that SBI misappropriated Plaintiff's course leadership materials and used them to teach a course with Shadowbox. Plaintiff sues for fraud in the inducement against SBI (Count I); misappropriation of trade secrets against both Defendants (Count II); and tortious interference with contract against Shadowbox (Count III).

On June 3, 2022, Defendants filed this Plea in Bar. SBI claims that Section G(4) of the subcontractor agreement, titled "Choice of Law & Jurisdiction", contains a valid forum selection clause that requires Plaintiff and SBI to litigate their dispute in a court of competent jurisdiction in Maryland. As such, Counts I and II against SBI cannot be heard in Virginia.

In addition, Defendants contend that the subcontractor agreement between Plaintiff and SBI unambiguously gave SBI proprietary rights to the leadership course materials that Plaintiff now claims were misappropriated. Defendants argue that a Plea in Bar is appropriate to adjudicate this issue because a finding that SBI has a contractual right to the leadership teaching materials at issue resolves the misappropriation of trade secrets claim against both Defendants (Count II), as well as the claim that Shadowbox tortiously interfered with Plaintiff's subcontractor agreement (Count III) simply by working with SBI on a project that used the leadership teaching materials.

Plaintiff's contends that the claims against SBI can be litigated in Virginia because the subcontractor agreement was the product of SBI's fraudulent inducement. Therefore, the forum selection clause in the contract is invalid. In addition, Plaintiff disputes Defendants' position that the subcontractor agreement is unambiguous as to whether SBI obtained a proprietary interest in the leadership course materials. Therefore, the Court cannot decide through a non-evidentiary, plea in bar hearing whether SBI obtained proprietary rights to the leadership course materials, which is the key issue in the misappropriation of trade secrets claim against both Defendants (Count II) and the tortious interference with contract claim against Shadowbox (Count III).

II. Legal Analysis

A plea in bar presents a distinct issue of fact which, if proven, bars a plaintiff's right of recovery. *Hilton v. Martin*, 275 Va. 176, 179 (2008). A plea in bar does not point out the legal insufficiency of allegations but rather demonstrates their irrelevance because of some other dispositive point, usually some affirmative defense such as *res judicata*, a release, statute of limitations, or statute of frauds. *California Condo. Ass'n v. Peterson*, 869 S.E.2d 893, 896 (Va. 2022); *Nelms v. Nelms*, 236 Va. 281, 289 (1988).

A. The Forum Selection Clause

Virginia courts adhere to the modern view of forum selection clauses—contractual limitations on the place or court for adjudicating future disputes are *prima facie* valid and enforceable unless unreasonable, unfair, affected by fraud, or affected by unequal bargaining power. *Paul Bus. Sys., Inc. v. Canon U.S.A., Inc.*, 240 Va. 337, 342 (1990) (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 12 (1972)).

The question presented is whether the term "affected by fraud" relates generally to any misrepresentation that induced a party to enter into a contract or whether the fraud must relate to inducing a party to agree to forum selection clause within the contract. The weight of federal and state court authority among jurisdictions adopting the modern view of forum selection clauses indicates that the fraud must relate specifically to the inclusion of the clause in the contract in order to render it invalid. *E.g.*, *Ash-Will Farms, L.L.C. v. Leachman Cattle Co.*, 61 Va. Cir. 165, at *3 (Winchester City Cir. Ct. Feb. 13, 2003) ("[A]ny fraud sufficient to vitiate the forum selection provision must be directed specifically at the insertion of the forum selection clause in the contract"); *State ex rel. 3C LLC v. O'Briant*, No. 21-0441, 2022 WL 2128345, at *10 (W. Va. June 14, 2022) ("[I]n order to rebut the presumption of enforceability of a forum-selection clause on the ground of fraud, the fraud alleged must be specific to the forum-selection clause itself"); *Cagle v. Mathers Fam. Tr.*, 2013 CO 7, ¶ 18 ("[A] forum selection clause is presumptively valid unless it is... fraudulently induced"); *Polk Cnty. Recreational Ass'n v. Susquehanna Patriot Com. Leasing Co.*, 273 Neb. 1026, 1040 (2007) (finding fraud allegations against a lease rather than procurement of the forum selection clause in particular "would not invalidate the forum selection clause"); *Provence v. Nat'l Carriers, Inc.*, 2010 Ark. 27, at 9-10, 360 S.W.3d 725, 730 ("[A] party like the appellants in the instant case must plead fraud in the inducement of the forum-selection clause itself to avoid its application. Generalized allegations of fraud with respect to the inducement of the contract as a whole, as the appellants have made in the instant case, will not operate to invalidate a forum-selection clause"); *see also Zaklit v. Glob. Linguist Sols., LLC*,

No. 1:14CV314 JCC/JFA, 2014 WL 3109804, at *7-8 (E.D. Va. July 8, 2014) (discussing the modern trend among courts to require that the fraud is directed at the forum selection clause itself rather than the contract as a whole before rendering a forum selection clause invalid). Plaintiff cites *Khosla v. Glob. Mortg., Inc.*, 72 Va. Cir. 229, at *3 (Fairfax Cnty. Cir. Ct. Nov. 8, 2006), in which the trial court did not require the fraud allegation to relate specifically to the inclusion of a contract's forum selection clause. This case appears to be an outlier that precedes much of the weight of authority to the contrary.

This Court holds that an otherwise valid forum selection clause is not rendered invalid by an allegation of fraud when the alleged misrepresentation is not directed at the forum selection clause itself. In the instant case, Plaintiff does not argue there was fraud pertaining to the inclusion of the forum selection clause. It only alleges that SBI made misrepresentations pertaining to rights to materials used in the contract. As such, Section G(4)'s forum selection clause facially is valid and enforceable. The Plea in Bar is granted as to Defendant SBI for Counts I and II.

B. The Ambiguity of the Contract

A contract is construed according to its plain meaning when the terms are clear and unambiguous. *TravCo Ins. Co. v. Ward*, 284 Va. 547, 552 (2012). When an ambiguity exists, courts may rely upon extrinsic evidence in the form of parol evidence to determine the parties' intent. *Aetna Cas. and Sur. Co. v. Fireguard Corp.*, 249 Va. 209, 215 (1995). A contract's term is ambiguous when there are multiple reasonable interpretations in view of the entire contractual context. *James River Ins. Co. v. Doswell Truck Stop, LLC*, 297 Va. 304, 306 (2019). The Court can examine the connotation of a term to determine if it is ambiguous. *See Am. Reliance Ins. Co. v. Mitchell*, 238 Va. 543, 549 (1989).

In this case, Section F of the subcontractor agreement between Boxer and SBI states, in pertinent part:

> All information gathered by Subcontractor for the purpose of fulfilling the Scope of Work during the performance of this Subcontract, including but not limited to reports, research, and electronic files, shall become the property of the Government or SBI. Notwithstanding any other provision of this contract, neither Subcontractor nor any consultant or subcontractor shall make any claim of copyright or any other ownership interest in any of the information gathered under this Subcontract...

The term "gathered" as used in Section F neither is defined in the agreement nor does it have a commonly understood legal meaning. The dictionary's primary definition of "gather" is "to bring together into a crowd, group, body, or mass." *Gather*, Webster's Third New International Dictionary (3d ed. 1961). A literal reading of this non-legal definition does not exclude items in the possession of the gatherer prior to the gathering, in this case Plaintiff's course materials. That would favor Defendants' position that the course materials were not misappropriated trade secrets.

On the other hand, the term "gathered" may connote bringing new items together that are not currently in one's possession, including materials created as part of the work product process. Examples may include reports, research, and electronic files—matters all referenced in Section F. This interpretation would favor Plaintiff's position that its pre-existing course materials are not covered by Section F and remain the exclusive property of Plaintiff.

Both Plaintiff and Defendants set forth reasonable interpretations of the term "gathered", which support their respective contrary positions. Without a definition in the contract itself, an ambiguity exists that cannot be resolved based on the pleadings and a non-evidentiary hearing. Accordingly, the Plea in Bar is denied as to Defendant Shadowbox for Counts II and III.

A copy of the Circuit Court's Order is enclosed.

Sincerely,

[redacted]

Stephen C. Shannon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Boxer Advisors, LLC,	)	
Plaintiff,	)	
	)	
VERSUS	)	**CASE NO. CL-2022-2654**
	)	
Success Business, Inc.,	)	
	)	
and	)	
	)	
Shadowbox Consulting Associates, LLC,	)	
Defendants.	)	

ORDER

MATTER CL-2022-2654 came before the Court on July 1, 2022, on a Plea in Bar initiated by Defendants;

IT IS ORDERED that the Plea in Bar is GRANTED as to Counts I and II pertaining to Success Business, Inc. and DENIED as to Counts II and III pertaining to Shadowbox Consulting Associates, LLC.

ENTERED this 22nd day of July 2022.

[redacted]

Judge Stephen C. Shannon

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.