

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**THE CADEN COMPANIES, INC,
Plaintiff,**

v.

**Case No. 15-148958-CB
Hon. James M. Alexander**

**MJ STEPS,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on cross motions for summary disposition. Defendant moves for summary disposition based on lack of personal jurisdiction, and Plaintiff moves based on an agreement to arbitrate.

According to the Complaint, Plaintiff claims that the parties entered into a July 1, 2013 “Distribution Agreement,” whereby Defendant would exclusively market and distribute Plaintiff’s “Belly Bandit” line of products in Europe. In exchange for the right to do so, Plaintiff claims that Defendant agreed to confidentiality, non-compete, and intellectual-property provisions that it subsequently breached. Plaintiff then filed the present suit, in part, seeking to compel arbitration based on Defendant’s alleged breaches.

Defendant responded to the Complaint by filing the present motion – arguing that Michigan lacks personal jurisdiction over it. To this end, Defendant moves for summary disposition under MCR 2.116(C)(1).

If the Court finds that Michigan can exercise jurisdiction over Defendant, then Plaintiff moves for summary disposition under (C)(7), seeking an order compelling arbitration.

The Court will first address Defendant's motion. A (C)(1) motion tests whether the Court has personal jurisdiction over a defendant. Plaintiff has the burden of establishing a prima facie showing of jurisdiction to avoid summary disposition. *Jeffrey v Rapid American Corp*, 448 Mich 178, 184; 529 NW2d 644 (1995). A court reviewing such a motion must examine the affidavits, pleadings, depositions, admissions as well as any other documentation submitted by the parties. MCR 2.116(G)(5); *Jeffrey*, 448 Mich 178. All factual disputes are resolved in the non-movant's favor. *Id.* Whether a court has personal jurisdiction over a party is a question of law. *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 426; 633 NW2d 408 (2001).

According to the Complaint, Plaintiff is a California corporation with an office in Birmingham, Michigan. Defendant, however, is a foreign corporation incorporated in Switzerland. Defendant claims that it has never registered to do business in Michigan, nor has it sold any products in Michigan or the United States.

Jurisdiction can be established by way of general personal jurisdiction or specific (limited) personal jurisdiction. *Oberlies*, 246 Mich App at 427. A court has general jurisdiction over a corporate defendant if it is incorporated in Michigan or if it consented to the court's exercise of jurisdiction. MCL 600.711.¹

In this case, the parties dispute whether Defendant consented to Michigan's exercise of jurisdiction. Plaintiff claims that Defendant so consented when it executed the July 1, 2013 Distribution Agreement, which provides (in relevant part) (emphasis removed):

The venue for any legal proceedings arising from or connected with this Agreement shall be exclusively in Oakland County, Michigan, each party consents to the personal jurisdiction of such courts and no party shall have the right to challenge venue based on forum non conveniens or otherwise.

¹ The consent provision of MCL 600.711(2) expressly implicates MCL 600.745 (reproduced below).

But Defendant argues that the Distribution Agreement never became an effective contract because Plaintiff never executed it. Plaintiff, who carries burden of establishing a prima facie showing of jurisdiction to avoid summary disposition, argues that Michigan can exercise jurisdiction, citing the Revised Judicature Act at MCL 600.745(2), which provides:

If the parties agreed in writing that an action on a controversy may be brought in this state and the agreement provides the only basis for the exercise of jurisdiction, a court of this state shall entertain the action if all the following occur:

- (a) The court has power under the law of this state to entertain the action.
- (b) This state is a reasonably convenient place for the trial of the action.
- (c) The agreement as to the place of the action is not obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means.
- (d) The defendant is served with process as provided by court rules.

Plaintiff further cites *Turcheck v Amerifund Fin, Inc*, 272 Mich App 341; 725 NW2d 684 (2006) for the proposition that “[a]llowing a party who is disadvantaged by a contractual choice of forum to escape the unfavorable forum-selection provision on the basis of concerns that were within the parties’ original contemplations would unduly interfere with the parties’ freedom to contract and should generally be avoided.” *Turcheck*, 272 Mich App at 350. Indeed, *Turcheck* does stand for the notion that “Michigan’s public policy favors the enforcement of contractual forum-selection clauses and choice-of-law provisions.” *Id.* at 345.

Both MCL 600.745 and *Turcheck* speak in terms of **contract**. The cited section of the Act presupposes an “agreement,” as does *Turcheck*. But Plaintiff presents only a partially executed contract in support of its consent argument and otherwise fails to address the effect of the same.

And it is well settled that “Before a contract can be completed, there must be an offer and acceptance. No contract can arise except on the express mutual assent of the parties. Unless an

acceptance is unambiguous and in strict conformance with the offer, no contract is formed.” *Independence Township v Reliance Bldg Co*, 175 Mich App 48, 53; 437 NW2d 22 (1989) (emphasis added) (internal citations omitted).

The parties do not dispute that Plaintiff did not execute the Distribution Agreement. Based on this failure, Defendant argues that there was no acceptance or mutual assent, and therefore, no contract. And because there was no contract, Defendant claims that Plaintiff cannot enforce an alleged contractual consent to Michigan’s jurisdiction.

As stated, Plaintiff’s argument fails to address the effect of its failure to execute the contract – beyond **concluding** that it “is immaterial.” In fact, Plaintiff’s entire argument is founded on the premise that the Distribution Agreement is a valid and binding contract. But Michigan law is clear that, “A party may not merely announce a position and leave it to [the] Court to discover and rationalize the basis for the claim.” *National Waterworks, Inc v International Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007).

Defendant, on the other hand, argues that (1) it never received any executed copy of the Distribution Agreement, and (2) the parties did not followed the terms of said Agreement. By way of example, Defendant argues that the essence of the proposed Distribution Agreement was for Defendant to obtain exclusive marketing and distribution rights for Plaintiff’s Belly Bandit products in Europe.

But, Defendant argues, after it executed the Agreement, Plaintiff continued to sell directly to retailers in the UK.² If the Agreement was valid (i.e. Defendant had exclusive distribution rights), Defendant argues, then Plaintiff would have been violating the same. But Plaintiff’s conduct is consistent with the notion that the Agreement was not effective – which is consistent with Plaintiff’s failure to execute the same. While Plaintiff **argues** that it did not

² And Defendant supports its factual allegations with an Affidavit.

improperly sell products in Europe, it fails to attach any **evidence** disputing Defendant's supported claims.

Further, the attached Distribution Agreement contains two alterations apparently made by Defendant's agent. First, Defendant's agent appears to have changed the amount Defendant was required to expend on marketing from 10% to 5%. And Defendant noted that it carried a liability insurance policy for \$1.2 million (and not \$1 million per occurrence and \$3 million aggregate as required under the contract). As a result, it is unclear if Defendant's changes were material such that its signature thereon created a counter-offer that Plaintiff could have accepted or rejected. But neither party addresses this issue.

In any event and for all of the foregoing reasons, the Court finds that the partially executed Distribution Agreement does not amount to an agreement or contract for purposes of Defendant's consent to Michigan's exercise of personal jurisdiction. As a result, Defendant's motion for summary disposition under (C)(1) is GRANTED, and Plaintiff's Complaint is DISMISSED.³

This Order is a Final Order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

March 2, 2016
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge

³ As a result of this ruling, the Court need not address Plaintiff's motion to compel arbitration. The Court will note, however, that had it ruled the Distribution Agreement (and consent to Michigan jurisdiction) valid and enforceable, then the Court would have granted Plaintiff's (C)(7) motion to compel arbitration as Plaintiff's claims fall squarely within the Agreement's broad arbitration provision.