

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

DEAN WESTON, et al.,

Plaintiffs,

v

Case No. 16-152236-CB

Hon. Wendy Potts

CARL LeSOUEF, et al.,

Defendants.

OPINION AND ORDER RE: DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

At a session of Court
Held in Pontiac, Michigan

On
AUG 25 2016

This matter is before the Court on Defendants Carl Le Souef, Pravansu Mohanty, Hydrogen Master Rights Limited, Somnio Global, L3C, Somnio Global, LLC, Domnio Domus, LLC, CSquared Innovations, LLC, Breakthroughs for Humanity Management Inc., and Cooper Harbor Breakthroughs, Inc.'s motion for summary disposition pursuant to MCR 2.116(C)(7), which tests whether a claim is barred as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). A motion under (C)(7) is decided on the pleadings, unless the parties submit evidence contradicting the allegations in the pleadings. *Turner v Mercy Hosp & Health Services*, 210 Mich App 345, 349; 533 NW2d 365 (1995).

For purposes of background, Defendant Hydrogen Master Rights Limited is a Delaware corporation formed for the purpose of receiving breakthrough hydrogen

technology which was purchased from Sellers Paul David Manos, Bernard Picot, and two trusts pursuant to an Asset Purchase Agreement. In the Complaint, Plaintiff Dean Weston asserts that he is the assignee of the Sellers, and he is the managing member of Plaintiff Engineering Interests, Inc. When Hydrogen Master and the Sellers signed the Asset Purchase Agreement, the parties agreed that the state and federal courts in Delaware would have sole and exclusive jurisdiction over any action arising out of or relating to the Agreement. The parties also agreed that the Agreement shall inure to and bind the parties' successors, permitted assigns and legal representatives. Defendants assert that all of Plaintiffs' claims relate to and arise out of the Agreement.

In response, Plaintiffs assert that the forum selection agreement does not bind non-parties to the agreement on issues not subject to the agreement. Plaintiffs cite to *Offerdahl v Silverstein*, 224 Mich App 417; 569 NW2d 834 (1997) for the proposition that a contractual forum selection clause, while otherwise valid, may not be enforced against a non-party to the contract. Plaintiffs claim they are not a party to the HMR contract, and that they did not agree to litigate their claims in Delaware. Plaintiffs further argue that there is no agreement as to forum for most of the defendants.

Plaintiffs also assert that the Court should not enforce the forum selection clause in the Agreement because doing so would require Plaintiffs to litigate in two forums and because the Court must enforce MCL 600.745. Plaintiffs argue that almost all sources of proof and evidence of the creation and development of the technology at issue are located in Michigan. Lastly, Plaintiffs assert that they do not have minimum contacts with Delaware and seem to argue that Delaware's exercise of jurisdiction would not comport with the due process requirements of fair play and substantial justice.

Michigan's public policy favors enforcement of a valid forum selection clause. *Turcheck v Amerifund Financial, Inc*, 272 Mich App 341, 345; 725 NW2d 684 (2006). Plaintiffs bear a heavy burden of showing that the clause is unenforceable. *Id* at 348. Plaintiffs cite to *Offerdahl, supra* in support of their argument that they should not be bound to the forum selection clause because they were not parties to the Agreement. However, the facts of *Offerdahl* can be distinguished from the present facts. In *Offerdahl*, the plaintiffs contended that they were not bound by an agreement of the previous property owners. Plaintiffs argued that they were not signatories to the contract, and since the contract was a license it was revoked upon conveyance of the underlying property. The Court of Appeals held that the Circuit Court should have first determined whether the plaintiffs were subject to the agreement before concluding that the action should have been brought in a different forum. *Offerdahl, supra*. *Offerdahl* held that a forum selection clause is unenforceable against one who is not bound by a contract—it did not hold that a forum selection clause is unenforceable against a non-party. *Offerdahl, supra*.

In the instant matter, Weston asserts he is the assignee of the Sellers. At paragraph 78 of the Complaint, Plaintiffs assert “Manos repeatedly confirmed Weston’s one-third interest in front of third parties and eventually Manos, Julie Blair, as Trustee, DBHS, Significan and Picot transferred their interests to Weston.” Further, at paragraph 122 of the Complaint, Plaintiffs allege that “Hydrogen Master Limited agreed to buy the subject technology from Picot and Manos, who have assigned their interest to Weston for \$40,400,000.” “An assignee stands in the position of the assignor, possessing the same rights and being subject to the same defenses.” *Burkhardt v Bailey*, 260 Mich App 636, 654; 680 NW2d 453 (2004). Further, the claims asserted by Engineering Interests arise out of and relate to the Agreement.

Plaintiffs assert that Defendants' motion should be denied pursuant to MCL 600.745(3), which provides that "[i]f the parties agreed in writing that an action on a controversy shall be brought only in another state and it is brought in a court of this state, the court shall dismiss or stay the action, as appropriate, unless any of the following occur: (a) The court is required by statute to entertain the action. (b) The plaintiff cannot secure effective relief in the other state for reasons other than delay in bringing the action. (c) The other state would be a substantially less convenient place for the trial of the action than this state. (d) The agreement as to the place of the action is obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means. (e) It would for some other reason be unfair or unreasonable to enforce the agreement." Plaintiffs argue that "the motion can be denied under any one of the above conditions; only one is required. The Motion to Dismiss should be denied on the grounds set forth under MCLA 650.7453(7)(b)(c) [sic] and/or (d)."

Plaintiffs claim that Delaware would be a "substantially less convenient place for trial" under MCL 600.745(3)(c) because nearly all witnesses are located in Michigan. But such a notion was recently rejected by the United States Supreme Court in *Atlantic Marine Constr Co v United States Dist Court*, ___ US ___; 134 S Ct 568, 582; 187 L Ed 2d 487 (2013). The *Atlantic Marine* Court reasoned "[w]hen parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation." *Id.* at 582.

This is so, as the Court reasoned, because "[w]hatever 'inconvenience' [the parties] would suffer by being forced to litigate in the contractual forum as [they] agreed to do was

clearly foreseeable at the time of contracting.” *Id.*; quoting *The Bremen v Zapata Off-Shore Co*, 407 US 1, 17-18; 92 S Ct 1907; 32 L Ed 2d 513 (1972).

The *Atlantic Marine* Court concluded: “When parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties’ settled expectations. A forum-selection clause, after all, may have figured centrally in the parties’ negotiations and may have affected how they set monetary and other contractual terms; it may, in fact, have been a critical factor in their agreement to do business together in the first place. In all but the most unusual cases, therefore, ‘the interest of justice’ is served by holding parties to their bargain.” *Id.* at 583. The Supreme Court’s reasoning is sound, and Plaintiffs otherwise fail to convince the Court that Delaware would be substantially less convenient place for this litigation.

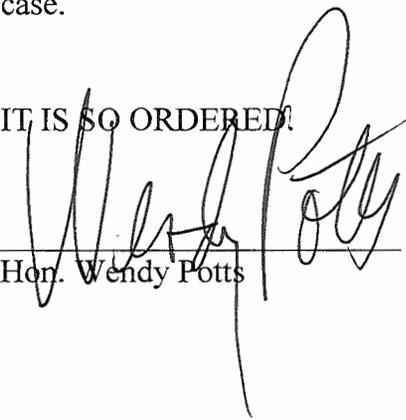
Because Plaintiffs have not demonstrated that any of factors in MCL 600.745(3) are applicable to this dispute, Defendants are entitled to dismissal of any claim that relates to or arises out of the Agreement. Despite broad assertions that the forum selection clause agreement is not binding on issues not subject to the agreement and that severance is involved on excluded claims, Plaintiffs present no evidence of claims not subject to the Agreement. Thus, this argument fails.

Plaintiffs’ argument that they do not have minimum contacts with Delaware and that the requirements of due process are not satisfied is inapplicable because Plaintiffs stand in the shoes of the assignor. *Burkhardt, supra*. Thus, the forum selection clause in the Agreement is applicable to Plaintiffs and renders the question of minimum contacts irrelevant. See *Potomac Leasing Co v The French Connection Shops, Inc.*, 172 Mich App 108, 111-12; 431 NW2d 214 (1988).

For all of the reasons stated above, the Court grants Defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) and dismisses Plaintiffs' complaint in its entirety.

This Order resolves the last pending claim and closes the case.

IT IS SO ORDERED



Hon. Wendy Potts

Dated: **AUG 25 2016**