IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

WAYNE MURRAY, d/b/a
M&M PLUMBING COMPANY, PLAINTIFF

vs. Civil Action No. 3:95cv18-A

MAXUS, INC., d/b/a
MAXUS CONSTRUCTION COMPANY,
and FIDELITY AND DEPOSIT
COMPANY OF MARYLAND, DEFENDANTS

MEMORANDUM OPINION

The court has before it the motion of the defendant, Maxus, Inc., d/b/a Maxus Construction Company ("Maxus"), to dismiss the above-styled case pursuant to Fed. R. Civ. P. 12(b)(3) (1995), on the ground that venue in this court is improper for the instant action. The case arises out of a dispute between the plaintiff, Wayne Murray, d/b/a M&M Plumbing Company ("Murray"), and Maxus regarding contracts for plumbing work on construction projects in Mississippi and Ohio. The district court's jurisdiction over this case between parties of diverse citizenship rests upon 28 U.S.C. § 1332.

In accordance with the provisions of 28 U.S.C. § 636(c), the parties consented to have a United States magistrate judge conduct all proceedings in this case, including an order for entry of final judgment. Therefore, the undersigned has authority to decide this motion to dismiss. The court finds that the forum selection clause in the contract between the parties is determinative, and the proper venue for this action is the Circuit Court of Jefferson County, Alabama. Accordingly, the defendant's motion to dismiss for improper venue shall be granted.

Wayne Murray is a Louisiana resident, and M&M Plumbing has its principal place of business in Louisiana. Maxus is an Alabama corporation with its principal place of business in Alabama, while Fidelity is a Maryland corporation principally located in Maryland. Murray subcontracted with Maxus to perform plumbing work on apartment construction projects in Mississippi and Ohio for which Maxus was the prime contractor. The work was to be performed

under two separate contracts, the "Ohio subcontract" and the "Mississippi subcontract," signed on October 27, 1993 and November 16, 1993 respectively.

Both contracts included exhibits specifically incorporated into the contracts by reference. Exhibits to both contracts contained some identical provisions, one of which gives rise to the instant motion. The relevant section provides that "[a]ny dispute under this subcontract shall be governed by the laws of Alabama and the parties hereby agree that the Circuit Court of Jefferson County, Alabama, shall be the sole and exclusive forum for resolutions of any dispute under this subcontract." The exhibits containing this provision were separately agreed to and executed, as were the contracts themselves, by Murray and a Maxus representative.

Murray contends that he commenced work under the subcontracts and continued to perform until early 1994, when Maxus ordered Murray to stop work at the Ohio job site. After reaching a verbal agreement, pursuant to which Murray was to receive a sum for work completed on the Ohio project while concentrating all his efforts on completing the Mississippi project, work continued. The parties soon disregarded the settlement agreement, and Murray resumed work at both sites. Murray contends that Maxus subsequently withheld payments for labor and materials and made such difficult demands that Murray was eventually pressured into turning over the jobs to another subcontractor. The instant action ensued, wherein Murray charges Maxus with breach of both contracts, fraudulent misrepresentation and tortious interference with the contracts.

Maxus has now moved to dismiss this case for improper venue or for summary judgment. The motion to dismiss is based upon the forum selection clauses contained in both subcontracts. Murray contends that the Mississippi contract is invalid, and its venue provision is also invalid, which renders the improper venue issue moot. The question now before the court is whether the forum selection clauses should be enforced.

Forum selection clauses, although traditionally disfavored, are now widely viewed as "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *M/S Bremen v. Zapata Off-Shore Company*, 407 U.S.

1, 10, 32 L. Ed. 2d 513, 92 S. Ct. 1907 (1972) (citations omitted).[1] Although the Court of Appeals for the Fifth Circuit has yet to rule specifically on whether a mandatory forum selection clause is enforceable,[2] this court is constrained to follow its own precedent and find the forum selection clauses in the subcontracts presently before the court to be enforceable.

The rule of law in this district is that of the *M/S Bremen* court -- forum selection clauses are "prima facie valid," and the court will enforce them unless to do so would be "unreasonable." *Hunter Distributing Company*, 820 F. Supp. at 286. "'The enforcement of such a clause would be unreasonable if the clause is invalid for fraud or overreaching, or if forcing the resisting party to proceed in the [contractually] chosen forum would be so difficult for that party that it would effectively deprive it of its day in court." *Id.* (citation omitted). It is not the contract which the party seeking to resist enforcement of the clause must prove was fraudulently induced, rather it is the forum selection clause itself. The enforceability of the forum selection clause turns on whether "the *inclusion of that clause in the contract* was the product of fraud or coercion." *Scherk v. Alberto-Culver Company*, 417 U.S. 506, 519 n.14, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1970) (emphasis in original); *see Boiardi Products Corporation v. Axam, Inc.*, No. 87-4010, 1989 WL 201020, at *3 (D. N.J. Mar. 23, 1989).

In the instant case, Murray's argument does not reach the issue of the reasonableness of the forum selection clauses. Instead, Murray, the party who filed suit seeking relief under the

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[1]While *M/S Bremen* was an admiralty case, the decision has been extended to encompass other cases, including contract cases. *See In re Fireman's Fund Insurance Companies, Inc.*, 588 F.2d 93 (5th Cir. 1989); *Clarkco Contractors, Inc. v. Texas Eastern Gas Pipeline Company*, 615 F. Supp. 775, 776 (M.D. La. 1985).

[2]The Fifth Circuit's most recent relevant decision involving a forum selection clause is *Caldas & Sons, Inc. v. Willingham*, 17 F.3d 123 (5th Cir. 1994). The court declined to reach the issue of enforceability of a mandatory forum selection clause because the clause in the contract before the court was permissive. *Id.* at 127. The clauses at issue in the instant case, however, contain mandatory language, similar to the clause addressed by the *M/S Bremen* court, *see M/S Bremen*, 407 U.S. at 2, and specify that the Alabama court "shall be the *sole and exclusive* forum for resolutions of any dispute under this subcontract" (emphasis added). As such, the court is guided by its previous decision in *Hunter Distributing Company, Inc. v. Pure Beverage Partners*, 820 F. Supp. 284 (N.D. Miss. 1993), discussed herein.

subcontracts in the first instance, argues now that the Mississippi subcontract is invalid,[3] which he contends renders the venue issue moot.[4] This circular argument, if adopted by the court, would mean that a party who has signed a contract containing a forum selection clause which he later regrets could invalidate the clause by claiming invalidity of the contract as a whole.[5] It may be that the Mississippi statutes in issue invalidate the Mississippi subcontract, but the fact remains that the validity of the subcontract for the Mississippi construction project itself is necessarily a "dispute under this subcontract," for which the forum selection clause provides the "sole and exclusive forum" of the Circuit Court of Jefferson County, Alabama.[6] Murray, having freely chosen to sign the forum selection clause, must live with his decision to do so.

Murray does not direct the court to circumstances which would render enforcement of the

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[3]Murray's contention in this regard is based upon a reading of Miss. Code Ann. §§ 31-3-15 (1990) and 31-3-21 (Supp. 1995).

[4]In his response brief in opposition to Maxus' motion to dismiss, Murray acknowledges that the subcontract relating to the Ohio project is valid, and its forum selection clause is "possibly" valid.

[5]In a similar case a defendant sought to convince the court that because the plaintiff had not performed certain "conditions precedent" to the formation of the contract, the contract itself, and in turn the forum selection clause which it contained, were invalid and unenforceable. *Grand Central Sanitary Landfill, Inc. v. C-E Huntington Limited Partnership*, No. CIV.A.95-0056, 1995 WL 92377, at *1-2 (E.D. Pa. Mar. 1, 1995). The "conditions" were the procurement of certain permits and agency approvals, much like the situation in the instant case. *Id.* at *2 n.1. As here, the party seeking to avoid the forum selection clause argued not that the clause was invalid due to any of the grounds stated in *M/S Bremen*, but that the contract itself was void. *Id.* at *2. The court's reasoning, which this court finds persuasive, was that by not attacking the validity of the clause itself, the "defendant tacitly admits that the . . . clause is effective if the contract as a whole is valid and enforceable, and, therefore, that it is truly seeking an adjudication from this court on the ultimate issues in the case under the guise of challenging only the enforceability of the forum selection clause." *Id.*

[6]Once he makes the argument that the Mississippi subcontract is invalid, Murray attempts to rehabilitate his claims against the defendant by contending that even though the contract is invalid, he should be allowed to recover sums expended on the Mississippi project from Maxus in *quantum meruit*. This court does not venture a guess as to whether this claim has merit, but notes that Murray would have difficulty circumventing the forum selection clauses on this basis alone. At least where non-contractual theories are pleaded alternatively to contractual theories, courts have been unwilling to allow the plaintiff to "avoid a forum selection clause if the claims asserted arise out of the contractual relation and implicate the contract's terms." *Crescent International, Inc. v. Avatar Communities, Inc.*, 857 F.2d 943, 944 (3rd Cir. 1988) (citations omitted).

forum selection clauses unreasonable. The clauses do not appear to be, nor does Murray claim that they are, the result of fraud or overreaching. They appear as part of exhibits which are not merely alluded to but specifically incorporated into both subcontracts. Each forum selection provision was separately executed by Murray and a representative of Maxus. Murray does accuse Maxus of fraud in relation to its performance under the alleged settlement agreement, but not with respect to inclusion of the forum selection clauses in the subcontracts. Although Murray contends that the exhibits were not signed until after execution of the original subcontracts, their existence and the intent to include them are obvious from the terms of the subcontracts themselves, and Murray does not allege that Maxus "actively concealed" them. *See Hunter Distributing Company*, 820 F. Supp. at 286. Nowhere does the court detect the presence of any overreaching or unequal bargaining power which would distinguish this situation from the one before the *Hunter Distributing Company* court. *Id.* at 286-87. Finally, with regard to the "inconvenience factor," *id.* at 287, Murray contends only that this district is the "situs" of Maxus' contractual default, and it is "a neutral forum equally convenient to both parties and their witnesses." This is insufficient to persuade the court that if Murray is forced to pursue this action, if at all, in our neighboring state of Alabama it will be tantamount to depriving Murray of his day in court. *Id.*

In *Hunter Distributing Company*, the court addressed whether it was to dispose of the case before the court by dismissal pursuant to Rule 12(b)(3) or by transfer of venue pursuant to federal statute.[7] The court held that because "no motion to transfer has been made and because the court is of the opinion that the forum selection clause should be enforced, this case is hereby dismissed without prejudice rather than transferred." *Id.* at 288 (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595, 113 L. Ed. 2d 622, 111 S. Ct. 1522 (1991)). In the instant case, Maxus has moved the court to dismiss the case for improper venue, and the court construes this as a motion pursuant to Rule 12(b)(3), which obviates the need to consider whether it should

[7]"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C.A. § 1404(a) (West 1993).

decide the case on the basis of section 1404(a).[8] The forum selection clauses at issue are *prima facie* valid, and Murray has not carried his burden of proving that enforcement would be unreasonable under these circumstances. As such, the court finds that this case should be dismissed without prejudice pursuant to Fed. R. Civ. P. 12(b)(3) (1995). A final judgment in accordance with this opinion shall issue this day.

This the 13th day of November, 1995.

UNITED STATES MAGISTRATE JUDGE

[8]Although statutory provisions such as 28 U.S.C. §§ 1404(a) and 1406(a) may be available, it does not appear that justice requires a transfer of this case as opposed to dismissal without prejudice to Murray's filing a complaint in Alabama. The applicable statute of limitations on contract claims in Alabama is six (6) years, and Murray should not be precluded from pursuing this cause of action in the Jefferson County Circuit Court should he choose to do so. Ala. Code § 6-2-34 (1994); *see AC, Inc. v. Baker*, 622 So. 2d 331, 333 (Ala. 1993).

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FINAL JUDGMENT

In accordance with the opinion issued this day, the above-styled case is hereby dismissed without prejudice.

IT IS SO ORDERED.

This the 13th day of November, 1995.

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UNITED STATES MAGISTRATE JUDGE