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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
Glenn P. Howell,	)	Case No. 2018-CP-23-02759
Plaintiff,	)	
vs.	)	**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION AND AMENDED MOTION TO DISMISS**
Covalent Chemical LLC, and Matthew W. Rowe,	)	
Defendants.	)	

I. Introduction

Plaintiff, Glenn P. Howell, by and through his undersigned counsel, hereby submits this Memorandum of Law in Opposition to Defendants' Motion and Amended Motion to Dismiss. As set forth in detail below, there is actually no mandatory, exclusive forum selection clause in the contract, but merely a waiver of personal jurisdiction provision for Harris County, Texas. In any event, jurisdiction in this court is specifically authorized by S.C. Code Ann. § 15-7-120(A), which allows a case to be brought in South Carolina, notwithstanding a mandatory forum selection clause for a foreign jurisdiction. Finally, a careful reading of Paragraph 8(K) of the Employment Agreement reveals that there is no mandatory arbitration clause, but only the permissive language that any dispute under the Employment Agreement "can be submitted by the Parties to Alternative Dispute Resolution, including arbitration under the rules of the American Arbitration Association in Texas." (Employment Agreement, at 7, ¶ 8(K) (Complaint, Ex. A) (emphasis added). Plaintiff does not wish to avail himself of arbitration, much less arbitration in Texas, which state has nothing whatsoever to do with the contract itself, with Defendant Covalent's current operations, or with Plaintiff's former employment with Defendant Covalent.

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II. Statement of the Case

Plaintiff filed this action in the Greenville County Court of Common Pleas on May 9, 2018. The Summons and Complaint were served on Defendant Rowe on May 17, 2018, and on Defendant Covalent on May 22, 2018. Plaintiff consented to Defendants' request for an extension until July 16, 2018 to respond to the Complaint as to both Defendants. Plaintiff filed an Amended Complaint on June 8, 2018, as a matter of right, under Rule 15(a), SCRCP. On July 16, 2018, Defendants filed a Motion to Dismiss under Rule 12(b)(3), SCRCP, based on allegedly improper venue. Defendants did not mention arbitration at all in the initial motion. Defendants' Motion to Dismiss was originally scheduled for a hearing on August 31, 2018, at 9:30 a.m., before Circuit Judge Robin Stillwell. On August 22, 2018, the undersigned received notice that the hearing on the motion had been rescheduled for October 4, 2018, "due to administrative scheduling order." On September 24, 2018, Defendants' filed an Amended Motion to Dismiss, adding alternative relief that arbitration of the case be compelled.

III. Facts

This case arises out of Plaintiff's previous employment with Defendant Covalent as a sales representative. Plaintiff contends that Defendant Covalent breached his Employment Agreement by failing and refusing to pay his commissions and expense reimbursements in a timely manner. Plaintiff's Complaint and Amended Complaint assert three causes of action: (1) for violation of the South Carolina Payment of Wages Act, (2) for breach of contract, and (3) for an equitable accounting.

Plaintiff was recruited to work for Defendant Covalent by Defendant Rowe, who previously worked with Plaintiff at another chemical company called Brenntag. (Howell Aff., at 1, ¶ 3)

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(attached hereto as Exhibit A). Defendant Rowe actually traveled to Greenville, South Carolina on two separate occasions in the summer of 2015 to recruit Plaintiff to come to work for Defendant Covalent. (Howell Aff., at 1, ¶ 4). Defendant Rowe emailed a proposed Employment Agreement to Plaintiff on or about September 24, 2015. Less than a week later, on September 30, 2015, Plaintiff signed the final version of the Employment Agreement while he was in Greenville, South Carolina and returned it to Defendant Rowe. (Howell Aff., at 2, ¶¶ 5-6). Plaintiff's address for notice as clearly stated in the Employment Agreement is a Greenville, SC address. (Employment Agreement, at 6, ¶ 8(F).

Defendant Rowe reportedly purchased Defendant Covalent in mid-2015, and re-established the company in Raleigh, North Carolina. The company had previously been located in Houston, Texas. (https://www.manta.com/c/mh19vww/covalent-chemical-llc). Attached hereto as Exhibit B is a copy of the North Carolina Secretary of State's Office business registration report showing that the new Defendant Covalent was formed on June 4, 2015, as a North Carolina Limited Liability Company.

Plaintiff's employment never had anything to do with Texas. (Howell Aff., at 2, ¶ 8). His sales territory never included Texas, and the only time he ever traveled to Dallas, Texas was shortly after he started working with Defendant Covalent, when he attended an independent trade conference as part of his training. (Howell Aff., at 2, ¶ 8-9). Paragraph 8(J) of the Employment Agreement appears to be left-over, boilerplate provision from the former incarnation of Covalent Chemical, before Defendant Rowe purchased the entire company and moved it to North Carolina. The email Plaintiff originally received from Defendant Rowe with the first draft of the Employment Agreement had been forwarded from a lawyer in Houston. A copy of that email string, without the attachments,

is attached hereto as Exhibit C.

IV. Discussion

A. Purported Forum Selection Clause in Employment Agreement is not Mandatory or Exclusive

Defendants assert that the Employment Agreement contains a "forum provision" that allegedly requires any case arising out of the Employment Agreement to be brought in Harris County, Texas. A careful reading of the actual language of the Employment Agreement compels no such conclusion. Section 9(J) of the Employment Agreement provides, in relevant part, "THE PARTIES AGREE TO THE JURISDICTION OF THE STATE AND FEDERAL COURTS LOCATED IN HARRIS COUNTY, TEXAS." (Employment Agreement, at 7, ¶ 8(J) (emphasis added). As the underlined language indicates, this is merely a waiver of personal jurisdiction. The Agreement does not state that any dispute arising out of this agreement must or shall be heard only in the courts of Harris County, Texas; it merely states that the parties waive personal jurisdiction for the courts in Texas to hear the case. This is plainly not an exclusive forum selection clause.

Defendants' arguments regarding the alleged "forum provision" also disregard South Carolina's statutory repudiation of such contractual provisions. Section 15-7-120(A) of the South Carolina Code specifically allows a case to be brought in South Carolina notwithstanding a provision in the contract that purports to require any claims to be brought in another state. S.C. Code Ann. § 15-7-120(A) ("Notwithstanding a provision in a contract requiring a cause of action arising under it to be brought in a location other than as provided in this title and the South Carolina Rules of Civil Procedure for a similar cause of action, the cause of action alternatively may be brought in the manner provided in this title and the South Carolina Rules of Civil Procedure for such causes of

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action."). South Carolina has a strong policy disfavoring forum selection clauses, as reflected in S.C. Code Ann. § 15-7-120(A). See Consolidated. Insured Benefits, Inc. v. Conseco Med. Ins. Co., 370 F. Supp. 2d 397, 399 (D.S.C. 2004). Plaintiff's counsel specifically raised Section 15-7-120(A) of the South Carolina Code to Defendants' counsel as soon as the original motion was filed. A copy of the email urging Defendants to withdraw their baseless motion in light of S.C. Code Ann. § 15-7-120(A) is attached hereto as Exhibit D.

Furthermore, employers in South Carolina cannot agree to avoid or circumvent the provisions of the Act by private contract. S.C. Code Ann. § 41-10-100. The South Carolina Payment of Wages Act is remedial legislation designed to protect working people and assist them in collecting compensation wrongfully withheld; thus, the statute is supposed to be interpreted liberally in light of that underlying purpose. See Abraham v. Palmetto Unified School Dist. No. 1, 538 S.E.2d 656 (S.C. Ct. App. 2000). Accordingly, the parties cannot avoid application of the S.C. Payment of Wages Act by attempting to agree that only Texas law applies to an employment relationship whereby the employee is "employed in South Carolina."

B. Forum Non Conveniens

Defendants also cannot attack the venue of this action on grounds of forum non conveniens, which generally allows a change of venue for the convenience of the parties or witnesses and in the interests of justice. This case has nothing whatsoever to do with the State of Texas, despite boiler-plate language in the Employment Agreement purporting to be a Texas contract. Plaintiff's employment had nothing to do with the State of Texas. Defendants cannot identify any party or witness for whom Texas would be a more convenient forum. Defendant Covalent is now headquartered in Raleigh, North Carolina, having moved from Texas in mid-2015 before Plaintiff

started his employment with the Company. Accordingly, nothing relating to the subject matter of this case occurred or is located in Texas.

The State of South Carolina has a significant interest in adjudicating this dispute. This case is clearly governed by the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10 et seq. The Act defines the term "employer" as "every person, firm, partnership, association, corporation . . . and any agent or officer of the above classes employing any person in this State." S.C. Code Ann. § 41-10-10(1). Defendant Rowe is subject to personal liability under the Act because he also falls within the definition of employer. See Dumas v. InfoSafe Corp., 320 S.C 188, 463 S.E.2d 641 (Ct. App. 1995).

South Carolina's courts have been very protective of the rights of South Carolina citizens in contractual choice of law matters. For example, in Stonhard, Inc. v. Carolina Flooring Specialists, Inc., 621 S.E.2d 352 (S.C. 2005), the South Carolina Supreme Court refused to enforce a New Jersey choice of law provision in an employment contract because such provision was contrary to the public policy of South Carolina. The Stonhard court stated that if a contractual choice of law results in a contract that is "invalid as a matter of law or contrary to public policy in South Carolina, our courts will not enforce the agreement." Id. at 159. In other words, South Carolina courts will not uphold choice-of-law provisions that are contrary to South Carolina public policy.

C. Arbitration Provision is Also Not Mandatory

Finally, Defendants raise the alternative argument that Plaintiff's case should be dismissed and that the Court should order the dispute submitted to arbitration. Again, Defendants have misinterpreted their own contract. Paragraph 8(K) of the Employment Agreement is simply not phrased as a mandatory arbitration provision: "Any claim, dispute, or controversy arising out of or

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in connection with or relating to this Agreement or the breach or alleged breach of this Agreement . . . can be submitted by the Parties to Alternative Dispute Resolution, including arbitration under the rules of the American Arbitration Association in Texas." (Employment Agreement, at 7, ¶ 8(K) (emphasis added). The emphasized language uses the plainly permissive phrase "can be submitted," not the mandatory phrases "must be submitted," "shall be submitted," or "can only be submitted," when describing arbitration. The arbitration section also uses the phrase "by the Parties" (plural), indicating that arbitration cannot unilaterally be demanded by a single party. Plaintiff does not wish to submit his claims to arbitration at all, especially not in Texas. (Howell Aff., at 4, ¶ 16).

Plaintiff did not draft the Employment Agreement. Accordingly, any ambiguities in the contract should be construed in favor of Plaintiff and against Defendant Covalent.

V. Conclusion

For all of the foregoing reasons, Defendants have failed to demonstrate sufficient cause to overcome Plaintiff's choice of Greenville County, South Carolina as the proper venue for this action. In addition, the purported arbitration provision in the Employment Agreement does not require arbitration of this dispute, even though such alternative dispute resolution would be permissible if agreed upon by the parties. Accordingly, Plaintiff respectfully suggests that Defendants' motions should be denied. Plaintiff also requests that the Court require Defendants to pay the attorney's fees incurred by Plaintiff in responding to this unnecessary motion.

* * *

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Respectfully submitted,

s/ David E. Rothstein

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September 30, 2018

Greenville, SC.

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