

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RGC International)
Investors, LDC,)
)
) Plaintiff,)
))
) v.) Civil Action No. 03-003-SLR
))
ARI Network Services, Inc.,)
))
) Defendant.)

MEMORANDUM ORDER

I. INTRODUCTION

Plaintiff RGC International Investors, LDC ("RGC") filed this action against defendant ARI Network Services, Inc. ("ARI") on January 2, 2003. (D.I. 1) RGC alleges ARI breached the terms of a contract between the parties, and, therefore, seeks declaratory, injunctive and other equitable and legal relief to enforce its contractual agreement. (Id. at 1) ARI filed a motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(7) and 19(b) or, in the alternative, to dismiss or stay the complaint pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, and the abstention doctrine in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976). (D.I. 7) For the reasons that follow, ARI's motion is denied.

II. DISCUSSION

ARI's current motion before this court argues RGC's action should be dismissed because RGC has failed to join an indispensable party pursuant to Fed. R. Civ. P. 12(b)(7) and 19(b). ARI concedes, and this court agrees, its argument that Taglich Partnerships ("Taglich") is an indispensable party under Fed. R. Civ. P. 19 is no longer applicable because ARI has reached a settlement agreement with Taglich. (D.I. 19 at 2) Therefore, ARI's motion to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(7) for failure to join Taglich as an indispensable party is moot.

In the alternative, ARI argues the action at bar should be dismissed or stayed because ARI has filed suit against RGC in the Milwaukee, Wisconsin County Circuit Court. ARI argues that under the Declaratory Judgment Act and Colorado River doctrine, this action should not go forward while a parallel action is pending in Wisconsin state court.

RGC and ARI entered a Securities Purchase Agreement ("SPA") on April 25, 2000, which outlined the terms of RGC's investment in ARI. (D.I. 1 at 1) RGC was issued: (1) a convertible debenture ("debenture") in the amount of four million dollars; (2) warrants to purchase 600,000 shares of ARI's common stock; and (3) an investment option to purchase 800,000 shares

(hereinafter collectively referred to as "ARI Securities").

(Id.)

The agreement states:

Both parties irrevocably consent to the exclusive jurisdiction of the United States federal courts located in Delaware with respect to any suit or proceeding based on or arising under this [a]greement, the agreements entered into in connection herewith or the transactions contemplated hereby or thereby and irrevocably agree that all claims in respect of such suit or proceeding may be determined in such courts. Both parties irrevocably waive the defense of an inconvenient forum to the maintenance of such suit or proceeding.

(D.I. 1, Ex. 1 at ¶ 8(a)) The debenture contains a similar provision which states:

The Borrower and Holder irrevocably consent to the exclusive jurisdiction of the United States federal courts located in Delaware in any suit or proceeding based on or arising under this Debenture, the agreements entered into in connection herewith or the transactions contemplated hereby or thereby and irrevocably agree that all claims in respect of such suit or proceeding may be determined in such courts. The Borrower and Holder irrevocably waive the defense of an inconvenient forum to the maintenance of such suit or proceeding.

(D.I. 1, Ex. 1A at ¶ VII(f)) All other documents containing material terms of the parties' agreement contain similar forum selection clauses. (D.I. 1 at 5)

The United States Supreme Court, in M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), announced a general rule that forum selection clauses are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be

'unreasonable' under the circumstances." Id. at 10; Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 28 n.7 (1988). A party can resist imposition of a forum selection clause if it could demonstrate that the contract resulted from "fraud, undue influence, or overweening bargaining power," or that "enforcement would contravene a strong public policy of the forum in which the suit is brought, whether declared by statute or by judicial decision." Id. at 12, 15. The Third Circuit Court of Appeals has interpreted Bremen to mean that

a forum selection clause is presumptively valid and will be enforced by the forum unless the party objecting to its enforcement establishes (1) that it is the result of fraud or overreaching, (2) that enforcement would violate a strong public policy of the forum, or (3) that enforcement would in particular circumstances of the case result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable.

Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 202 (3d Cir. 1983), overruled on other grounds by Lauro Lines v. Chasser, 490 U.S. 495 (1989).

As far as unreasonableness, under Bremen it is

incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.

Bremen, 407 U.S. at 18. "This standard is satisfied if a litigant can demonstrate that it 'would face blatant prejudice in the foreign forum' or 'if enforcement of the foreign forum

selection would be severely impractical.'" Mobilificio San Giacomo S.P.A. v. Stoffi, No. CIV.A.96-415-SLR, 1998 WL 125534, at *8 (D. Del. 1998).

ARI has offered no evidence that the forum selection clause was the result of fraud or overreaching, that there is strong public policy against enforcing the forum selection clause or that enforcement of the clause would force litigation in an inconvenient jurisdiction. As a result, the forum selection clause in the contract between RGC and ARI is valid and enforceable, and the present action is properly before this court.

III. CONCLUSION

At Wilmington this ~~31st~~ day of July, 2003, having reviewed defendant's motion to dismiss or stay (D.I. 7);

IT IS ORDERED that:

1. Defendant's Rule 19 motion to dismiss (D.I. 7) is moot.
2. Defendant's motion to dismiss or stay pursuant to the Declaratory Judgment Act and Colorado River doctrine (D.I. 7) is denied.



United States District Judge

1:03-cv-00003

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