

TWENTIETH JUDICIAL CIRCUIT
OF VIRGINIA



HON. DOUGLAS L. FLEMING, JR., CHIEF JUDGE
HON. STEPHEN E. SINCAVAGE
HON. JEANETTE A. IRBY
HON. JAMES P. FISHER
HON. JAMES E. PLOWMAN, JR.

Loudoun, Fauquier and
Rappahannock Counties
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HON. W. SHORE ROBERTSON
HON. JAMES H. CHAMBLIN
HON. THOMAS D. HORNE
HON. BURKE F. McCAHILL
HON. JEFFREY W. PARKER

JUDGES

RETIRED JUDGES

6 March 2022

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In re: _____ v. _____
Case No. CL 21-
Circuit Court of Loudoun County

Dear Counsel:

This matter is before the Court on the Defendant's Motion to Dismiss, filed on July 26, 2021. Counsel briefed the issues. The Court heard oral argument on February 22, 2022 and took the matter under advisement. The Defendant, a non-resident of Virginia, posits that the Court lacks personal jurisdiction over him.

The first step in the analysis of personal jurisdiction is to examine the Amended Complaint to determine whether the facts alleged fall within the reach of Virginia's long-arm statute. Section 8.01-328.1(A) of the Code of Virginia articulates circumstances when this Court would be authorized to exercise personal jurisdiction.

The Plaintiff suggests that the Court may exercise personal jurisdiction over the Defendant under § 8.01-328.1(A)(1) for "transacting any business in this Commonwealth."

For purposes of the following analysis, the Court will assume *arguendo* that the Defendant has transacted business in the Commonwealth and that Plaintiff's claims arise out of such business, i.e., that § 8.01-328.1(A)(1) has been satisfied.

The second step of the analysis is to determine whether the reach of the long-arm statute is consistent with due process or "traditional notions of fair play and substantial justice." Graduate Mgmt. Admission Counsel v. Raju, 241 F.Supp.2d 589, 592 (E.D. Va. 2003) (quoting Alitalia-Linee Aeree Italiane v. Casinoalitalia.com, 128 F.Supp.2d 340, 347-48 (E.D. Va. 2001)). Such notions of fair play require that the party has "certain minimum contact" with the forum state. Id. at 593 (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

To establish those minimum contacts, the Court must consider "(1) the extent to which the defendant purposely avail[ed] itself of the privilege of conducting activities in the State; (2) whether the plaintiff's claims arise out of those activities directed at the State; and (3) whether the exercise of personal jurisdiction would be constitutionally reasonable." Id. (quoting ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 712 (4th Cir. 2002)) (internal citations omitted) (alteration in original).

In case law on this subject matter, Virginia courts have repeatedly reasoned that the consequence of conducting business in Virginia is the invocation of the benefits and protections of the laws of Virginia. The reasoning follows, then, that subjecting those who conduct business in Virginia to personal jurisdiction in Virginia does not offend traditional notions of fair play and substantial justice. See, e.g., Peninsula Cruise v. New River Yacht Sales, 257 Va. 315, 321 (1999); Orchard Management Co. v. Soto, 250 Va. 343, 351 (1995); Kolbe, Inc. v. Chromodern, Inc., 211 Va. 736, 739, 741 (1971).

In the instant case, however, the Court finds that subjecting the Defendant to personal jurisdiction in Virginia would offend traditional notions of fair play and substantial justice. The Court finds that the existence of § 4113.62 of the Ohio Revised Code¹, which governed the

¹ § 4113.62 of the Ohio Revised Code provides as follows:

(A) Any provision of a construction contract, agreement, or understanding that waives rights under a surety bond is void and unenforceable as against public policy.

(B) Any provision of a construction contract, agreement, or understanding, or specification or other documentation that is made a part of a construction contract, agreement, or understanding, that waives any pending or asserted claim on the basis of final payment made from one person to another for the construction contract, agreement, or understanding, is void and unenforceable as against public policy, when the person against whom the claim is pending or asserted has received notice of that pending or asserted claim. Nothing in this division precludes parties to a construction contract, agreement, or understanding from entering into a subsequent settlement agreement arising from a claim under that construction contract, agreement, or understanding.

(C)(1) Any provision of a construction contract, agreement, or understanding, or specification or other documentation that is made a part of a construction contract, agreement, or understanding, that waives or precludes liability for delay during the course of a construction contract when the cause of the delay is a proximate result of the owner's act or failure to act, or that waives any other remedy for a construction contract when the cause of the delay is a proximate result of the owner's act or failure to act, is void and unenforceable as against public policy.

(2) Any provision of a construction subcontract, agreement, or understanding, or specification or other documentation that is made part of a construction subcontract, agreement, or understanding, that waives or precludes liability for delay during the course of a construction subcontract when the cause of the delay is a proximate result of the owner's or contractor's act or failure to act, or that waives any other remedy for a construction subcontract when the cause of the delay is a proximate result of the owner's or contractor's act or failure to act, is void and unenforceable as against public policy.

(D)(1) Any provision of a construction contract, agreement, understanding, or specification or other document or documentation that is made a part of a construction contract, subcontract, agreement, or understanding for an improvement, or portion thereof, to real estate in this state that makes the construction contract or subcontract, agreement, or other understanding subject to the laws of another state is void and unenforceable as against public policy.

(2) Any provision of a construction contract, agreement, understanding, specification, or other document or documentation that is made a part of a construction contract, subcontract, agreement, or understanding for an improvement, or portion thereof, to real estate in this state that requires any litigation, arbitration, or other dispute resolution process provided for in the construction contract, subcontract, agreement, or understanding to occur in another state is void and unenforceable as against public policy. Any litigation, arbitration, or other dispute resolution process provided for in the construction contract, subcontract, agreement, or understanding shall take place in the county or counties in which the improvement to real estate is located or at another location within this state mutually agreed upon by the parties.

(3) Nothing in this section shall be construed to apply to any promissory note, loan agreement, mortgage, security agreement, assignment of rents, or any other contract, agreement, understanding, or other document or documentation to which a financial institution, as defined in section 5725.01 of the Revised Code, or any affiliate, as defined in division (A)(1) of section 1109.53 of the Revised Code, is a party.

(E) No construction contract, agreement, or understanding that makes payment from a contractor to a subcontractor or materials supplier, or from a subcontractor to a materials supplier, lower tier subcontractor, or lower tier materials supplier contingent or conditioned upon receipt of payment from any other person shall prohibit a person from filing a claim to protect rights under sections 153.56, 1311.06, and 1311.26 of the Revised Code from expiring during the pendency of receipt of payment.

(F) Nothing in this section shall be construed to create a liability for a surety on a bond that is greater than that of its principal, or limit the availability to a surety of any defenses available to its principal.

(G) As used in this section:

subject contract at its inception makes it legally impossible for the Defendant to invoke the benefits and protections of the laws of Virginia in connection with this contract.^{2 3}

Therefore, despite any desire, intention, or design to avail itself of the benefits and protections of the laws of Virginia, the Defendant was constructively barred from any acting purposefully in furtherance of any desire, intention, or design to do so. It would be unfair and unjust for the Defendant to be haled into Virginia courts when, the Defendant, whether wittingly or unwittingly, was shielded from that eventuality by Ohio law. The Court finds that this Court's exercise of personal jurisdiction is not constitutionally reasonable.

Moreover, the Court finds that any interpretation of the pertinent provisions of the subject contract that yields a result that a Virginia court is proper court to litigate this matter, i.e., that the contract requires the matter be litigated outside of Ohio (which would include this Court finding that the instant motion should be denied), would necessarily cause those provisions to be voided under Subsection D (1) of § 4113.62.

For the foregoing reasons, the Court grants the Defendants motion to dismiss. An order incorporating and memorializing this ruling is entered by the Court.

Very truly yours,



Stephen E. Sincavage,
Judge

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- (1) "Contractor" and "lower tier subcontractor" have the same meanings as in section 4113.61 of the Revised Code.
 - (2) "Materials supplier" includes any person by whom any materials are furnished in furtherance of an improvement.
 - (3) "Lower tier materials supplier" means a materials supplier who is not in privity of contract with a contractor but is in privity of contract with another subcontractor or a materials supplier.
 - (4) "Subcontractor," "improvement," and "materials" have the same meanings as in section 1311.01 of the Revised Code.
 - (5) "Construction contract" means a contract or agreement for the design, planning, construction, alteration, repair, maintenance, moving, demolition, or excavation of a building, structure, highway, road, appurtenance, or appliance situated on real estate located in this state.

² Subsection D (1) of § 4113.62 of the Ohio Revised Code is clear that any provision of a construction contract, such as the subject contract, which makes the contract subject to the laws of any state except Ohio, is void against public policy.

³ Subsection D (2) similarly voids provisions that require the matter be litigated in any state except Ohio.