STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

HEARING CONSULTANTS, INC.,
a Michigan corporation,

Plaintiff,

Case No. 2014-3540-CK

vs.

j2 GLOBAL COMMUNICATIONS, INC.,
d/b/a MyFax, a California corporation,

Defendants.
_____/

OPINION AND ORDER

Defendant has filed a motion for summary disposition pursuant to MCR 2.116(C)(4) and (7). Plaintiff has filed a response and requests that the motion be denied. In addition, Defendant has filed a supplemental brief in support of its motion.

Factual and Procedural History

This lawsuit stems from a contract entered into by the parties. Plaintiff is a corporation that operates an audiology practice that provides hearing tests and hearing aid sales and repairs. Defendant is a corporation that is in the business of providing internet faxing services that permit the sending and receiving of faxes using the internet.

On June 5, 2014, Plaintiff's office manager contacted Defendant to inquire into the services that Defendant provides. During the call Plaintiff agreed to take part in a free 30 day trial of the "Myfax" services.

Plaintiff alleges that on or about June 27, 2014, Defendant incorrectly ported one of Plaintiff's office telephone numbers instead of its fax number. As a result, Plaintiff asserts that it

was not able to received phone calls until the problem was fixed 3 weeks later. Plaintiff's complaint seeks damages for the period of time that the problem existed.

On November 7, 2014, Defendant filed its instant motion for summary disposition. Plaintiff has filed a response and requests that the motion be denied. In addition, Defendant has filed a supplemental brief in support of its motion. On December 8, 2014, the Court held a hearing in connection with the motion and took the matter under advisement.

Standard of Review

Summary disposition under MCR 2.116(C)(4) is appropriate when the trial court "lacks jurisdiction of the subject matter." MCR 2.116(C)(4). For jurisdictional questions under MCR 2.116(C)(4), this Court "'determine[s] whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate ... [a lack of] subject matter jurisdiction.' " *L & L Wine & Liquor Corp. v. Liquor Control Comm.*, 274 Mich App 354, 356, 733 NW2d 107 (2007).

MCR 2.116(C)(7) permits summary disposition where the claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action. In reviewing a motion under MCR 2.116(C)(7), the Court accepts as true the plaintiff's well-pleaded allegations, construing them in the plaintiff's favor. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The Court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties when determining whether a genuine issue of material fact exists. *Id.* Where a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. *Kent v*

Alpine Valley Ski Area, Inc, 240 Mich App 731, 736; 613 NW2d 383 (2000). Where no material facts are in dispute, whether the claim is barred is a question of law. *Id*

Arguments and Analysis

In its motion, Defendant contends that its agreement with Plaintiff requires all disputes to be litigated exclusively in California. In its response, Plaintiff contends that it did not have notice of the terms and conditions contained in the customer agreement at issue ("Customer Agreement").

The Customer Agreement is located on Defendant's website. These types of terms constitute what federal courts have deigned a "browsewrap" agreement. The Court in *In re Zappos.com, Inc., Customer Data Sec. Breach Litigation*, 893 FSupp2d 1058 (D. Nev., 2012), provided the following overview regarding the type of terms of conditions used on the internet:

> With a browsewrap agreement, a website owner seeks to bind website users to terms and conditions by posting the terms somewhere on the website, usually accessible through a hyperlink located somewhere on the website; in contrast, a "clickwrap" agreement requires users to expressly manifest assent to the terms by, for example, clicking an "I accept" button. *Specht v Netscape Commc'ns Corp*, 306 F3d 17, 22 n. 4 (2d Cir 2002) (J. Sotomayor). "Because no affirmative action is required by the website user to agree to the terms of a contract other than his or her use of the website, the determination of the validity of a browsewrap contract depends on whether the user has actual or constructive knowledge of a website's terms and conditions." *Van Tassell v United Mktg Grp.*, 795 FSupp.2d 770, 790 (ND Ill 2011) (citing *Pollstar v Gigmania, Ltd.*, 170 FSupp2d 974, 981 (ED Cal 2000)); *see also* Mark A. Lemley, *Terms of Use*, 90 Minn L Rev 459, 477 (2006) ("Court may be willing to overlook the utter absence of assent only when there are reasons to believe that the [website user] is aware of the [website owner's] terms."); Note, *Ticketmaster Corp v Tickers.com, Inc.: Preserving Minimum Requirements of Contract on the Internet*, 19 Berkeley Tech L J 495, 507 (2004) ("[S]o far courts have held browsewrap agreements enforceable if the website provides sufficient notice of the license."). Where, as here, there is no evidence that plaintiffs had actual knowledge of the agreement, "the validity of a browsewrap contract hinges on whether the website provides reasonable notice of the terms of the contract." *Van Tassell*, 795 F Supp2d at 791 (citing *Specht*, 306 F3d at 32).

In this case, Defendant's representative advised Plaintiff's office manager that Defendant's services are subject to the terms of conditions on its website and that its services were subject to the terms and conditions. (*See* Defendant's Exhibit 4, Recording of Initial Phone Call, at 11:40). Further, Defendant sent Plaintiff a "welcome" email. (*See* Defendant's Exhibit 5). In addition to providing Plaintiff with its login, password, and account number, the email also advised that all use of the services is subject to the terms of the Customer Agreement, and provided a link to the Customer Agreement. (Id.) Moreover, the login page that Plaintiff had to utilize to access its account provides a link to the Customer Agreement. (*See* Defendant's Exhibit 7.)

In its response, Plaintiff contends that it did not have actual or constructive notice of the Customer Agreement. However, even assuming that Plaintiff's position is true, the Customer Agreement would nevertheless be enforceable if Defendant provided reasonable notice of the Customer Agreement. *Van Tassell,* 795 F Supp2d at 791 (citing *Specht,* 306 F3d at 32). Based on the facts set forth above, the Court is convinced that reasonable notice is provided where, as here, the customer is advised that the services are subject to the terms not only during the initial contact, but in a separate email, and again each time the customer logs in. Consequently, the Court is convinced that by utilizing Defendant's services, Plaintiff agreed to be bound by the terms of the Customer Agreement.

The primary provision at issue in this case is the forum selection clause provided by ¶24 of the Customer Agreement, which provides:

> YOU EXPRESSLY AGREE THAT THE EXCLUSIVE JURISDICTION FOR ANY CLAIM OR DISPUTE ARISING FROM THE USE OF j2 GLOBAL SOFTWARE OR THE SERVICES RESIDES IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA OR A SUPERIOR COURT FOR THE STATE OF CALIFORNIA.

In its response, Plaintiff asserts that the above-referenced forum selection provision (the "Forum Clause") should not apply because the facts in this case fall within three exceptions to the general public policy in favor of enforcing forum-selection clauses. See *Turcheck v Amerifund Fin, Inc*, 272 Mich App 341, 346; 725 NW2d 684 (2006). Specifically, Plaintiff contends that the following exceptions contained within MCL 600.745 apply:

> (3) If 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:
>
> ****
>
> (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.

A party seeking to avoid a contractual forum-selection clause bears a heavy burden of showing that the clause should not be enforced. *Turcheck*, 272 Mich App, 346, citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17-18, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). Accordingly, the party seeking to avoid the forum-selection clause bears the burden of proving that one of the statutory exceptions of MCL 600.745(3) applies. *Turcheck*, 272 Mich App, 346.

In this case, Plaintiff asserted that most of its witnesses reside in Michigan and that the pertinent transactions took place in Michigan. However, plaintiff failed to present admissible documentary evidence supporting any of these assertions. Plaintiff also claimed that the contract was obtained through abuse of economic power, inasmuch as Defendant is a large corporation and Plaintiff is a small local business who was unable to negotiate the terms of the contract at the

time the agreement was executed. Again, however, Plaintiff failed to present evidence to support her assertions that Defendant wielded unfair bargaining power or that the clause was not subject to negotiation. Under the law of Michigan Plaintiff's unsupported allegations are inadequate to meet its burden of showing that enforcement of the forum-selection clause would have been unreasonable, unjust, substantially inconvenient, or unfair. *The Bremen*, 407 US at 17-18; *see also* 1 Restatement Conflict of Laws, 2d (1988 Revisions), § 80, comment c, p 85 ("[t]he burden of persuading the court that stay or dismissal of the action would be unfair or unreasonable is upon the party who brought the action").

Moreover, the claimed inconvenience of litigating in California should have been apparent to Plaintiff when it agreed to the forum-selection clause. Like the United States Supreme Court in *The Bremen*, this Court concludes that inconvenience, insofar as it is within the contemplation of the parties at the time of contracting, should not render a forum-selection clause unenforceable. *The Bremen*, 407 US at 16-17. "Where the inconvenience of litigating in another forum is apparent at the time of contracting, that inconvenience is part of the bargain negotiated by the parties. Allowing a party who is disadvantaged by a contractual choice of forum to escape the unfavorable forum-selection provision on the basis of concerns that were within the parties' original contemplations would unduly interfere with the parties' freedom to contract and should generally be avoided." *Turcheck*, 272 Mich App at 350. For these reasons, the Court is convinced that Plaintiff's contentions are without merit and that the Forum Clause should be enforced as written.

Finally, Plaintiff claims that the Customer Agreement's limitations clause is inapplicable and unconscionable. However, due to the Court's determination that the Forum Clause should be enforced, the Court does not have the jurisdiction necessary to make any determinations as to

the merits of Plaintiff's underlying claims. Consequently, Plaintiff's assertions as to the validity of the limitations clause are not properly before this Court and will not be entertained.

Conclusion

Based on the foregoing, Defendant's motion for summary disposition is GRANTED. Plaintiff's claims against Defendant RCC Associates, Inc. are DISMISSED based on the forum selection clause in the Customer Agreement. The Court states this Opinion and Order resolves all pending matters and CLOSES the case. MCR 2.602(A)(3).

IT IS SO ORDERED.

/s/ John C. Foster

Dated: December 26, 2014

JCF/sr

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