

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & CONSUMER DOCKET
DOCKET NO. BCD-CIV-2021-21

DIAMOND BUSINESS CREDIT)
CORP. f/k/a Business Credit Direct)
Corp.,)
)
Plaintiff,)
)
v.)
)
TWIN RIVERS PAPER COMPANY,)
LLC, TRACE ENERGY, LLC, and ED)
PELLETIER & SONS, CO.,)
)
Defendants.)

ORDER DENYING TRACE ENERGY'S
MOTION TO DISMISS FOR IMPROPER
VENUE

This case involves an interconnected collection of claims growing out of and related to work performed at a paper mill located in Madawaska, Maine. Pursuant to M.R. Civ. P. 12(b)(6), Defendant Trace Energy, LLC (“Trace”) first brought a Motion to Dismiss all four counts of the Complaint pled against it, based on lack of standing, failure to join a necessary party, and forum non conveniens. The Court denied the Motion. Pursuant to M.R. Civ. P. 12(b)(3), Trace now brings a Motion to Dismiss the Cross-Claim pled against it by Defendant Ed Pelletier & Sons, Co. (“Pelletier”), on the grounds of improper venue. For the reasons discussed below, the Court denies the Motion.

STANDARD OF REVIEW

A motion to dismiss is the favored vehicle used to transport a request for dismissal due to improper venue, pursuant to M.R. Civ. P. 12(b)(3). *Becker v. W.R. Berkley Corp.*, No. BCD-CIV-2021-01, 2021 WL 2817081, at *3 (Me. B.C.D. June 14, 2021). In this case, Trace bases its Motion

on a forum selection clause contained in a written agreement between it and Pelletier. The Law Court has not squarely addressed the enforceability of forum selection clauses, though it has recognized foreign judgments entered based on such selection clauses. *See, e.g., Soc'y of Lloyd's v. Baker*, 673 A.2d 1336 (Me. 1996) (finding appellant knowingly and voluntarily signed contract with English jurisdictional exclusivity provision); *GENUJO LOK Beteiligungs GmbH v. Zorn*, 2008 ME 50, ¶ 22, 943 A.2d 573 (enforcing German judgment in part due to appellant's agreement to German jurisdiction in notarized recognition of debt). The Business and Consumer Docket takes the position that forum selection clauses are *prima facie* valid and should be enforced unless they are the product of fraud or overreaching, or unless enforcement would be unreasonable or unfair or would contravene a strong public policy of the forum. *Id.* (citing *Advenio Inc. v. Mariner Software, Inc.*, No. BCD-CV-14-63, 2015 WL 1756069, at *9 (Me. B.C.D. Mar. 20, 2015)).

FACTS

The background of this case is discussed in the Court's previous Order and is not repeated here. As to this Motion, the Court views the facts alleged in Pelletier's Cross-Claim if they were admitted. *See Moody v. State Liquor & Lottery Comm'n*, 2004 ME 20, ¶ 7, 843 A.2d 43. According to the allegations, Pelletier performed work at the mill for which it has not been fully paid. In connection therewith, Pelletier and Trace entered into a Subvendor Payment, Forbearance, and Lien Release Agreement (the "Agreement"). Paragraph 8 of the Agreement provides as follows:

This Agreement shall be deemed entered into by the parties hereto in the State of New Hampshire, and shall be governed by the laws of the State of New Hampshire. Any dispute arising under this Agreement shall be resolved in the State or Federal courts of the State of New Hampshire, and the parties hereby consent to the jurisdiction of such courts and waive all defenses to such jurisdiction on the basis of personal jurisdiction or forum non convenience.

(Pelletier’s Crosscl. Ex. A.) Trace has failed to complete payment to Pelletier as required by the Agreement. By way of its Cross-Claim, Pelletier seeks damages against Trace for breach of the Agreement.

DISCUSSION

Plaintiff Diamond Business Credit Corp. (“Diamond”) initiated this litigation in Maine, not Pelletier. Both Trace and Pelletier were named as defendants (along with Twin Rivers Paper Company). The litigation was commenced in November 2020 and has been actively litigated here for nearly a year. In August 2021 Pelletier filed its Cross-Claim (without objection of the parties and with leave of Court). More recently, in September 2021, Trace filed a motion seeking leave to file a third-party claim against another entity involved with the work at the mill. All the claims arise from or are related to work performed at the mill in Madawaska, and all the claims are closely connected.

Pelletier does not deny that it entered into the Agreement, and that the Agreement contains a forum selection clause. However, in light of the existing litigation in Maine—which Pelletier did not start—Pelletier argues it would be wasteful, duplicative, and inefficient to peel off the Cross-Claim and require Pelletier to bring its claim in New Hampshire. The Court agrees. All the claims, including the Cross-Claim, are related. Pelletier did not choose this forum, but now finds itself litigating here. The Court can easily apply New Hampshire law to the Cross-Claim. New Hampshire is adjacent to Maine; with the flexibility of the Business Court’s statewide venue, the actual trial location can be selected based on minimizing travel for as many witnesses and parties as possible. And with the advent of Zoom in the courtroom, the Court will consider requests to appear by video for witnesses and parties who cannot travel from New Hampshire to Maine on

account of Covid-19. Given the totality of the circumstances, enforcing the Agreement’s forum selection clause would be unreasonable and unfair.

Trace objects on the grounds that “the only way that a court cannot enforce an otherwise-valid forum selection [clause] is if the person seeking to avoid its enforcement proves that doing so will essentially deprive that litigant of her or his day in court.” (Trace’s Reply Mem. *2.) The “day in court” standard originates from the U.S. Supreme Court’s decision in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972). That case, however, involved a dispute between a United States and a German corporation, in admiralty court, over the enforceability of a forum-selection clause in an international towage contract. *Id.* at 2. Those facts are very different, to say the least, from the facts of this case. And to the extent the “day in court” language is utilized by *Becker v. W.R. Berkley Corp.*, the facts and procedural posture of that case are also very different from those of the current case. Accordingly, the Court is not persuaded by Trace’s argument.

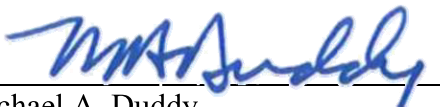
CONCLUSION

For all the foregoing reasons, Trace’s Motion to Dismiss Pelletier’s Cross-Claim for Improper Venue is DENIED.

So Ordered.

Pursuant to M.R. Civ. P. 79(a), the Clerk is instructed to incorporate this Order by reference on the docket for this case.

Dated: 09/23/2021



Michael A. Duddy
Judge, Business and Consumer Iocket

Entered on the docket: 09/23/2021