IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LATINO FOOD MARKETERS, LLC.,

OPINION AND ORDER

Plaintiff,

03-C-0190-C

v.

OLE MEXICAN FOODS, INC.,

Defendant.

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This is a civil action for monetary relief in which plaintiff Latino Food Marketers, LLC, is suing defendant Ole Mexican Foods, Inc. for breach of contract, anticipatory repudiation of contractual duties under Wis. Stat. § 402.610, breach of implied duty of good faith and fair dealing and unjust enrichment. Plaintiff alleges that defendant entered into "multiple contracts" with plaintiff when defendant submitted purchase orders to plaintiff for cheese. Plaintiff alleges further that defendant breached its performance by failing to pay for the purchase of plaintiff's cheese or any outstanding balances due for the purchase of plaintiff's cheese.

Presently before the court is defendant's motion to dismiss pursuant to Rule 12(b)(2) and 12(b)(3). Defendant argues that this court lacks personal jurisdiction over defendant

and that venue is improper. Defendant bases its dismissal motion on its contention that the parties entered into a long-term supply contract that contained a forum selection clause requiring the parties to litigate disputes in Georgia.

In addition to this motion, defendant requests in its reply brief that if the court determines that there are disputed issues of fact, the court convert defendant's motion to a motion for summary judgment under Rule 56 or, if the court determines that plaintiff has met its burden by contesting all of defendant's factual submissions, the court hold an evidentiary hearing to resolve any disputed issues of material fact. Because plaintiff has made a prima facie case establishing that venue in this matter may be proper in the Western District of Wisconsin and because there are disputed issues of material fact relating to whether venue is proper in this district, I will schedule an evidentiary hearing to resolve the issues of material fact.

For the purpose of deciding this motion, I have culled the following facts from the complaint as well as the declarations, exhibits and affidavits which accompanied the parties' briefs.

FACTS

Plaintiff Latino Food Marketers, LLC is a Wisconsin company with its principal place of business in Monroe, Wisconsin. Plaintiff is the exclusive marketing agent for Mexican

Cheese Producers, which manufactures cheese. Defendant Ole Mexican Foods, Inc. is a Georgia corporation with its principal place of business in Norcross, Georgia. It distributes cheese products.

Defendant purchased cheese through purchase orders from plaintiff beginning in September 2001. Around this same time, plaintiff and defendant began to discuss a long-term supply contract. During September and October 2001, plaintiff and defendant exchanged draft contracts.

On November 12, 2001, plaintiff sent defendant a signed draft of defendant's previously proposed long-term supply contract, to which plaintiff had made several handwritten changes, along with a letter asking defendant to initial each handwritten change, sign the November 12 document and fax a copy back to plaintiff. (From this point forward, I will refer to this document as the "November 12 document" solely for the sake of simplicity.) The November 12 document provides that plaintiff shall manufacture and package certain cheese products in quantities as requested by defendant. It includes three handwritten changes: (1) that defendant granted plaintiff an exclusive license, instead of non-exclusive license, to manufacture and package specified cheese products; (2) that plaintiff would sell these products to defendant at the lowest prices in the southeast United States, instead of in the world; and (3) that the list of cheese products could be amended by mutual agreement, instead of solely by defendant. In addition, the November 12 document

includes clauses specifying that the contract be construed pursuant to the laws of Georgia and that "[b]oth parties consent to exclusive jurisdiction of a competent court in Fulton County, Georgia." The purchase orders did not contain a similar choice of law or forum selection clause.

DISPUTED FACTS

Plaintiff asserts that it never received a signed copy of the November 12 document from defendant and that defendant told plaintiff over the phone that it would not agree to its terms. Defendant alleges that it signed the November 12 document, made a copy of the document signed by both parties, sent plaintiff a signed copy via Federal Express, and thereafter lost their own copy of the contract when it moved its offices in December 2001, which is why it is unable to produce a copy of the document signed by both parties. In any event, defendant argues, it is not necessary to have a copy of the contract or even to prove that it was signed because the parties have behaved toward each other as if the November 12 document was in effect. Plaintiff denies that the item sent by Federal Express was a signed copy of the November 12 document, saying that it was a check and denies that it behaved as if the November 12 document was in effect. The parties dispute whether they continued to attempt to negotiate a long-term supply contract at meetings held between the parties in June 2002. In addition, defendant alleges that in February 2003, plaintiff did not

dispute the existence of the November 12 document when the parties discussed the November 12 document and defendants sent plaintiff a copy of the document signed by the plaintiff.

OPINION

Diversity jurisdiction is present in this case. 28 U.S.C. § 1332(a)(1). Before proceeding in this matter, I ordered plaintiff Latino Food Marketers, LLC to submit an affidavit setting forth the citizenship of each of its members. Plaintiff has done so. It appears from the affidavit that none of the members of plaintiff are citizens of Georgia.

The issue before this court is whether the parties ever formed a contract containing a forum selection clause that would make venue in this court improper. Under federal law, forum selection clauses are prima facie valid and should be enforced unless they are shown to be unreasonable by the resisting party. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972); see Heller Financial Co., Inc. v. Midwhey Powder Co., Inc., 883 F.2d 1286, 1290-91 (7th Cir. 1989). This is true in Wisconsin and Georgia as well. See Leasefirst v. Hartford Rexall Drugs, 168 Wis. 2d 83, 88-89, 483 N.W.2d 585, 587 (Wis. Ct. App. 1992) (stating forum selection clause is enforceable unless contract provision is unreasonable in view of parities' bargaining power); Antec Corp. v. Popcorn Channel L.P., 482 S.E.2d 509, 510 (Ga. Ct. App. 1997).

As a procedural matter, a forum selection clause raises questions of venue, not personal jurisdiction. See Freitsch v. Refco, Inc., 56 F.3d 825, 830 (7th Cir. 1995) (motion to dismiss on basis of forum selection clause should be deemed brought under Rule 12(b)(3) (improper venue)). When a defendant moves to dismiss for improper venue pursuant to Rule 12(b)(3), the plaintiff bears the burden of establishing that venue is proper. Grantham v. Challenge-Cook Bros., Inc., 420 F.2d 1182, 1184 (7th Cir. 1969). The Court of Appeals for the Seventh Circuit has not said what is necessary to meet this burden but it has established a well-defined standard for motions challenging personal jurisdiction: "the allegations in [the plaintiff's] complaint are to be taken as true unless controverted by the defendant['s] affidavits, and any conflicts in the affidavits are to be resolved in [the plaintiff's] favor." Turnock v. Cope, 816 F.2d 332, 333 (7th Cir. 1987) (noting standard for personal jurisdiction). At least one other circuit has applied this personal jurisdiction standard when evaluating a plaintiff's evidence on motions to dismiss for lack of venue under Fed. R. Civ. P. 12(b)(3). See Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 324 (9th Cir. 1996). Several district courts within the Seventh Circuit have adopted this standard. See Reed v. Brae Railcar Management, Inc., 727 F. Supp. 376, 377 (E.D. Ill. 1989); Moore v. AT&T Latin America Corp., 177 F. Supp. 2d 785, 788 (N.D. Ill. 2001); Graves v. Pikulski, 115 F. Supp. 2d 931, 934 (S.D. Ill. 2000); Nagel v. ADM Investor Servs., 995 F. Supp. 837, 843 (N.D. Ill. 1998); Karlberg European Tanspa, Inc. v. JK-Josef Kratz

Vertriebsgeselischaft MbH, 699 F. Supp. 669, 670 (N.D. Ill. 1988). One court reasoned that the same standard should apply because venue and personal jurisdiction are similar insofar as a defendant may waive the plaintiff's failure to meet either requirement. Reed, 727 F. Supp. at 377. Because the reasoning of these courts is sound, I will follow it in evaluating plaintiff's burden on a motion under Fed. R. Civ. P. 12(b)(2) to a motion under Fed. R. Civ. P. 12(b)(3).

When deciding a motion to dismiss for improper venue, the court may examine facts outside the complaint. Nagel, 727 F. Supp. at 377. Moreover, "[w]hen jurisdiction or venue depends on contested facts . . . the district judge is free to hold a hearing and resolve the dispute before allowing the case to proceed." Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 676-77 (7th Cir. 2001) (distinguishing between motions to dismiss based on personal jurisdiction and venue and Rule 12(b)(6) motions that require district court to accept plaintiff's allegations in complaint as true); see also Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d § 1352 (motion may be denied or held in abeyance whenever court determines that further information is needed to determine whether venue is proper).

In the context of motions to dismiss for lack of personal jurisdiction, the Court of Appeals for the Seventh Circuit has stated that the district court must decide whether any material facts are in dispute. If so, it must hold an evidentiary hearing to resolve them, at

which point the party asserting personal jurisdiction must bear the burden of persuasion. Until such a hearing takes place, the party asserting the existence of personal jurisdiction over the defendant need make out only a prima facie case of personal jurisdiction. Hyatt International Corp. v. Coco, 302 F.3d 707, 713 (7th Cir. 2002).

Whether venue is proper in the Western District of Wisconsin depends on whether the parties agreed to the November 12 document because that is the only contract containing a forum selection clause. The individual purchase orders do not restrict the plaintiff's forum. (Defendant does not argue that venue would be improper in this district in the absence of a valid forum selection clause.)

Defendant argues that the November 12 document is enforceable under both the Wisconsin and Georgia versions of the Uniform Commercial Code. The applicable law states that

> a contract for the sale of goods for the price of $500 or more is . . . enforceable . . . [if] there is some writing sufficient to indicate that a contract for the sale has been made between the parties and signed by the party against whom enforcement is sought

Wis. Stat. § 402.201(1) and accord Ga. Code § 11-2-201(1). However, neither party addresses whether the November 12 document constitutes "a contract for the sale of goods for the price of $500 or more." The official comment to U.C.C. § 2-201 section provides that:

> The required writing need not contain all the material terms of the contract and such terms as are stated need not be precisely stated. All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction. . . . *The only term which must appear is the quantity term* which need not be accurately stated but recovery is limited to the amount stated. . . . Only three definite and invariable requirements as to the memorandum are made by this subsection. First, it must evidence a contract for the sale of goods; second, it must be "signed," a word which includes any authentication which identifies the party to be charged and third, *it must specify a quantity*.

U.C.C. § 2-201, cmt. 1 (emphasis added); see also Cloud Corp. v. Hasbro, Inc., 314 F.3d 289, 295 (7th Cir. 2002) (stating "[t]he quantity term in a contract for a sale of goods for more than $500 must be memorialized in writing by the party sought to be held to that term.")

When addressing quantity, the U.C.C. provides that "[u]nder this Article, a contract for output or requirements is not too indefinite since it is held to mean the actual good faith output or requirements of the particular party." U.C.C. § 2-306, cmt. 2. Consequently, courts have held that a memorandum indicating that the contract is for the buyer's requirements satisfies the statutes of frauds despite the absence of a precise quantity term. Embedded Moments, Inc. v. International Silver Co., 648 F. Supp. 187, 192 (E.D.N.Y. 1986); see also Zayre Corp. v. S.M. & R. Co., Inc., 882 F.2d 1145, 1154 (7th Cir. 1989) (applying Illinois equivalent of U.C.C. to find that requirement contract or writing that states that buyer's requirements is quantity to be bought sufficiently states a quantity term under § 2-201). To qualify as a requirements contract, the contract must be either for as

many goods as the purchaser may require or for the seller's entire output. Zayre Corp., 882 F.2d at 1155; see also Brooklyn Bagel Boys, Inc. v. Earthgrains Refrigerated Products, Inc., 212 F.3d 373, 378 (7th Cir. 2000) (stating contract was not requirements contract because it did not expressly obligate defendant to purchase all or any specified quantity of its requirements from plaintiff); but see Cloud Corp. v. Hasbro, Inc., 314 F.3d 289, 292-94 (7th Cir. 2002) (finding that party was bound after it signed letter that contained "terms and conditions" to govern future purchase orders).

Although the November 12 document does not expressly state a quantity term, it would be a requirements contract if the contract were also exclusive. Section 1.05(a) of the document provides:

> [Plaintiff] [m]anufacturer shall manufacture and package such types and quantities of Licensed Products that [defendant] OMF reasonably requests by production order

Alone, this section would not be enough to constitute a requirements contract because what defendant "reasonably requests" could be considerably less than what defendant requires. However, plaintiff alleges that it changed § 1.01 from non-exclusive to exclusive.

> [Defendant] OMF grants, and [Plaintiff] [m]anufacturer accepts a[n] exclusive license to manufacture and package those [defendant] OMF Cheese Products listed in Exhibit A

When § 1.01 is read together with § 1.05, the November 12 document appears to be a requirements contract because plaintiff would be the exclusive manufacturer of the agreed

upon cheese products.

Even if I make the assumption that it is, however, it is unclear whether the November 12 document is a *writing sufficient* to indicate that a contract has been made between the two parties. In this odd set of circumstances, the parties dispute whether the defendant ever agreed to the terms of the November 12 document. Plaintiff avers it signed the November 12 document to which it had made handwritten changes that plaintiff was unsure defendant would accept. Plaintiff avers that defendant did not accept these changes. On the other hand, defendant avers that it did accept these changes and now seeks to enforce the November 12 document as a valid contract. In other words, the parties dispute whether there was ever a meeting of the minds on all the essential terms of the contract. See U.C.C. § 2-201, cmt. 1 ("All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction.").

On the present record, plaintiff has made a prima facie showing that the parties did not reach an agreement in November 12 document and hence, that venue is proper in the Western District of Wisconsin. Plaintiff argues that defendant rejected the November 12 document in a telephone conversation in late November 2001 and that the two parties continued to negotiate for a long-term supply contract after November 2001. Defendant disputes these averments with sworn testimony, asserting that it signed the November 12 contract and returned a copy to plaintiff via Federal Express in November 2001. Defendant

also asserts that plaintiff did not dispute the existence of a contract in February 2003.

Even if the November 12 document is not an enforceable contract under the U.C.C., I must decide whether the two parties ever attained the requisite meeting of the minds before I can decide whether venue is proper in this district. Common law recognizes situations in which a contract need not be signed by both parties in order to be enforceable. First, if the parties did indeed form a contract that met the requirements of the statutes of frauds, the contract is enforceable even if the writing is lost or destroyed. See 4-23 Corbin on Contracts § 23.10 (2003). Second, "[a] written agreement may be effective even if both parties have not signed it if the parties otherwise demonstrate their right to contract." Ziege Dist. Co., Inc. v. All Kitchens, Inc., 63 F.3d 609, 612 (7th Cir. 1995) (citing Consolidated Papers, Inc., 153 Wis. 2d 589, 599 (Ct. App. 1989)). Because the absence of a contract signed by both parties is not determinative of the question whether the contract exists, the success of defendant's motion rests on resolution of the question whether defendant accepted the November 12 document with plaintiff's handwritten changes in November 2001.

Consequently, the question of whether venue lies in this district cannot be determined without resolution of the disputed material facts. Therefore, I will hold an evidentiary hearing on the issue.

ORDER

IT IS ORDERED that an evidentiary hearing will be held on the parties' disputed material facts on Wednesday, October 1, 2003 at 9:00 a.m.

Entered this 20th day of August, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge