IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JORDAN TUMINARO,

OPINION AND ORDER

Plaintiff,

11-cv-203-bbc

v.

THE GARLAND COMPANY, INC.,

Defendant.

- -

Plaintiff Jordan Tuminaro was a sales representative for the Garland Company from 2002 to 2009. Although Ohio is defendant's state of incorporation and the location of its principal place of business, plaintiff solicited business for defendant exclusively in Wisconsin, where plaintiff lived until 2006. (He then moved to Illinois but continued to service the same territory in Wisconsin.) Now that plaintiff has left defendant's employment, he is seeking to declare invalid a noncompete agreement he has with defendant. That agreement includes an Ohio choice of law provision and forum selection clause, which are the subject of defendant's motion to dismiss the case or transfer it to Ohio. Jurisdiction is present under 28 U.S.C. § 1332 because the parties' citizenship is diverse and defendant alleges that it has lost more than $75,000 as a result of plaintiff's departure. Macken ex rel. Macken v. Jensen,

333 F.3d 797, 799 (7th Cir. 2003) (in cases involving declaratory or injunctive relief, amount in controversy may be valued from perspective of defendant).

In accordance with Beilfuss v. Huffy Corp., 2004 WI App 118, 274 Wis. 2d 500, 507, 685 N.W.2d 373, I conclude that the Ohio forum selection clause is not enforceable. In addition, I conclude that transfer is not required under 28 U.S.C. § 1404. Accordingly, I am denying defendant's motion.

OPINION

Plaintiff challenges the forum selection clause on the ground that it violates Wisconsin public policy. The threshold question is whether the validity of the clause should be determined under state or federal law. Defendant says that federal law should apply, citing IFC Credit Corp. v. Aliano Bros. General Contractors, Inc., 437 F.3d 606, 608 (7th Cir. 2006); plaintiff says that it should be Wisconsin law, citing Abbott Laboratories v. Takeda Pharmaceutical Co. Ltd., 476 F.3d 421, 423 (7th Cir. 2007). (Neither side argues for Ohio law, so I will set that possibility aside.) The court of appeals did not resolve the question in either IFC Credit or Abbott Laboratories because it concluded that any difference between federal law and state law (Illinois in those cases) was not so great as to alter the outcome. In fact, it seems that in each instance the court of appeals has been asked to decide the validity of a forum selection clause, it has declined to take a stance because the result would

be the same either way. E.g., Kochert v. Adagen Medical International, Inc., 491 F.3d 674, 677 (7th Cir. 2007) (Indiana law or federal law); Muzumdar v. Wellness Intern. Network, Ltd., 438 F.3d 759, 761 (7th Cir. 2006) (Illinois law or federal law). See also Israeli v. Dott. Gallina S.R.L., 632 F. Supp. 2d 866, 868 (W.D. Wis. 2009) (declining to decide whether forum selection clause was governed by Wisconsin law or federal law because the parties "agree[d] that Wisconsin law and federal law are the same").

It is not too surprising that it has been unnecessary to decide the matter. Under federal law, the general question is whether enforcement of the forum selection clause would be "unreasonable under the circumstances." M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972). This is little different from the standards under state law, including Wisconsin. Converting/Biophile Laboratories, Inc. v. Ludlow Composites Corp., 2006 WI App 273, ¶ 22, 296 Wis. 2d 273, 285-86, 722 N.W.2d 633, 639-40 (forum selection clause is valid "unless enforcement is shown to be unreasonable under the circumstances"). Further, under both federal law and Wisconsin law, the clause may not be enforced if it would violate the forum state's public policy. M/S Bremen, 407 U.S. at 15 ("A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."); Converting/Biophile Laboratories, 2006 WI App 273, at ¶ 22 ("[W]here a forum-selection clause is deemed to be unconscionable or a violation of public policy, we

have declared it unreasonable and have refused to enforce it."). Thus, whether a federal or state standard applies, state law may affect the decision.

In later cases, the Supreme Court and the Court of Appeals for the Seventh Circuit have not discussed M/S Bremen's statement that forum selection clauses may be void for violating the public policy of the forum state. E.g., Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991); Northwestern National Insurance Co. v. Donovan, 916 F.2d 372 (7th Cir. 1990). However, neither court has disavowed that language or suggested that it is no longer controlling. Other courts continue to consider state public policy, even when applying the federal standard. E.g., Doe 1 v. AOL LLC, 552 F.3d 1077 (9th Cir. 2009) (refusing to enforce forum selection clause that violated California public policy). Further, the Court of Appeals for the Seventh Circuit has stated that"a forum selection clause is enforceable to the same extent as the usual terms of a contract," IFC Credit Corp., 437 F.3d at 610, and, generally, contracts are not enforceable if they are against public policy. 5 Richard A. Lord, Williston on Contracts § 12:1 (4th ed. 2009). Defendant does not seem to deny the relevance of state law because it relies on a decision in which the court stated that, under federal law, a forum selection clause should not be enforced if doing so "would contravene a strong public policy of the forum in which the suit is brought." Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 325 (9th Cir. 1996).

Plaintiff argues that the forum selection clause at issue in this case violates Wisconsin

public policy, relying on Beilfuss v. Huffy Corp., 2004 WI App 118, 274 Wis. 2d 500, 507-509, 685 N.W.2d 373, 377. In that case, the court held that it would not enforce an Ohio choice of law provision and forum selection clause because of a conflict between Ohio and Wisconsin law regarding the enforceability of noncompete agreements:

> Wis. Stat. § 103.465 makes it the public policy of this state that "[a]ny . . . restrictive covenant imposing an unreasonable restraint is illegal, void and unenforceable even as to so much of the covenant . . . as would be a reasonable restraint." Gen. Med. Corp. v. Kobs, 179 Wis. 2d 422, 431, 507 N.W.2d 381 (Ct. App. 1993) (citation omitted). On the other hand, Ohio law permits selective enforcement or judicial modification of an unreasonable covenant not to compete so as to enforce the covenant deemed reasonable. Raimonde v. Van Vlerah, 42 Ohio St.2d 21, 325 N.E.2d 544, 547 (1975).
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> Consequently, we hold the choice of law provision in the employment agreement violates the public policy of this state and reverse the circuit court's conclusion that it is enforceable. Further, we hold that because the choice of law provision is invalid, the enforcement of the forum selection provision would be unreasonable. Hall, 150 Cal. App.3d at 418, 197 Cal. Rptr. 757.

Id. at ¶¶ 15-16.

The parties seem to agree that, if Beilfuss is controlling, I must invalidate the forum selection clause. Beilfuss is indistinguishable: the court held without reservation that Ohio forum selection clauses were unenforceable in Wisconsin in the context of a noncompete agreement that includes an Ohio choice of law provision, as the agreement in this case does. However, defendant points out that federal courts deciding questions of state law are bound

by the decisions of the *supreme* court of that state, but not necessarily by those of the state court of appeals. Officer v. Chase Insurance Life and Annuity Co., 541 F.3d 713, 715 (7th Cir. 2008) ("When sitting in diversity, we must apply the substantive law of the state as we believe the highest court of that state would apply it when faced with the same issue."). Defendant asks this court not to follow Beilfuss because it is contrary to M/S Bremen, 407 U.S. 1, and Star Direct, Inc. v. Dal Para, 2009 WI 76, 319 Wis. 2d 274, 767 N.W.2d 898. It also argues that Beilfuss is wrong because the court did not decide whether the noncompete agreement was valid *before* it determined the validity of the choice of law and forum selection clauses. I find neither of these arguments persuasive.

First, defendant says that "under Beilfuss forum selection clauses are given no weight and would be automatically invalid," which is inconsistent with the rule of M/S Bremen that such clauses are "entitled to great weight and are presumptively valid." Dft.'s Br., dkt. #4, at 15. Although it is true that in M/S Bremen, 407 U.S. at 15, the Supreme Court held that the burden is on the party resisting the forum selection clause to show that it is invalid, the state court of appeals cited M/S Bremen in Beilfuss and acknowledged that holding. Beilfuss, 2004 WI App 118, at ¶ 17 ("[I]n M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972), the United States Supreme Court held that such clauses are prima facie valid and should be enforced unless enforcement is shown to be unreasonable under the circumstances."). However, the court of appeals concluded that "it is unreasonable to

enforce the forum selection clause because it violates Wisconsin's strong public policy governing covenants not to compete." Id. at ¶ 18.

Defendant devotes much space in its briefs to Star Direct, but this focus is a little puzzling because the supreme court did not purport to overrule Beilfuss in Star Direct or even cite it, even though Star Direct was decided five years after Beilfuss. In fact, Star Direct did not even involve a forum selection clause. The questions in that case related to validity of substantive provisions of a noncompete agreement.

Finally, it is putting the cart before the horse to argue that courts should consider the validity of the substantive provisions in a noncompete agreement in order to determine whether the forum selection clause is valid. If that were correct, the forum selection clause would be generally pointless. What purpose would it serve to send a case to another forum *after* the court decided that the noncompete agreement was enforceable? Issues such as jurisdiction and venue are decided before the merits.

Defendant raises a number of potentially valid criticisms of Beilfuss. For example, in that case, the court of appeals seemed to conflate the validity of the choice of law clause and the forum selection clause, assuming that, if the choice of law clause is unenforceable, then the forum selection clause must be stricken as well. In addition, the court seemed to take the view that it would constitute a violation of Wisconsin public policy to transfer a dispute about a noncompete agreement to any state that did not provide protections identical to

those in Wisconsin. This is an expansive interpretation of the case on which Beilfuss relied, Bush v. National School Studios, Inc., 139 Wis. 2d 635, 644-45, 407 N.W.2d 883, 887-88 (1987), in which the state supreme court refused to apply a Minnesota choice of law clause to a dispute about dealership termination because the Wisconsin Fair Dealership Law includes a provision prohibiting it from being "varied by contract."

Nevertheless, I am reluctant to disregard Beilfuss, which is the only statement from the Wisconsin judiciary regarding the validity of a forum selection clause in the context of a noncompete agreement. "If the state's highest court has yet to rule on an issue, decisions of the state appellate courts control, unless there are persuasive indications that the state supreme court would decide the issue differently." Thomas v. H & R Block Eastern Enterprises, Inc., 630 F.3d 659, 663 (7th Cir. 2011) (internal citations omitted). Although the result in Beilfuss may be subject to reasonable debate, defendant has not provided "persuasive indications" that the supreme court would overrule Beilfuss if given the chance. In fact, in Drinkwater v. American Family Mutual Insurance Co., 2006 WI 56, ¶¶ 25, 28-29, 290 Wis. 2d 642, 652, 714 N.W.2d 568, 573, the supreme court relied on Beilfuss in concluding that Wisconsin's made-whole doctrine should trump an Iowa choice of law provision in the contract. The supreme court did not criticize or question Beilfuss in Drinkwater or in any other case and I am not aware of any other Wisconsin court that has done so.

Further, Wisconsin law regarding the enforceability of noncompete agreements has not changed substantially since Beilfuss. In Star Direct, 2009 WI 76, at ¶¶ 65-78, the court held that different restrictive covenants in the same employment contract do not necessarily rise and fall together. If one covenant is unenforceable as unreasonable, other reasonable limitations may be divisible when they "suppor[t] different interests that can be independently read and enforced." Id. at 78. This approach remains stricter than Ohio's, which allows courts to save an unreasonable covenant through reformation, as defendant admits. Dft.'s Br., dkt. #4, at 16 (citing Century Business Services, Inc. v. Urban, 900 N.E.2d 1048, 1053 (Ohio Ct. App. 2008), and Raimonde v. Van Vlerah 42 Ohio St.2d 21, 24-25, 325 N.E.2d 544, 546-47 (Ohio 1975)). Although I agree with defendant that the difference is not a large one, defendant does not point to any Wisconsin authority that requires it to be. E.g., Deminsky v. Arlington Plastics Machinery, 2003 WI 15, ¶ 18, 259 Wis. 2d 587, 603, 657 N.W.2d 411, 419 (interpreting Bush as refusing to apply Minnesota choice of law provision in part because "Minnesota law may have had some protection for unfair termination of franchises, but it did not have an *equivalent* Fair Dealership Law") (emphasis added) . Accordingly, I am following Beilfuss and declining to enforce the forum selection clause.

In the alternative, defendant includes a brief argument that the case should be transferred to Ohio under 28 U.S.C. § 1404(a), which permits transfer when doing so would

be in the interest of justice and serve the convenience of the parties and witnesses. The burden rests on the party seeking the transfer to show that the other district is "clearly more convenient." Coffey v. Van Dorn Iron Works, 796 F.2d 217, 219 (7th Cir. 1986).

Defendant has not met this burden. It admits that Wisconsin is more convenient for plaintiff and that relevant evidence and witnesses may be located in this state. Although it says that Ohio is more convenient for it and that relevant evidence and witnesses will be in that state as well, that is not enough. "[W]hen the inconvenience of the alternative venues is comparable there is no basis for a change of venue; the tie is awarded to the plaintiff." In re National Presto Industries, Inc., 347 F.3d 662, 663-64 (7th Cir. 2003). Defendant does not cite any specific evidence showing that its own inconvenience and that of its Ohio witnesses substantially outweighs the inconvenience that plaintiff and Wisconsin witnesses would suffer if the case were transferred. Generac Corp. v. Omni Energy Systems, Inc., 19 F. Supp. 2d 917, 923 (E.D. Wis. 1998) (to demonstrate convenience to witnesses, defendant is required to "clearly specify the key witnesses to be called" and submit "affidavits, depositions, stipulations, or any other type of document containing facts tending to establish who (specifically) it planned to call or the materiality of that testimony") (quoting Heller Financial, Inc. v. Midwhey Powder Company, Inc., 883 F.2d 1286, 1293-94 (7th Cir. 1989)).

With respect to the interest of justice, the only argument defendant makes is that an

Ohio jury has a greater interest in resolving the dispute than a Wisconsin jury because the case "potentially impacts the income and profits of an Ohio corporation and taxes to be paid." Dft.'s Br., dkt. #4, at 19. This is not persuasive. Although the relationship of the forum to the dispute is a relevant factor, Research Automation, Inc. v. Schrader-Bridgeport International, Inc., 626 F.3d 973, 978 (7th Cir. 2010), Wisconsin has an interest in the dispute because the noncompete agreement affects plaintiff's ability to conduct business in this state and provide goods and services to Wisconsin residents. I cannot conclude that defendant's presence in Ohio tips the balance so heavily as to require transfer.

ORDER

IT IS ORDERED that defendant The Garland Company's "Motion to Dismiss Pursuant to 28 U.S.C. § 1406 and Rule 12(b)(1) & (3) of the Federal Rules of Civil

Procedure, or, in the Alternative, to Transfer Pursuant to 28 U.S.C. § 1404(a)," dkt. #3, is DENIED.

Entered this 6th day of May, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge