IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

DIDION MILLING, INC.,

Plaintiff,

v.

BMH CHRONOS RICHARDSON, INC.,

Defendant.

OPINION AND ORDER

02-C-0264-C

- -

This is a civil action for monetary relief in which plaintiff Didion Milling, Inc. alleges that defendant BMH Chronos Richardson, Inc. breached its contract by selling plaintiff a defective automatic corn flour bagging system. Presently before the court is defendant's motion to dismiss plaintiff's claim for lack of personal jurisdiction and improper venue. Specifically, the parties dispute whether their contract contains a forum selection clause requiring the parties to litigate disputes in New Jersey.

Because I conclude that the parties' contract does not contain a forum selection clause, I will deny defendant's motion to dismiss. From the affidavits submitted by the parties and the record, I find the following facts for the sole purpose of deciding this motion.

FACTS

Plaintiff is incorporated in Wisconsin and has its principal place of business in Johnson Creek, Wisconsin. Defendant is incorporated in Delaware and has its principal place of business in Fairfield, New Jersey. The amount in controversy exceeds $75,000.

On or about September 3, 1999, defendant submitted a proposal to plaintiff for an automatic corn flour bagging system. The proposal included specifications about the proposed equipment, prices, terms of delivery and may have included defendant's standard terms and conditions of sale. Defendant proposed that plaintiff purchase the "CHRONO-FILL K1000 High Speed Bagging System." Defendant's standard terms and conditions contain a forum selection clause that stated, "Any suit arising out of this contract shall be brought only in the State or Federal courts of the State of New Jersey, and in the event of such suit, the parties hereto waive any defense based upon personal jurisdiction or improper venue." The proposal stated further that "the price and delivery are valid for an order placed within thirty (30) days of this quotation. After this period, we reserve the option to requote price and delivery."

After defendant submitted the proposal to plaintiff, defendant conducted testing at plaintiff's request to determine whether the bagging system described in the proposal met plaintiff's specifications. In a letter dated September 28, 1999, defendant summarized its understanding of plaintiff's requirements on the basis of a meeting between them in which

they discussed the September 3 proposal. In a letter dated November 23, 1999, defendant requested that plaintiff send samples so that it could conduct further testing.

In a letter dated January 5, 2000, defendant summarized the results from the testing that occurred on December 20 and 21, 1999. In this letter, defendant also listed a summary of two different bagging systems, the "K1000 Carousel" and the "PBS 2000 Dual Spout System" and recommended that plaintiff purchase the PBS 2000 system. In another letter dated January 19, 2000, defendant submitted additional information about the two systems.

On or about January 27, 2000, plaintiff sent defendant a letter in which it stated it was making an "offer to purchase." The letter included the specifications of the K1000 Carousel and related equipment, the price and terms of delivery. Plaintiff's January 27 letter referred to defendant's January 5 letter but did not refer to the September 3 proposal. The letter concluded by requesting that defendant prepare a letter of acceptance in response to its offer to purchase.

On or about February 4, 2000, defendant submitted a letter to plaintiff in which it stated it was making a "qualified acceptance of [plaintiff's] letter dated January 27, 2000." In the letter, defendant modified 22 sections of plaintiff's January 27 letter. Defendant's modifications were specific and detail-oriented. For example, instead of accepting the phrase "dust free" to describe the testing environment, defendant substituted the phrase "dust controlled." The September 3 proposal was the only piece of correspondence that either

contained or referred to a forum selection clause.

OPINION

A. Choice of Law

In a federal lawsuit based on diversity of citizenship, the court will apply the choice-of-law principles of the jurisdiction in which it sits to determine the substantive law that will apply. See generally Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U. S. 487, 496-97 (1941). Therefore, Wisconsin's choice-of-law principles apply. Under Wisconsin law, contract rights are "determined by the local law of the state in which the contract has the most significant relationship." Handal v. American Farmers Mutual Casualty Co., 79 Wis.2d 67, 73, 255 N.W.2d 903, 906 (1977). In determining which state has the most significant relationship with the contract, the court should consider place of contracting, place of performance, place of the subject matter of the contract, domicile, nationality, place of incorporation and principal place of businesses, law under which the contract will be most effective, and other contracts presented in the given case. Belland by Rosenberg v. Allstate Insurance Co., 140 Wis.2d 391, 397, 410 N.W.2d 611, 614 (Ct. App. 1987).

I conclude that the contract has the most significant relationship with Wisconsin because (1) the parties intended that the bagging system would be used in Wisconsin; (2) the allegedly defective bagging system that gives rise to plaintiff's cause of action is located

in Wisconsin; and (3) plaintiff is a Wisconsin corporation with its principal place of business in Wisconsin.

B. Forum Selection Clause

As a preliminary matter, there is some confusion about the number of pages defendant faxed to plaintiff. According to the first page of the September 3 proposal, defendant faxed 14 pages to plaintiff. However, the proposal that defendant submitted with its motion is 15 pages in length. See Aff. of William Pawlowski, dkt. #10, at Exh. A. Moreover, according to the proposal itself, the terms and conditions were located "on the reverse side of page one." Id. Therefore, it is not clear whether plaintiff actually received the terms and conditions page as part of the September 3 proposal. In fact, John A. Didion avers nebulously that he does not recall ever "seeing" the forum selection clause. See Aff. of John A. Didion, dkt. #12, at ¶ 10. In other words, the parties' averments and exhibits leave one wondering whether plaintiff ever *received* the terms and conditions page. In any event, even if plaintiff had received the terms and conditions page as part of the September 3 proposal, for the reasons stated below I find that the January 5 letter constituted the offer and the January 27 letter was an acceptance with modifications.

Defendant argues that (1) the September 3 proposal was the offer, which contained the forum selection clause, and plaintiff's January 27 letter accepted defendant's offer; (2)

any differences in plaintiff's January 27 letter were either additions or modifications to the proposal pursuant to Wis. Stat. § 402.207; and (3) plaintiff never rejected the proposal either orally or in writing. In response, plaintiff contends that the parties' contract did not contain a forum selection clause because plaintiff never accepted the September 3 proposal. Plaintiff argues the January 27 letter constituted the offer because the proposal's price and delivery terms had expired and the two parties had engaged in five months of negotiations following the September 3 proposal. Moreover, plaintiff argues that it referred to the January 27 letter as an "offer to purchase"; it never mentioned the September 3 proposal; and defendant responded to it on February 4 letter with a "qualified acceptance."

The Uniform Commercial Code does not define offer. Thus, the common law still determines which communication constitutes the offer. See Rich Products Corp. v. Kemutec, Inc., 66 F. Supp. 2d 937, 955-56 (E.D. Wis. 1999). Therefore, the critical question is whether the September 3 proposal was an offer or merely a preliminary step in negotiations. See Nickel v. Theresa Farmers Cooperative Association, 247 Wis. 412, 416, 20 N.W.2d 117, 118 (1945) (courts find it difficult to determine whether price quotation is offer or merely preliminary step in negotiations). Often the level of detail and completeness determines whether the communication is a quotation or an offer. See Rich Products, 66 F. Supp. 2d at 956. Details that are essential to forming an offer include a description of the goods to be sold, the quantity, the price of each item and the delivery

terms. See Architectural Metal Inc., v. Consolidated Inc., 58 F.3d 1227, 1229 (7th Cir. 1995). Once the court determines which communication was the offer, it analyzes communications subsequent to the offer under Wis. Stat. § 402.207 to determine the terms of the contract. See Rich Products, 66 F. Supp. 2d at 956.

The September 3 proposal ceased to be an offer after 30 days because its pricing and delivery terms had expired. In fact, plaintiff did not agree to the proposed equipment and began to negotiate these terms with defendant. The negotiations continued for approximately four months after the proposal's price and delivery terms had expired. Once those terms expired, the proposal no longer constituted an offer because the parties were negotiating the specifications of the equipment as well as the price and delivery terms. Simply put, the September 3 proposal was merely a preliminary step in the negotiations.

Defendant argues that because plaintiff never rejected the proposal explicitly, plaintiff's silence constituted an offer. To accept an offer to make a contract there must be a meeting of the minds, which is a "factual condition demonstrated by word or deed." Zeige Distributing Co. Inc. v. All Kitchens, Inc., 63 F.3d 609, 612 (7th Cir. 1995) (citing Household Utilities Inc. v. Andrews Co., 71 Wis. 2d 17, 29, 236 N.W.2d 663, 669 (Ct. App. 1976)). In this case, plaintiff's conduct following the September 3 proposal was consistent with rejection of an offer. First, plaintiff and defendant did not have a meeting of the minds as to the equipment, price or delivery and continued to negotiate these terms

for five months. Specifically, defendant had to conduct extensive testing on its equipment to show plaintiff that its product could meet plaintiff's requirements. Moreover, in its January 5 letter, defendant even suggested that plaintiff purchase a completely different bagging system (the PBS 2000) instead of the one described in the September 3 proposal (the K1000 Carousel). The negotiations encompassed the essential terms of the contract (equipment, price and delivery) and not insignificant details. Second, plaintiff rejected defendant's offer because plaintiff called its January 27 letter an "offer to purchase." See Yee v. Giuffre, 176 Wis. 2d 189, 192-93, 499 N.W. 2d 926, 927 (Ct. App. 1993) (courts will enforce plain meaning of contract). Moreover, defendant responded with a "qualified acceptance" of the January 27 letter. Third, plaintiff's January 27 letter referred to defendant's January 5 letter but did not mention defendant's September 3 proposal. See Goebel v. First Federal Savings and Loan Association of Racine, 83 Wis. 2d 668, 673, 266 N.W.2d 352, 355 (1978) ("a specific mention in a contract of one or more matters is considered to exclude other matters of the same nature or class not expressly mentioned, even when all such matters would have been inferred had none been expressed").

Because the September 3 proposal is not part of the parties' contract, the contract does not contain a forum selection clause requiring the parties to litigate in New Jersey. Therefore, personal jurisdiction and venue are proper.

ORDER

IT IS ORDERED that defendant's motion to dismiss this lawsuit for lack of personal jurisdiction and improper venue is DENIED.

Entered this 13th day of November, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge