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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

TACS AUTOMATION, LLC,
Plaintiff,

v. **Case No. 18-164289-CB**
Hon. James M. Alexander

DANA DRIVESHAFT MANUFACTURING, LLC,
Defendant.
______________________________________/

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant's motion for summary disposition. In its First Amended Complaint, Plaintiff claims that it provided labor and materials for conveyor and related automated systems to Defendant based on several quotations.

Plaintiff claims that Defendant verbally directed Plaintiff to proceed with the work according to these quotations, but Defendant has since failed to pay for the same. As a result, Plaintiff filed the present case (in part) on breach of contract and promissory estoppel claims seeking over $675,000 for the work. Plaintiff also alleges tortious interference and defamation claims based on alleged interference with (and statements to) Plaintiff's subcontractors and customers.

Defendant now seeks summary disposition of Plaintiff's Complaint under MCR 2.116(C)(8) based on an Ohio forum-selection clause found in the August 23, 2015 "Equipment Purchase Terms and Conditions" contract.[1] The Court will note however, that Defendant's

[1] A (C)(8) motion tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Such a motion may be granted only where the claims alleged are "so clearly unenforceable as a matter

motion is properly considered under MCR 2.116(C)(7), which governs whether a claim is claim is barred, among other grounds, by "an agreement to . . . litigate in a different forum."[2]

"It is undisputed that Michigan's public policy favors the enforcement of contractual forum-selection clauses and choice-of-law provisions." *Turcheck v Amerifund Fin, Inc*, 272 Mich App 341, 345; 725 NW2d 684 (2006).

The *Turcheck* Court reasoned:

> A party seeking to avoid a contractual forum-selection clause bears a heavy burden of showing that the clause should not be enforced. 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 at 348, citing *The Bremen v Zapata Off-Shore Co*, 407 US 1, 17-18; 92 S Ct 1907; 32 L Ed 2d 513 (1972).

In its Response, Plaintiff does not claim that any of the MCL 600.745 factors apply.[3] Instead, Plaintiff's makes three arguments. First, Plaintiff claims that Defendant's motion (and

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of law that no factual development could possibly justify recovery." *Wade v Dept of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). When considering such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade*, 439 Mich at 162-163. Additionally, when considering such motions, the court considers only the pleadings. MCR 2.116(G)(5).
Further, "[w]hen an action is based on a written contract, it is generally necessary to attach a copy of the contract to the complaint. Accordingly, the written contract becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8)." *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007); citing MCR 2.113(F) and *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003).

[2] When analyzing a (C)(7) motion, our Supreme Court has held:

> A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(G)(5). Moreover, the substance or content of the supporting proofs must be admissible in evidence. . . . Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); citing *Patterson v. Kleiman*, 447 Mich 429, 434, n. 6; 526 NW2d 879 (1994).

[3] Although undisputed that none of these factors apply, the cited statute, MCL 600.745(3), provides:

> 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:
> (a) The court is required by statute to entertain the action.
> (b) The plaintiff cannot secure effective relief in the other state for reasons other than delay in bringing the action.
> (c) The other state would be a substantially less convenient place for the trial of the action than this state.

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the forum-selection clause) "is based on terms of a document which is not the contract between the parties." Second, Plaintiff claims that this proposed document "specifically excludes that claims between the parties from the dispute resolution terms of the alleged contract." Finally, Plaintiff challenges Defendant's assertion that an Ohio case was filed before Plaintiff served the instant lawsuit.

With respect to its first argument, Plaintiff argues that it is not bound by the document containing the Ohio forum-selection clause because **Defendant did** not sign the same (only Plaintiff signed the document). And, Plaintiff argues, when only one party has bound itself to perform, and the other has not, there is no mutuality of agreement necessary to create a binding contract.[4]

In its Reply Brief, Defendant argues that it (Defendant) signed three Purchase Agreements attached to the Equipment Purchase Terms and Conditions that each **specifically incorporated** the Terms and Conditions.

Indeed, even a cursory review provides that each of the three "Schedule A Form of Purchase Term Sheets" includes a provision that "This Purchase Agreement is subject to the provisions set forth in the Terms." The "Terms" is specifically defined term as the "Equipment Purchase Terms and Conditions, effective August 23, 2016," which is the same document containing the Ohio forum-selection clause at Section 31.1.

Simply, Plaintiff's argument that it is not bound by the Equipment Purchase Terms and Conditions is disingenuous. Both parties executed three separate "Schedule A Form of Purchase

(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.

[4] "The essential elements of a valid contract are the following: '(1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation.'" *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005); quoting *Thomas v Leja*, 187 Mich App 418, 422; 468 N.2d 58 (1991).

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Term Sheets" – each of which specifically incorporated the August 23, 2016 Equipment Purchase Terms and Conditions ("Terms and Conditions").

Plaintiff next argues that the Terms and Conditions specifically excludes the current dispute. When interpreting a contract, Michigan law is well-established that "a court must construe and apply unambiguous contract provisions as written." *Rory v Cont'l Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Further, "[a] contract must be interpreted according to its plain and ordinary meaning." *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008). "Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court." *Holmes*, 281 Mich App at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

Plaintiff argues that the current action does not involve a "Dispute" that would invoke the Ohio forum-selection clause. The relevant provision (found in Section 31.1) provides that a "Dispute" under Section 31 is "a dispute, controversy or claim has arisen out of these Terms or any Purchase Agreement or the performance hereof of thereof." But Section 31.2 goes on to provide that "[t]he issue of whether a termination of any Purchase Agreement is proper will not be considered a Dispute."

In its Response, Plaintiff claims that "[t]he issue between Dana and TACS is whether TACS was properly terminated and according to paragraph 31.2 of Exhibit B, <u>these issues are not disputes, by definition</u>." (emphasis in original).

But, unlike its Response, Plaintiff's First Amended Complaint alleges that it performed work under the terms of the parties' agreement and Defendant refused to pay for the same. The Court will note that Plaintiff cites to two paragraphs in its First Amended Complaint (¶¶ 25-26) which reference Defendant's alleged termination of the contract, but these allegations are only

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used to support its tortious interference claim. They are not alleged to support a claim that the alleged termination was "proper." As such, these allegations do not support Plaintiff's argument that its claims are not subject to Section 31.1's dispute resolution procedures.

Simply, Plaintiff alleges claims arising out of Defendant's non-performance under the Terms and Conditions or Purchase Agreements. As such, the Terms and Conditions' Section 31.1 applies to the present lawsuit. Under the same, the parties are bound to the dispute resolution procedures contained therein (including the Ohio forum-selection clause).

For all of the foregoing reasons, the Court will enforce the parties' clear intent as expressed in their written contract and GRANT Defendant's motion for summary disposition under (C)(7) based on the Ohio contractual forum-selection clause.

This Order is a Final Order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

June 20, 2018	/s/ James M. Alexander
Date	Hon. James M. Alexander, Circuit Court Judge