[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON Justice PART 55

Index Number : 108920/2010
STERLING NATIONAL BANK
VS.
MID-SOUTH TOOLING INC
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO.
MOTION DATE 1/12/11
MOTION SEQ. NO.
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-4
Answering Affidavits — Exhibits	5-6
Replying Affidavits	7

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

FILED
MAR 17 2011
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/16/11

JANE S. SOLOMON J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

----------X

STERLING NATIONAL BANK AS ASSIGNEE OF NORVERGENCE INC.,

Plaintiff,

-against-

MID-SOUTH TOOLING, INC. and TERRY JONES, Individually,

Defendants.

----------X

Index №.: 108920/10

DECISION and ORDER

JANE S. SOLOMON, J.S.C.:

In a case involving an Equipment Rental Agreement (ERA) in which plaintiff Sterling National Bank (Sterling), assignee of the ERA, seeks $48,558.61 under breach of contract and account stated theories, defendants Mid-South Tooling, Inc. (Mid-South) and Terry Jones (Jones) move, pursuant to CPLR 3211, to dismiss the complaint for lack of personal jurisdiction and forum non conveniens.

Background

Sterling is a banking corporation organized under the laws of New York, with its principal place of business located at 500 Seventh Avenue. Mid-South is a machine shop located in Macon, Georgia which is certified, under section 8 (a) of the Small Business Act (15 USC § 631, *et seq.*), as a disadvantaged small business, and which has no information technology department and no in-house counsel.

In January 2004, Jones, vice president of Mid-South,

signed a five-year ERA with NorVergence Inc. (NorVergence). NorVergence, the lessor, subsequently assigned the ERA to Sterling, shortly before being forced into bankruptcy by its creditors in June 2004. NorVergence was later found to have violated the Federal Trade Commission Act (FTC Act) in connection with its business of selling telecommunications services to consumers that principally were small businesses, non-profit groups, churches and municipalities (*Fed. Trade Comm. v NorVergence, Inc.*, 2005 WL 3754864, *3, 2005 US Dist LEXIS 40699 [D NJ 2005] [finding, among other things, that NorVergence's deceptive practices "caused injury to consumers in the amount of at least $181,721,914"]).

Sterling argues that the basis for personal jurisdiction over defendants is a forum selection clause in the ERA, printed in six-point font, which provided that:

> This agreement shall be governed by, construed and enforced in accordance with the laws of the State in which Rentor's principal offices are located or, if this Lease is assigned by Rentor, the State in which the assignee's principal offices are located, without regard to such State's choice of law considerations and all legal actions relating to this Lease shall be venued exclusively in a state or federal court within that State, such court to be chosen at Rentor or Rentor's assignee's sole option. You hereby waive right to trial by jury in any lawsuit in any way relating to this rental

(ERA, at 2).

Mid-South and Jones argue that this floating

[* 4]

jurisdiction clause, where the ultimate forum is unknown at formation, is unenforceable because it lacks specificity and was obtained through fraud and overreaching. Moreover, Mid-South and Jones contend that the ERA is unenforceable, as it violates various federal and New York statutes, including the FTC Holder Rule (16 CFR § 433.2), section 5 (a) of the FTC Act (14 USC § 45 [a]), New York Executive Law § 63 (12), and CPLR 4544.

Mid-South and Jones submit, among other things, an attorney's affirmation, an affidavit from Jones, the findings of the trustee in the NorVergence bankruptcy case (*In re NorVergence, Inc.*, 405 BR 709 [Bankr D NJ 2009]), a copy of the NorVergence Screening Manager Training Manual, which prescribes, in detail, how sales agents were to trick customers into signing ERAs and guarantees, and an affidavit from David Rodriguez, a former NorVergence salesperson.

As the Appellate Term recently noted while examining a similar record, including many of the same documents, in a case involving another one of NorVergence's assignees:

> These documents, taken together, indicate that defendants ... were among the numerous victims of a scheme whereunder NorVergence, targeting small businesses and not-for-profit corporations with high credit ratings and without in-house counsel or technology personnel, tricked those entities and their owners into signing equipment rental agreements and guarantees, which were presented to them for signature as part of NorVergence's ostensibly non-binding, no-risk "Cost Savings Proposal" for the installation

> of proprietary, technologically innovative telecommunications equipment and the provision of telecommunications services

(*Studebaker-Worthington Leasing Corp. v New Concepts Realty, Inc.*, 25 Misc 3d 1, 4 [App Term, 2d Dept 2009]).

While NorVergence pitched the "Cost Savings Proposal" as an integrated telecommunications program, the ERA related only to a single piece of equipment, which NorVergence called "the Matrix," but which was, in fact, an Ad Tran router, worth only a small fraction of the sum value of the ERA (*see In re NorVergence*, 405 BR at 719). The router, which is often provided without cost as part of telecommunication agreements, did not, as NorVergence claimed, eliminate per minute charges on calls, and, as NorVergence did not reimburse the telecommunication carriers, the Matrices proved worthless to NorVergence clients (*see id.* at 719-724).

Discussion

"Forum selection clauses, which are prima facie valid, are enforced because they provide certainty and predictability in the resolution of disputes," and courts will not set them aside unless the challenging defendant demonstrates that enforcement would be unreasonable and unjust, or that the clause is invalid because of fraud or overreaching (*Sterling Natl. Bank v Eastern Shipping Worldwide, Inc.*, 35 AD3d 222, 222 [1st Dept 2006] [internal quotation marks and citations omitted]).

Sterling does not deny Mid-South and Jones's allegation that NorVergence cobbled together the two-page ERA by removing pages from two supposedly non-binding, no-risk credit application packets, which the NorVergence salesman prevented Jones from reading (Jones Affidavit, ¶¶ 5-7). Instead of denying that the underlying contract was permeated with fraud, Sterling argues that there is no evidence that it had any knowledge of fraud by NorVergence at the time it bought the ERA. Sterling contends that Mid-South and Jones's motion to dismiss must be denied, as there is no evidence that it, as assignee, committed any fraud with respect to the forum selection provision.

While the concept of severability generally applies to forum selection clauses (*see Sterling Natl. Bank v Eastern Shipping Worldwide, Inc.*, 35 AD3d at 223), "where a party alleges that a contract is void *ab initio*, the doctrine of separable contracts is inapplicable" (*Studebaker-Worthington Leasing Corp.*, 25 Misc 3d at 8, citing *Matter of Weinrott [Carp]*, 32 NY2d 190 [1973]; *see also DeSola Group v Coors Brewing Co.*, 199 AD2d 141, 141 [1st Dept 1993] [forum selection clause "unenforceable since the record is replete with allegations indicating that the entire Agreement was permeated with fraud"]). In *Studebaker-Worthington Leasing Corp.*, the Appellate Term held that "the ERA was so permeated with fraud as to render the contract as a whole, including the forum selection clause contained therein, void and

unenforceable" (25 Misc 3d at 8]).

Sterling is incorrect in arguing that the outcome here is controlled by *Sterling Natl. Bank v Eastern Shipping Worldwide, Inc.*, which, like *Studebaker-Worthington Leasing Corp.*, also involved a NorVergence assignee and a former NorVergence customer, but where the Appellate Division enforced the forum selection clause. In contrast to Mid-South, which is certified as a small, disadvantaged business, the defendant corporation in *Sterling Natl. Bank* was "a sophisticated business entity" (35 AD3d at 223). Moreover, in *Sterling Natl. Bank,* the defendants "failed to advance any grounds upon which [the Court] might disregard the forum designation contained in the lease agreement" (*id.* at 222-223), whereas Mid-South and Jones have made a substantial showing, uncontradicted by plaintiff, that they were tricked into signing what was represented to be a non-binding application, but which was, when later pruned and rearranged by NorVergence, an unconscionably one-sided contract that conferred no benefits on them. Finally, defendants in *Sterling Natl. Bank* did not allege "any fraud or overreaching, on the part of the assignee ... " (*id.* at 223), while here, Mid-South and Jones allege that Sterling knew or should have known that the ERA was rife with fraud, not only because Sterling had already received numerous consumer defaults and consumer complaints, but because the ERAs, in form and content, violated

various federal and New York statutes. Other than a conclusory denial of wrongdoing, Sterling does not answer these claims.

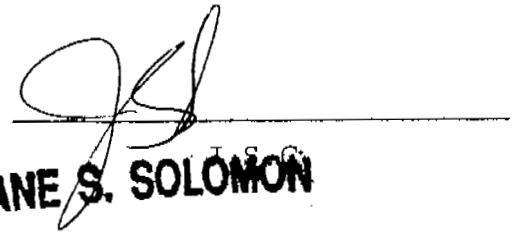
As in *Studebaker-Worthington Leasing Corp.* and *DeSola Group*, the record here demonstrates that the contract was void from the beginning, as it was permeated with fraud. Thus, the ERA's floating forum selection clause is inadequate to support jurisdiction over these Georgia defendants. Sterling does not contend that Mid-South and Jones would be subject to New York jurisdiction under CPLR 302, and Jones's affidavit shows that the defendants' only tie to New York is the forum selection clause, which, of course, never refers to New York. As such, Mid-South and Jones's motion to dismiss for lack of personal jurisdiction must be granted.

Based on the foregoing, it hereby is

ORDERED that defendants' motion to dismiss pursuant to 3211 (a) (8) is granted and the complaint is dismissed, with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.

Dated: March 16, 2011

ENTER:



J.S.C.
JANE S. SOLOMON