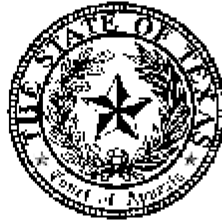
Reversed and remanded and Opinion filed April 19, 2001.



In The

Fourteenth Court of Appeals

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NO. 14-00-00062-CV

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HOOKS INDUSTRIAL, INC., Appellant

V.

FAIRMONT SUPPLY COMPANY, Appellee

On Appeal from the 157th District Court
Harris County, Texas
Trial Court Cause No. 98-22695

O P I N I O N

Appellant, Hooks Industrial, Inc., ("Hooks") filed suit against Fairmont Supply Company ("Fairmont") in a Harris County, Texas court. Hooks appeals the trial court's order dismissing the case, without prejudice, based on a forum selection clause found in an exhibit to the contract in dispute between Hooks and Fairmont. The clause states that all disputes are to be tried in Pennsylvania. Because we find that the forum selection clause contained in the exhibit applies only to specific purchases of Hooks' goods – and not to the entire contract – we hold that Hooks is not limited to bringing suit only in Pennsylvania. Therefore, we reverse and remand this cause to the trial court for further proceedings on the merits.

FACTUAL BACKGROUND

Hooks and Fairmont entered into a "Strategic Distribution and Alliance Agreement" ("Alliance Agreement"). The Alliance Agreement established a distributor/supplier relationship between the parties, and detailed the duties and obligations of each party. In the Alliance Agreement, Fairmont contracted to "use Hooks as their exclusive supplier for all products defined in [the Alliance Agreement]." Under the "Terms of Sale" section of the Alliance Agreement, it states, "Hooks['] sales and Fairmont's purchases hereunder shall be in accordance with Fairmont's standard terms and conditions, a copy of which is attached as Exhibit 'B' and incorporated herein by reference."

Hooks sued Fairmont for "fail[ing] to use reasonable efforts to promote and solicit orders for Hooks products, fail[ing] to provide sales personnel with professional sales direction and management . . . [and] fail[ing] to purchase [Products as described in the Alliance Agreement]."

Fairmont moved to dismiss Hooks' Texas lawsuit because Exhibit "B" contained a forum selection clause which stated that all disputes are to be tried in Pennsylvania. The trial court dismissed Hooks' cause of action without prejudice based on the forum selection clause.

Neither party disputes that a forum selection clause, entered into by two sophisticated parties, dealing at arms-length, is valid. *Churchill Corp. v. Third Century*, 396 Pa. Super. 314, 578 A.2d 532, 536 (1990). The bone of contention, however, is two-fold. First, is the forum selection clause found in Exhibit "B" applicable to the entire Alliance Agreement, or limited in application only to disputes arising out of sales and purchases made pursuant to the Alliance Agreement? Second, if it is so limited, does this lawsuit arise out of a dispute regarding sales and purchases made?

DISCUSSION AND HOLDINGS

Hooks argues that the forum selection clause refers only to the disputes over sales and purchases contingent upon such sales or purchases occurring. In connection with this, Hooks argues that the plain language of the section of the Alliance Agreement incorporating Exhibit "B," refers only to sales and purchases.

Fairmont, on the other hand, contends that (1) the incorporation of Exhibit "B" was for all purposes, and not just for sales and purchases; and (2) Hooks' pleadings to the trial court *did* deal with sales and purchases under the Alliance Agreement, so the forum selection clause would be invoked under any interpretation of the applicability of Exhibit "B." We disagree with both of these contentions.

STANDARD OF REVIEW

An appeal of a motion to dismiss is reviewed under an abuse of discretion standard of review. *Bowers v. Matula*, 943 S.W.2d 536, 538 (Tex. App.—Houston [1st Dist.] 1997, no writ). The scope of review is limited to those arguments raised by the motion to dismiss. *Brown v. Aetna Casualty & Surety Co.*, 135 Tex. 583, 145 S.W.2d 171 (1940).

In interpreting a writing, however, we use a *de novo* standard of review, because interpretation of a writing is a legal matter. *Southwest Intelecom, Inc. v. Hotel Networks, Corp.*, 997 S.W.2d 322 (Tex. App.—Austin 1999, pet. denied).

APPLICABLE LAW

All parties concede that the Alliance Agreement as a whole governs this lawsuit. The Alliance Agreement contains a choice of law provision that states, "[t]he validity, construction and performance of this Alliance Agreement shall be determined in accordance with the internal laws of the Commonwealth of Pennsylvania applicable to agreements made and to be performed within that State." The analysis in this opinion turns upon construction of this Alliance Agreement. Therefore, in accordance with the choice of law provision, we shall use Pennsylvania law to construe the Alliance Agreement.

INCORPORATION BY REFERENCE

We look first to the language in the Alliance Agreement. The "Terms of Sale" section of the Alliance Agreement states that, "Hooks['] sales and Fairmont's purchases hereunder shall be in accordance with Fairmont's standard terms and conditions, a copy of which is attached as Exhibit 'B' and incorporated herein by reference." The standard terms and conditions contract has an even narrower scope; it applies to specific orders. Repeatedly throughout the one page contract, it refers to "this order" and "this contract," meaning the standard terms and conditions contract. In addition, the paragraph with the standard terms and conditions that contains the forum selection clause states, "[a]ny and all actions at law . . . for any breach of . . . *this* contract . . . shall be instituted and maintained only in a court . . . in Allegheny County, Pennsylvania . . . ." (emphasis added).

Pennsylvania law directs us to give words in a contract their ordinary meaning, unless circumstances show that a different meaning was intended. *B.F. Goodrich Co. v. Wilson*, 337 Pa. 333, 10 A.2d 422, 423 (1940). Applying the ordinary meaning to the words in the "Terms of Sale" section of the Alliance Agreement, we find language that is narrow in scope and is incapable of being interpreted as being meant to apply to the entire contract. The clause restricts the application of the standard terms and conditions to sales and purchases between Hooks and Fairmont. In addition, the rest of the Alliance Agreement contains no expansive language that would even imply that the forum selection clause should be applied to the entire Alliance Agreement. The clauses setting forth the parties' respective duties were not made subject to Fairmont's terms and conditions. Finally, the choice of law clause contained in the Alliance Agreement provides only that Pennsylvania law should apply to the contract. It does not contain a forum selection clause; one easily could have been inserted. When we add to all of this the very narrow language contained in Fairmont's terms and conditions, we can reach only one conclusion: the forum selection clause contained in Exhibit "B" is applicable only as to Hooks' sales and Fairmont's purchases.[1]

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[1] We also note that there are identical choice of law clauses in both the alliance agreement and in Exhibit "B." Where possible, we are to read a contract in such a way that gives meaning to all of its terms. *Marcinak v. Southeastern Greene Sch. Dist.*, 375 Pa. Super. 486 A.2d 1025, 1027 (1988). If Exhibit "B" were applicable to the entire Alliance Agreement, and not limited in application to the "Terms of Sale" section

ARE SALES AND PURCHASES THE BASIS OF THIS LAWSUIT?

Clearly, if Hooks' sales and Fairmont's purchases form the basis of the underlying lawsuit, or are implicated by the underlying lawsuit, then the forum selection clause of Exhibit "B" is invoked, and suit in Texas is barred by virtue of the forum selection. The next step, then, is to determine whether this lawsuit arises under a breach of the "Terms of Sale" section, where Exhibit "B" is incorporated, or under some other section. Only if this suit arises under the "Terms of Sale" section, or implicates it, will the forum selection clause apply, thus barring suit in Texas.

Looking at Hooks' live pleading, which is its second amended petition, we find that the lawsuit is not about Hooks' sales nor Fairmont's purchases. In part, it is about what Hook did not sell and what Fairmont did not purchase. While that might seem to implicate the "Terms of Sale" section of the contract, we find that here it does not.

This lawsuit arises from Hooks' allegations that Fairmont breached its duties under the contract in "fail[ing] to use reasonable efforts to promote and solicit orders for Hooks products, fail[ing] to provide sales personnel with professional sales direction and management . . . [and] fail[ing] to purchase [Products as described in the Alliance Agreement]." The Alliance Agreement, in Sections 3 and 5(c), provides that "Fairmont shall use Hooks as their exclusive supplier for all products defined in Products paragraph (03)."[2] The "Terms of Sale" section is found in Section 8 of the Alliance Agreement. It states that "Hooks['] sales and Fairmont's purchases hereunder shall be in accordance with . . . Exhibit 'B.'" Clearly, if purchases had been made, and a dispute arose in connection with those purchases, a suit regarding that dispute would fall under the "Terms of Sale" section, and Exhibit "B," including

of the agreement, then that would render the Alliance Agreement's choice of law clause a nullity. We will not adopt such an interpretation. Moreover, the fact that the parties felt the need to place the choice of law clause in the Alliance Agreement is some evidence that they believed the clause from Fairmont's Terms and Conditions did not apply to the entire Alliance Agreement.

[2] The products, defined in paragraph 3, are "pumps, compressors, valves, turbines, mechanical seals, refrigeration equipment, oem parts, replica parts and services and any other similar products agreed upon in writing . . . ."

its forum selection clause, would be implicated. The suit at bar does not deal with purchases that were made. Instead, it deals with Fairmont's failure to use Hooks as its exclusive supplier for certain defined products. The suit certainly deals with a lack of purchasing, but that implicates Sections 3 and 5(c) of the Alliance Agreement, not "purchases hereunder" as contemplated by the Section 8, the "Terms of Sale" section. Hooks' pleading does not complain of breach of contract with respect to Hooks' sales or Fairmont's purchases. The forum selection clause of Exhibit "B," therefore, was not triggered. Accordingly, the forum selection clause found in Exhibit "B" does not limit the forum for this cause of action to Pennsylvania. Rather, we find that Hooks may bring this suit in the forum of its choice, barring any jurisdictional and due process impediments to the contrary; issues which are not before us today.

The judgment of the trial court is hereby reversed, and the cause remanded to the trial court for further proceedings on the merits.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed April 19, 2001.

Panel consists of Justices Fowler, Edelman and Cannon.[3]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[3] Senior Justice William B. Cannon sitting by assignment.