

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

NEON CONSTRUCTION ENTERPRISES, INC.,)	)	
	)	
Plaintiff,	)	CASE NO. ST-11-CV-13
	)	
vs.	)	ACTION FOR BREACH OF
	)	CONTRACT,
INTERNATIONAL BONDING and	)	MISREPRESENTATION
CONSTRUCTION SERVICES, INC. a/k/a	)	AND DAMAGES
THE IBCS GROUP, INC. and	)	
EDMUND C. SCARBOROUGH,	)	
	)	
Defendants.	)	

DESMOND L. MAYNARD, ESQ.
Law Offices of Desmond L. Maynard
P.O. Box 8388
St. Thomas, VI 00801
Attorney for Plaintiff

MIKE PISCITELLI, ESQ.
Vezina, Lawrence & Piscitelli, P.A.
300 SW First Avenue, Suite 150
Fort Lauderdale, FL 33301
Attorney for Defendants

CHRISTIAN, ADAM G., Judge

MEMORANDUM OPINION

(Filed: July 25, 2012)

I. SUMMARY

Before the Court is Defendants' "Special Appearance and Motion to Dismiss." Plaintiff filed an opposition thereto, and Defendants filed a reply memorandum. For the reasons set forth below, Defendants' motion to dismiss will be denied.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

According to the complaint, Plaintiff was the successful bidder on a construction project in St. Thomas, Virgin Islands. The project was owned by the Government of the Virgin Islands ("the Government"). On or about October 20, 2009, Plaintiff and Defendant Scarborough entered into a General Agreement of Indemnity under which said Defendants agreed to act as surety for Plaintiff on the government-sponsored project. Plaintiff agreed to pay Defendants the sum of Nineteen Thousand Eight Hundred Sixty Four Dollars and Ninety Five Cents (\$19,864.95) as premiums for said surety agreement. Further, Defendants asserted that any payment and/or performance bonds contemplated thereunder would be acceptable to the

Government. Subsequent to the consummation of the agreement, the Government informed Defendants that the payment and performance bonds were unacceptable to the Government, and would result in the invalidation of the Plaintiff's successful project bid.

Additionally, Plaintiff alleges that Defendants represented to it that they were in the business of providing payment and performance bonds to certain businesses, including entities engaged in the construction business in the Virgin Islands. According to the complaint Defendants advised Plaintiff that they were legally authorized to do business in the Virgin Islands. Plaintiff alleges that Defendants knew or should have known that they were not legally authorized to conduct business in the Virgin Islands. Based on these allegations, Plaintiff asserts that Defendants' conduct was intentional, willful, wanton, and in reckless disregard of and indifference to the rights of Plaintiff. Plaintiff contends that Defendants' actions and conduct constitute breach of contract and misrepresentation.

Defendants filed their Special Appearance and Motion to Dismiss on the basis of a forum selection clause and a choice-of-law clause contained in the General Agreement of Indemnity ("GAI") entered into between the parties. The GAI provision reads: "This agreement shall be interpreted in accordance with the laws of the Commonwealth of Virginia. Venue and any action relating to this Agreement shall lie solely in the appropriate court located in the Commonwealth of Virginia." Based on these forum selection and choice-of-law clauses, Defendants contend that this action must be dismissed.

III. LEGAL DISCUSSION

Although Defendants state that their motion is pursuant to FED. R. CIV. P. 12(b),¹ they do not specify which of the seven subsections is applicable. The motion does not attack the authority of this Court to hear this matter, and, therefore, is not a challenge to subject matter jurisdiction under Rule 12(b)(1).² Generally, courts around the country treat a motion to dismiss based on a forum selection clause as either one to dismiss for failure to state a claim pursuant to FED. R. CIV. P. 12(b)(6), or one to dismiss for improper venue under 12(b)(3).³ However, regardless of which of these two subsections of Rule 12(b) is utilized, all courts apply a similar substantive analysis when confronted with a forum selection clause.⁴ Specifically,

...a forum selection clause is presumptively valid and will be enforced by the forum unless the party objecting to its enforcement establishes (1) that it is the result of fraud or overreaching; (2) that enforcement would violate strong public

¹ Rule 12(b) applies in civil actions in the Superior Court pursuant to SUPER. CT. R. 7.

² *Botman Int'l, B.V. v. Int'l Produce Imports, Inc.*, 205 F. App'x 937, 941 (3d Cir. 2006) ("...the applicability of a forum selection clause or choice-of-law clause is not a jurisdictional issue and a party may waive its right to enforce it.").

³ *See, Salovarra v. Jackson Nat'l Life Ins. Co.*, 246 F.3d 289, 298 n. 6 (3d Cir. 2001).

⁴ *Compare, Rivera v. Centro Medico de Turabo, Inc.*, 575 F.3d 10, 18 (1st Cir. 2009) (relying on FED. R. CIV. P. 12(b)(6)), with, *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 325 (9th Cir. 1996) (relying on FED. R. CIV. P. 12(b)(3)).

Neon Construction Enterprises, Inc. v. International
Bonding and Construction Services, Inc., et al.
Superior Court Case No. ST-11-CV-13
Memorandum Opinion

policy of the forum; or (3) that enforcement would in the particular circumstances of the case result in jurisdiction so seriously inconvenient as to be unreasonable.⁵

Both parties refer to this legal standard throughout their arguments, whether in favor of, or against, the dismissal of this civil action. The Court determines that Plaintiff has the better position, though for reasons other than those it has articulated. Plaintiff alleges in its complaint that the parties entered into an indemnity agreement in which Defendant Scarborough agreed to serve as surety. Plaintiff also attaches to the complaint a copy of the “General Agreement of Indemnity.” In both their motion to dismiss and reply memorandum, Defendants, through counsel, agree that the agreement attached to Plaintiff’s complaint is the pertinent agreement and rely upon the same.

In the Virgin Islands, suretyship is a form of insurance which includes “...guaranteeing the performance of contracts, other than insurance policies, and guaranteeing and executing bonds, undertakings, and contracts of suretyship;”.⁶ Thus, surety insurance in this Territory is governed by the provisions of the Virgin Islands Insurance Code.⁷ This Code renders the forum selection and choice-of-law clauses relied on by Defendants unenforceable. The Insurance Code provides, in pertinent part,

(a) No insurance contract delivered or issued for delivery in this territory and covering subjects located, resident, or to be performed in this territory, shall contain any condition, stipulation, or agreement which-

(1) requires it to be construed according to the laws of any other territory, state or country except as necessary to meet the requirements of the motor vehicle financial responsibility laws of such other territory, state or country;

(2) deprives the courts of this territory of the jurisdiction of action against the insurer...⁸

The Legislature has set a very clear policy dictating that forum selection clauses and choice-of-law clauses cannot be enforced when the subject matter of an insurance contract is in the Virgin Islands. That is the case here. Plaintiff alleges that it entered into the subject agreement for the purpose of securing performance bonds in conjunction with a construction project sponsored by the Government of the Virgin Islands. Defendants do not contest these allegations in their motion. Enforcement of the clauses, as requested by Defendants, would

⁵ *Moneygram Payment Sys., Inc. v. Consorcio Oriental, S.A.*, 65 F. App’x 844, 846 (3d Cir. 2003) (quoting *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.* 709 F.2d 190, 202 (3d Cir. 1983)). See also, *Citibank, N.A. v. Chammah*, 44 V.I. 87, 92 (Terr. Ct. 2001) (citing *Gen. Eng’g Corp. v. Martin Marietta Alumina*, 783 F.2d 352, 358 (3d Cir. 1986)).

⁶ V.I. CODE ANN. tit. 22, 458(4). See also, 22 V.I.C. §§ 1101-1104 (setting forth various obligations of surety insurers).

⁷ *George & Benjamin Gen. Contractors v. Government*, 34 V.I. 117, 130, 921 F. Supp. 304, 311 (D.V.I. App. Div. 1996).

⁸ 22 V.I.C. § 820(a).

Neon Construction Enterprises, Inc. v. International
Bonding and Construction Services, Inc., et al.
Superior Court Case No. ST-11-CV-13
Memorandum Opinion

violate the clear-cut policy set by the Legislature in Section 820. But, it is the obligation of this tribunal to give effect to the intent of the Legislature as set forth in the plain language of the statute,⁹ and that duty mandates the denial of Defendants' motion.

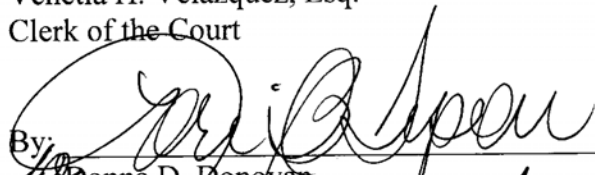
IV. CONCLUSION

The forum selection and choice-of-law clauses set forth in the General Agreement of Indemnity, and relied upon by Defendants, are not enforceable under Virgin Islands law. Therefore, Defendants' Special Appearance and Motion to Dismiss will be denied in an appropriate order of even date.

Dated: July 25, 2012


Hon. Adam G. Christian
Judge of the Superior Court
of the Virgin Islands

ATTEST:
Venetia H. Velazquez, Esq.
Clerk of the Court

By: 
Donna D. Donovan
Acting Court Clerk Supervisor 7 25 2012

⁹ E.g., *Shoy v. People*, 55 V.I. 919, 926-927 (V.I. 2011) (citations omitted).