

1992

Lundahl Instruments, Inc., a Utah corporation v. Safety Technology, Inc., a California corporation : Brief of Appellee

Utah Supreme Court

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DOCKET NO.

92-0108-34

IN THE UTAH SUPREME COURT

LUNDAHL INSTRUMENTS, INC.,
a Utah corporation,

Plaintiff and Appellant,

VS.

SAFETY TECHNOLOGY, INC.,
a California corporation,

Defendant and Appellee.

BRIEF OF APPELLEE

Appellate Court No. 910489

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STATEMENT OF JURISDICTION

The Supreme Court of Utah has jurisdiction in accordance with § 78-2-2-(3)(j) Utah Code Ann. (Repl. Vol. 1991)¹ because this is an appeal from a final order of the District Court for the First Judicial District of the State of Utah, in and for the County of Cache and jurisdiction has not been placed in the Court of Appeals under § 78-2a-3 U.C.A.

STATEMENT OF THE ISSUES

1. Whether a freely bargained for contractual provision which determines where venue shall lie for causes of action arising out of that contract is enforceable?

2. Whether a parties' stipulation, that all litigation arising out their mutual contract shall be brought in a court of competent jurisdiction where the defendant resides, requires dismissal of an action brought otherwise than in accordance with its terms?

3. Whether a forum selection clause providing that venue for any litigation arising out of the Agreement, or in connection with the transaction shall lie in a particular court is mandatory?

¹Unless otherwise stated, all further references to Utah Code Ann. (Repl. Vol. 1991) shall be referred to as U.C.A.

4. Whether the attempted unilateral termination of an Agreement containing a valid forum selection clause by the party seeking to avoid enforcement of the Agreement's forum selection clause prevents enforcement of the forum selection clause?

All issues involve questions of law, therefore the District Court's rulings should be reviewed for their correctness. Mountain Fuel Supply v. Salt Lake City, 752 P.2d 884, 887 (Ut. 1988).

CONSTITUTIONAL PROVISIONS AND STATUTES

The following Utah State Statutes and section of the Utah Constitution are applicable to the case at bar:

§ 78-13-9, Utah Code Annotated (1953):

The court may, on motion, change the place of trial in the following cases:

(1) when the county designated in the complaint is not the proper county.

(2) when there is reason to believe that an impartial trial cannot be had in the county, city, or precinct designated in the complaint.

(3) when the convenience of witnesses and the ends of justice would be promoted by the change.

(4) when all the parties to an action, by stipulation or by consent in open court entered in the minutes, agree that the place of trial may be changed to another county. Thereupon the court must order the change as agreed upon.

§ 78-13-4 Utah Code Annotated (1953):

When the defendant has contracted in writing to perform an obligation in a particular county of the state and resides in another county, an action on such contract obligation may be commenced and tried in the county where

such obligation is to be performed or in which the defendant resides.

§ 78-13-4, Utah Code Annotated (Repl. Vol. 1991), as amended:

When the defendant has signed a contract in the state to perform an obligation, an action on the contract may be commenced and tried in the following venues:

(1) If the action is to enforce an interest in real property securing a consumer's obligation, the action may be brought only in the county where the real property is located or where the defendant resides.

(2) An action to enforce an interest other than under Subsection (1) may be brought in the county where such obligation is to be performed, the contract was signed, or in which the defendant resides.

§ 78-13-7, Utah Code Annotated (1953):

In all other cases the action must be tried in the county in which the cause of action arises, or in the county in which any defendant resides at the commencement of the action; provided, that if any such defendant is a corporation, any county in which such corporation has its principal office or place of business shall be deemed the county in which such corporation resides within the meaning of this section. If none of the defendants resides in this state, such action may be commenced and tried in any county which the plaintiff may designate in his complaint; and if the defendant is about to depart from the state, such action may be tried in any county where any of the parties resides or service is had, subject, however, to the power of the court to change the place of trial as provided by law.

Article VIII, Section 5, Constitution of Utah, prior to 1985 repeal:

The state shall be divided into seven judicial districts, for each of which, at least one judge shall be selected as hereinbefore provided. Until otherwise provided by law, a district court at the county seat of each county shall be held at least four times a year. All civil and criminal business arising in any county, must be tried in such county, unless a change of venue be taken, in such cases as may be provided by law. Each judge of a district court shall be at least twenty-five years of age, an active member of the bar in good standing, learned in the law, a resident of the state of

Utah three years next preceding his selection, and shall reside in the district for which he shall be selected. Any district judge may hold a district court in any county at the request of the judge of the district, and, upon a request of the governor it shall be his duty to do so. Any cause in the district court may be tried by a judge pro tempore, who must be a member of the bar, sworn to try the cause, and agreed upon by the parties, or their attorneys of record. (As amended November 7, 1944, effective January 1, 1945.)

STATEMENT OF THE CASE

NATURE OF THE CASE

The present appeal concerns the enforcement of a contractual stipulation specifying the forum for litigation arising out of the contracting parties' relationship.

COURSE OF PROCEEDINGS

The plaintiff originally filed its complaint for breach of contract in the District Court of the First Judicial District of the State of Utah ("District Court"). The defendant then brought a Motion to Dismiss, based upon a clause in the contract which required that all actions be brought in a court of competent jurisdiction in the state where the defendant resides. The District Court determined that enforcement of the forum selection clause contained in the contract was not prohibited by any applicable Utah law and that the contractual stipulation should be enforced according to its express terms. Accordingly, the District Court dismissed the case. The plaintiff has appealed the District Court's dismissal of the case to this court.

STATEMENT OF FACTS

1. Lundahl Instruments, Inc. ("Lundahl"), Plaintiff and Appellant (a Utah corporation), and Safety Technology, Inc. ("STI"), Defendant and Appellee (a California corporation), voluntarily, knowingly, at arm's length and under the representation of counsel executed a Master License and Marketing Agreement dated April 21, 1989 ("Agreement"). (Record at 53.)

2. STI's principal place of business and residence is California. (Record at 1, 23).

3. The Agreement contains a clause which says, in pertinent part:

Venue for any litigation arising out of this Agreement, or in connection with the transactions contemplated hereby, shall lie in any federal or state court sitting in Defendant's state, with proper jurisdiction over the subject matter thereof. Therefor, if Lundahl were to commence an action against STI, jurisdiction would be in California; if STI were to file an action against Lundahl, jurisdiction would be in Utah.

(Record at 54.)

4. In February of 1991, Lundahl unilaterally attempted to terminate the Agreement, over the written objections of STI. (Record at 40).

5. STI does not recognize Lundahl's improper termination of the Agreement and intends to assert numerous defenses and counterclaims based upon Lundahl's wrongful actions. (Record at 40-41).

6. Lundahl filed the instant action on June 6, 1991; and the District Court dismissed the action on September 30, 1991, based

upon § 78-13-4 Utah Code Ann. (1953), as amended. (Record at 1, 53-55).

SUMMARY OF THE ARGUMENT

Utah law provides that its venue provisions may be waived by parties to an action. Further, Utah law allows parties to stipulate where venue for certain types of action will lie.

In the present case, each party to the contract knowingly waived its right to assert venue according to the statutes of the state where it maintains its respective residence. The parties stipulated that venue for any litigation arising out of their Agreement, or in any way connected with the Agreement, should lie in any federal or state court sitting in the defendant's state, provided the court has proper jurisdiction over the subject matter.

Because Utah law allows venue to be waived, and by statute expressly provides that parties may stipulate where venue shall lie, the parties should be bound by the terms of their contract, which contract was freely bargained for and entered into with the able representation of counsel, and for which no allegations of fraud, misrepresentation, overreaching, undue bargaining power or adhesion have been raised.

The unambiguous wording of the forum selection clause and use of the word "shall" are mandatory rather than permissive. It should be enforced accordingly.

Further, the equities of the case being evenly balanced, plaintiff should be required to bear the hardship of traveling to a foreign forum because it agreed to at the time of contracting.

Finally, because no fraud in connection with the forum selection clause as been alleged, and because this action arises out of the Agreement or in connection with the transactions contemplated therein, a wrongful, unilateral attempt to terminate the Agreement, even if successful, does not affect the validity and enforceability of the forum selection clause.

ARGUMENT

I. THE FORUM SELECTION CLAUSE IS VALID, ENFORCEABLE, AND AUTHORIZED BY UTAH STATUTES AND CASE LAW.

A. Forum Selection Clauses Are Prima Facie Valid And Enforceable Under The Majority Rule.

Even though forum selection clauses in the past were not well received, "the vast majority of courts today follow the rule that such clauses are prima facie valid and will be upheld absent a showing that they result from fraud, overreaching, that they are unreasonable or unfair, or that enforcement would contravene a strong public policy of the forum." Intermountain Systems, Inc. v. Edsall Const. Co., 575 F. Supp. 1195, 1197 (D. Colo. 1983); Carnival Cruise Lines v. Shute, 499 U.S. ___, 113 L. Ed. 622 (1991). The Restatement (Second) of Conflict of Laws § 80 (1971) follows this same approach and it has been adopted by many state courts. See, Manrique v. Fabbri, 493 So. 2d 437, 440 (Fla. 1986); ABC Mobile Systems, Inc. v. Harvey, 701 P.2d 137, 139 (Colo. App.

1985); Colonial Leasing Co. v. McIlroy, 765 P.2d 219, 220 (Or. App. 1988).

Prior hostility of courts to forum selection clauses was due to an argument that such clauses tended to "oust" a court of jurisdiction. This was squarely rejected by the Supreme Court in The Bremen v. Zapata Off-shore Co., 407 U.S. 1, 12 (1971). In Bremen, the Court rejected such arguments as "hardly more than a vestigial legal fiction." Id. Regarding the ouster of jurisdiction argument, the Court stated:

"It appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals."

Id. The threshold question which should be applied today is whether a court should exercise "its jurisdiction to do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause." Id.

Courts have given various reasons supporting the enforcement of forum selection clauses: (1) Such clauses are demanded by present-day commercial realities and expanding trade. Id. at 15. (2) Failure to enforce such clauses will provide "procedural loopholes through which one of the contracting parties can use dilatory tactics to escape clearly entered into obligations." Maritime LTD. Partnership v. Greenman AD. A., 455 So. 2d 1121, 1123 (Fla. App. 4 Dist. 1984). (3) They promote uniform results

because a corporate defendant will not have to litigate similar issues in numerous different forums. LFC Lessors, Inc. v. Pearson, 585 F. Supp. 1362, 1364 (D. Mass. 1984). (4) They protect the legitimate expectation of the parties; Steward Organization, Inc. v. RICOH Corp., 487 U.S. 22, 33 (1988) (Concurring opinion by Justice Kennedy). (5) They limit the fora in which a large corporate defendant could be potentially subject to suit. Carnival Cruise Lines v. Shute, 113 L. Ed. at 632. (6) They dispel confusion "about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum, and conserving judicial resources that otherwise would be devoted to deciding those motions." Id. (7) Finally, they reduce litigation costs, which savings may be passed on to consumers. Id.

Utah courts have not expressly adopted the Restatement or federal case law, nor have they addressed whether forum selection clauses are even valid and enforceable. Utah case law and Utah statutes are, however, in harmony with the above principles.

B. Forum Selection Clauses Do Not Contravene Any Strong Public Policies of the State of Utah.

Sections 78-13-9(3) and 78-13-9(4) U.C.A. state:

The court may, on motion, change the place of trial in the following cases:

(3) when the convenience of witnesses and the ends of justice would be promoted by the change.

(4) when all parties to an action, by stipulation or by consent in open court entered in the minutes, agree that the place of trial may be changed to another county. Thereupon the court must order the change as agreed upon.

Montana has almost identical statutory provisions except for one very significant difference. The Montana statutes state:

Section 25-2-201 Montana Code Ann. (1991), When change of venue is required. The court or judge must, on motion, change the place of trial in the following cases: . . . (3) when the convenience of witnesses and the ends of justice would be promoted by the change.

Section 25-2-202 Montana Code Ann. (1991), Change of venue on agreement of parties. All the parties to an action, by stipulation or by consent in open court entered in the minutes, may agree that the place of trial may be changed to any county in the state. Thereupon the court must order the change as agreed upon. (Emphasis added)

The Montana supreme court has held that these statutes authorize forum selection clauses in contracts. Montana Wholesale Accounts Service, 758 P.2d 759, 760 (Mont. 1988).

Section 78-13-9(4) U.C.A. does not restrict changes in venue to counties within the state, as does Montana's statute. If the Utah legislature had intended that changes in venue be limited to changes within the state it would have drafted the statute as did the Montana legislature. The fact that the words "in the state" are missing in the Utah statute indicates the legislature did not intend a similar restriction. Even if the omission was merely an oversight on the part of the legislature, the broad authority contained in § 78-13-9(3) U.C.A. indicates that such contractual provisions are not against any strong public policy enunciated by the legislature.

A legislature knows how to draft a statute to clearly state their intent. In Title 29, General Provisions Relating to

Contracts, Idaho Code Ann. (1991 Supp.) § 29-110, Limitations on right to sue, it states:

Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunal, or which limits the time within which he may thus enforce his rights, is void.

Id.

The Utah statutes are devoid of any remotely similar provision. Therefore, enforcement of a forum selection clause in Utah would not contravene any strong public policy.

Regardless of which venue statute is controlling, the results are identical. Section 78-13-4, Utah Code Ann. (1953), § 78-13-4 U.C.A., and § 78-13-7 U.C.A. all allow venue for the present case to lie in the county where the defendant resides and are modified and controlled by the additional options of § 78-13-9 U.C.A. A complete reading of § 78-13-7 U.C.A. reveals that, contrary to plaintiff's contention, there is nothing requiring the current action to be brought exclusively in the First Judicial District Court of the State of Utah or even requiring it to be in Utah as it states the action may be "in the county in which any defendant resides" or "[i]f none of the defendants resides in this state, such action may be commenced and tried in any county which the plaintiff may designate in this complaint." Id., (emphasis added). The use of the word "may" makes this provision purely permissive.

Defendant does not dispute that absent the contractual stipulation the current action could be brought in the First Judicial District; however, by its express terms § 78-13-7 U.C.A.

does not mandate that the current action be maintained only in the First Judicial District. Moreover, § 78-13-7 U.C.A. is still "subject to the power of the court to change the place of trial as provided by law" and thus any mandatory directives of § 78-13-7 U.C.A. are subject to the overriding provisions of § 78-13-9 U.C.A. Article VIII, Section 5, Constitution of Utah, which was repealed in 1985, is irrelevant to the current action because in White v. Rio Grande Western Railroad Co., 71 P. 593, 594 (Ut. 1903) the court stated that this section is "so indefinite and general as to render it necessary in each case in which the venue is made an issue to resort to the common law in order to determine whether the venue has been properly laid." Id. Current statutes have made a resort to the common law unnecessary to determine where venue should properly lie.

Finally, § 78-13-9(4) U.C.A. does not state that only stipulations entered into by the parties to the action subsequent to filing a court action are enforceable by the court. This section states that when parties to an action, either by stipulation or by consent in open court agree that the place of trial may be changed to another county, "[t]he court must order the change as agreed upon." (emphasis added). The Montana supreme court, as previously quoted, has interpreted this to include contractual agreements entered into by the parties prior to any litigation. Montana Wholesale Accounts, 758 P.2d at 760. Notably, § 78-13-9(4) U.C.A. is not permissive; it requires courts to order changes according to the parties' agreement.

C. Forum Selection Clauses Should Be Enforced Because They Represent Parties' Rights To Freely Contract As Desired, Absent Any Violation Of Public Policy Considerations.

Utah courts have long recognized that "[w]ith few exceptions, it is axiomatic in contract law that persons dealing at arm's length are entitled to contract on their own terms without the intervention of the courts for the purpose of relieving one side or the other from the effects of a bad bargain." Bekins Bar V Ranch v. Huth, 664 P.2d 455, 459 (Ut. 1983); see also John Call Engineering v. Manti City Corp., 743 P.2d 1205, 1208 (Ut. 1987) ("a party is bound by the contract which he or she voluntarily and knowingly signs,"); Kinne v. Industrial Commission, 609 P.2d 926, 928 (Ut. 1980) ("it is not unreasonable to hold a party responsible for obligations he assumes by contract.").

Under the above enunciated principles, Utah recognizes that parties should be bound by the contracts which are freely entered into and they should not be allowed to escape responsibility for terms which they agreed to, just because the deal may have turned sour. Although Utah courts have not applied these contract principles to cases dealing with forum selection clauses, federal courts have and they have required parties to abide by the terms of their agreements. In Manetti-Farrow, Inc. v. Gucci American, Inc., 858 F.2d 509, 515 (9th Cir. 1988) the plaintiff, an exclusive dealer of Italian perfume, brought an action against the perfume's manufacturer for breach of contract and various torts. The Italian defendant sought to enforce a forum selection clause that required actions to be brought in Italian courts. In rejecting the concern

propounded by the plaintiff the court stated, "it is a concern which the parties presumably thought about and resolved when they included the forum selection clause in their contract. [The plaintiff] now wants to change the bargain." Id.

Similarly, in Rini Wine Co. v. Guild Wineries and Distilleries, 604 F. Supp. 1055 (N.D. Ohio 1985) the court found that the inconveniences asserted by the party seeking to avoid the forum selection clause were not grounds sufficient to prevent transfer of the case. Much like the Manetti-Farrow court, the court in Rini Wine Co. stated that because the plaintiff could have foreseen the inconveniences at the time of entering into the agreement, it could not now complain of any injustice. Id. at 1059.

D. Forum Section Clauses Should Be Valid And Enforceable Because Contracting Parties Have Waived Their Rights To Venue As Dictated by Statute.

Finally, under Utah law "venue is a privilege which may be waived." Petersen v. Ogden Union Railway and Depot Co., 175 P.2d 744, 747 (Ut. 1946). "Provisions in a contract selecting a forum act as a waiver of statutory provisions which would normally determine the appropriate forum." Furry v. First Nat. Monetary Corp., 602 F. Supp. 6, 8 (W.D. Okla. 1984).

A forum selection clause acts as a waiver of venue rights and the right to assert lack of personal jurisdiction as a defense. International Investment and Equine Consultants, Inc., 573 F. Supp. 592, 594 (W.D. Pa. 1983); Vessels Oil & Gas Co. v. Coastal Refining and Marketing, Inc., 764 P.2d 391, 392 (Colo. App. 1988). Because

parties to a contract may "agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether," it follows that parties may also agree concerning where venue shall lie. The Bremen, 407 U.S. at 11.

Lundahl voluntarily waived its rights to the venue provisions in Utah's statutes when it agreed that:

Venue for any litigation arising out of this Agreement, or in connection with the transactions contemplated hereby, shall lie in any federal or state court sitting in Defendant's state, with proper jurisdiction over the subject-matter thereof. Therefore, if Lundahl were to commence an action against STI, jurisdiction would be in California; if STI were to file an action against Lundahl, jurisdiction would be in Utah.

Lundahl foresaw the inconveniences that might arise from such a provision; however, while represented by counsel, it freely chose to enter into the Agreement. There have been no allegations of fraud, misrepresentation, overreaching, unreasonableness or unfairness. Regardless of whether the case is litigated in California or Utah, one party will suffer an inconvenience. Each party was equally bound by the Agreement's terms. Had STI brought the action it would have been required to endure the inconveniences of litigating in a foreign forum.

The action is for breach of contract and subject-matter jurisdiction is proper within a California court. There have been no allegations that California does not have an interest in guarantying a party's rights under a contract. Hence Lundahl would not be deprived of its day in court, nor will it work an injustice

to require Lundahl to litigate its claims in a California's court. Accordingly, the plain terms of the Agreement should be enforced.

II. THE CONTRACTUAL STIPULATION IS MANDATORY, UNLESS WAIVED.

"'Shall' in other contexts has an ordinary meaning of imperative obligation, leaving no discretion or choice for the actor. It is typically contrasted and distinguished from 'may.'" Intermountain Systems Inc., 575 F. Supp. at 1198. The judge in Intermountain further stated, "I know of no reason why a different result should obtain in a forum selection clause." Id.; see e.g., S. Lewis Lionberger Co. v. Edward G. Gerritts, 687 F. Supp. 237, 238 (W.D. Va. 1987) (clause which simply submitted any and all disputes to a particular forum was found to be mandatory.)²; see also, ABC Mobile Systems, 701 P.2d at 139 (forum selection clause merely stating "the venue of actions . . . are placed"³ found to be mandatory.)

The contractual stipulation in question contains much stronger language than the provisions referenced above. It is not merely permissive because it states venue "shall" lie in the defendant's resident state. Moreover, to clarify, the stipulation gives an illustration of how venue shall be determined. In view of the

²In its entirety the clause stated: Subcontractor hereby submits itself to the jurisdiction of the federal courts of the Southern District of Florida for the resolution of any and all disputes involving an aggregate amount of \$10,000.00 or more and agrees that service by registered mail to its address set forth above shall constitute sufficient service. Id.

³The entire clause stated: The place of all payments required under this agreement and the venue of actions for disputed matters and performances are placed in the City of Oakland, county of Alameda, State of California. Id.

strong language and clear illustration, the contractual stipulation cannot be characterized as permissive only.

Because the defendant has not waived its right to assert the contractual provision, the plaintiff is bound to its agreement.

III. THE EQUITIES ARE EQUALLY DIVIDED BETWEEN THE PLAINTIFF'S AND THE DEFENDANT'S RESIDENCE AS VENUE CHOICES.

"The burden should be upon the party who brings suit elsewhere than in the selected state to persuade the court that enforcement of the choice of forum clause would be unjust." Colonial Leasing Co. v. McIlroy, 765 P.2d at 220. In Colonial the court found that "the jurisdictional provision was not a 'take-it-or-leave-it' proposition. . . . The Defendant chose to take it, and plaintiff did not compel that choice." Id. Accordingly, the court ruled that enforcement of the clause was not unfair or unreasonable.

When the equities are equally balanced, the forum selection clause should be enforced. Cedarbrook Associates v. Equitec Savings Bank, 678 F. Supp. 107, 108 (E.D. Pa. 1987). In Cedarbrook the plaintiffs' documents and witnesses were located in Pennsylvania while the defendant's documents and an important witness were located in California. The forum selection clause specified venue should lie in California. The court held the trial should be in California because "as between the two forums, one side is bound to be inconvenienced." Id.

In Rini Wine Co., the court stated: "it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient

that he will for all practical purposes be deprived of his day in court." 604 F. Supp. at 1059. The court further noted that "litigation to one degree or another subjects all parties, whether corporations or individual, to hardship. The essential inquiry is whether plaintiff could foresee these inconveniences at the time of entering into the agreement." Id. Having so noted, the Rini Wine Co. court held that because the inconveniences were foreseeable the plaintiff failed to carry its burden of proof. Id.; see, also, LFC Lessors, Inc., 585 F. Supp. at 1364-1395 (Where businessman was not coerced into signing the agreement and enforcement of the clause would not effectively deprive him of his day in court, agreement would be enforced); Karlberg European Tanspa Inc., v. JK-Josef Dratz Vertriebsgesellschaft MBH, 615 F. Supp. 344 (N.D. Ill. 1986) (American distributor required to litigate in West Germany because inconveniences not insurmountable and therefore plaintiff was not deprived of his day in court).

The instant case is not simply a failure by the defendant to pay for goods received pursuant to the Uniform Commercial Code Article Two Sales Contract case. Defendant intends to assert numerous affirmative defenses and counterclaims in its response. (Record at 40, 41). Although plaintiff may be inconvenienced by litigating in the state of California, defendant will be equally inconvenienced if it is forced to litigate in the state of Utah. The parties have already agreed and stipulated who should bare the burden of these inconveniences. Plaintiff should not be allowed to escape the terms of the bargained for Agreement.

IV. THE UNDERLYING CONTRACT GOVERNS THE CURRENT ACTION, EVEN IF IT WERE FOUND TO HAVE BEEN EFFECTIVELY TERMINATED BY THE WRONGFUL UNILATERAL ACTIONS OF THE PLAINTIFF.

"In the absence of contractual language expressly or implicitly indicating the contrary, a forum selection clause survives termination of the contract. Termination of a contract does not divest parties of rights and duties already accrued." Advent Electronics, Inc. v. Samsung Semiconductor, Inc., 709 F. Supp. 843, 846 (N.D. Ill. 1989). Further, if resolution of given claims relates to the interpretation of a contract containing a forum selection clause, the forum selection clause will govern, even though the claims may sound in tort. Id. Finally, even if the contract is invalid because of fraud, "the fraud complained of must be specifically related to the inclusion of the forum selection clause" in order to invalidate it. Zions First National Bank v. Allen, 688 F. Supp. 1495, 1498 (D. Ut. 1988).

In February of 1991, the plaintiff, unilaterally and in violation of the express terms of the contract, attempted to terminate the contract. (Record at 40). Defendant has never recognized plaintiff's improper termination and intends to assert numerous defenses and counterclaims based upon plaintiff's wrongful actions. However, even if the court finds that the Agreement was validly terminated, under the above stated principles, the forum selection clause should still be enforced because the action arose out of the Agreement or was in connection with the transactions contemplated thereir.

CONCLUSION

For the reasons set forth above, the final order of the district court should be affirmed.

RESPECTFULLY submitted this 21st day of January, 1992.

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CERTIFICATE OF MAILING

I caused four true and correct copies of the foregoing BRIEF OF APPELLEE to be mailed in the United States mail, first class postage prepaid, on the 21st day of January, 1992, to the following:

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