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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: 67,770

Fla. Bar No. 390844

FRANCISCO J. MANRIQUE, INVERSIONES CONTINENTALES, N.V., a foreign corporation and ARGOVILLE CORPORATION, N.V., a foreign corporation,

Appellants,

vs.

GIORGIO FABBRI,

Appellee.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, THIRD DISTRICT

APPELLEE'S BRIEF

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TABLE OF CONTENTS

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TABLE OF CITATIONS

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STATEMENT OF THE CASE [1]

Appellee GIORGIO FABBRI (hereinafter "FABBRI"), filed a Complaint against Appellants FRANCISCO J. MANRIQUE (hereinafter "MANRIQUE"), INVERSIONES CONTINENTALES, (hereinafter "CONTINENTALES") and ARGOVILLE CORPORATION, N.V. (hereinafter (ARGOVILLE"). (A-1) The Complaint contains five Counts. Count I seeks a declaratory judgment regarding the rights and other relationships of the parties to a stockholders' settlement agreement and stock option and the addendum thereto (hereinafter "option agreement"). Count II seeks specific performance on the part of Appellants regarding FABBRI's excercise of the option. Count III seeks an injunction prohibiting Appellants from selling or conveying real property owned by ARGOVILLE without giving notice to or obtaining consent from FABBRI. Count IV seeks an accounting of all business transactions entered into by ARGOVILLE. Count V alleges a breach of the agreement. (A-1)

MANRIQUE, CONTINENTALES and ARGOVILLE filed a Motion to Dismiss FABBRI's Complaint for lack of subject matter jurisdiction (A-25). The Motion to Dismiss for lack of subject matter jurisdiction was grounded upon Paragraph Four of the option agreement which provides:

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[1] Appellee disagrees with Appellants' Statement of the Case in that Appellants failed to mention that their Motion to Dismiss was grounded on a lack of subject matter jurisdiction.

> "... the laws of the Netherlands Antilles shall control in case of any such conflict or dispute between the parties to this agreement, who submit themselves to that jurisdiction...." (A-13)

The trial court denied Appellants' Motion to Dismiss by Order rendered April 8, 1985. (A-29).

On appeal to the District Court of Appeal, Third District, the Court concluded that "at best, the language reflects an agreement by the parties not to contest the jurisdiction of the Netherlands Antilles courts if suit is brought in that jurisdiction," (A-35). The Court's opinion, filed August 6, 1985, affirmed the trial court's Order of Dismissal (A-34).

STATEMENT OF THE FACTS[2]

ARGOVILLE Corporation is a Netherlands Antilles corporation authorized and doing business in the State of Florida (A-1). Prior to August, 1981, FABBRI and CONTINENTALES each owned 50% of the outstanding shares of ARGOVILLE (A-1). ARGOVILLE's principal asset is a parcel of real property located in Dade County, Florida with a value in excess of $4,000,000.00 (Four Million Dollars). (A.1).

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[2] Appellee disagrees with Appellants' abreviated version of the facts in this case in that all references to Dade County, Florida were deleted. Appellee's arguments required him to recite facts which evidence the many contacts between Dade County, Florida and the litigation.

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On August 31, 1981, FABBRI entered into an agreement with CONTINENTALES through its nominee representative, FRANCISCO J. MANRIQUE. This agreement was executed in Miami, Florida. (A-9). The agreement provided:

1. FABBRI sold his 50% interest in ARGOVILLE to CONTINENTALES. (A-9).

2. FABBRI was given an option to repurchase the same amount of stock. (A-11).

3. FABBRI was given the proxy to vote 50% of the stock of ARGOVILLE. (A-11).

4. FABBRI was given a seat on the three person board of directors during the option period. (A-12).

5. FABBRI was entitled to receive 50% of the proceeds from any loans made to ARGOVILLE. (A-12).

6. FABBRI's exercise of the option would entitle him to receive a credit toward the repurchase price of the stock equal to 50% of the amount of loans made to ARGOVILLE. (A-12). The amounts were to be paid by ARGOVILLE directly to CONTINENTALES. (A-12).

The option was to run for a period of one year from August 31, 1981, and could be renewed or extended for a second year at FABBRI's discretion (A-11). On February 21, 1982, FABBRI and CONTINENTALES and MANRIQUE executed an addendum to the option agreement of August 31, 1981. (A-20). The addendum provided, inter-alia, that the option period would run for three years,

thus allowing the option to be excercised on or before December 15, 1984. (A-23).

On December 14, 1981, ARGOVILLE executed a mortgage in favor of Flagship National Bank of Miami on the real property owned by ARGOVILLE. (A-20). The mortgage was given as security for the issuance of a letter of credit by Flagship for the benefit of MANRIQUE. (A-20). MANRIQUE used the letter of credit to purchase stock in Gold Coast National Bank. (A-20). FABBRI approved this two million six hundred thousand dollar ($2,600,000.00) transaction when he executed the addendum to the option agreement referred to above. The addendum provided that MANRIQUE as principal debtor, personally guarantee repayment to Flagship. (A-20).

On December 22, 1983, ARGOVILLE encumbered the property by pledging it as security for a loan from Capital Bank in the amount of $5,120,000.00. (A.3). The proceeds from this loan were applied to satisfy the Flagship Bank loan referred to above. (A-3). The remainder of the loan proceeds were paid to or for the benefit of MANRIQUE. (A-3). FABBRI did not receive any portion of the loan proceeds as required under the terms of the option agreement. (A-3).

On October 13, 1984, ARGOVILLE again encumbered the property by pledging it as security for a loan in the amount of $6,600,000.00 from Banco Mercantil Venezolano, N.V. (A-3). The proceeds of this loan were applied as follows:

1. Approximately $250,000.00 was used to pay off the existing first mortgage on the real property owned by ARGOVILLE and located in Dade County, which mortgage was held by Biscayne National Corporation. (A-3).

2. Approximately $650,000.00 was used to satisfy the personal indebtedness of MANRIQUE to Commerce Bank. (A-3).

3. A portion of the $6,600,000.00 was used to satisfy the Capital Bank loan referred to above. The remainder was paid to or for the benefit of MANRIQUE. (A-3).

FABBRI did not receive any portion of these loan proceeds as required under the terms of the agreement. (A-3).

On December 7, 1984, FABBRI excercised his option to repurchase and sought to apply the loan proceeds from the loans described above as a credit toward the repurchase price of the stock pursuant to the terms of the option agreement and addendum. (A-31). Defendants refused to accept FABBRI's excercise of his option. In addition, Defendants refused apply the proceeds from the loans against the repurchase price of the stock or to convey the stock. (A-33).

FABBRI then filed this action.

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SUMMARY OF ARGUMENT

Appellants have appealed to the Supreme Court alleging that the language contained in the agreement in question is a forum selection clause. The District Court of Appeal, Third District, held in its opinion that the issue before the court was not that of forum selection as was the issue in the Zurich Insurance Company v. Allen, 436 So.2d 1094 (Fla. 3d DCA 1983) and Maritime Limited Partnership v. Greenman Advertising Associates, Inc., 455 So.2d 1121 (Fla. 4th DCA 1984) cases relied on by Appellants to establish a conflict between the districts. The Court refused to apply either of these cases in its reasoning and stated in its opinion:

> Because we conclude that the language of the contract as quoted above merely establishes which law governs in the event of a dispute we decline Appellants' invitation. There is no question that the parties are free to include a choice of law clause in a contract without violating any public policy. The phrase "who submit themselves to that jurisdiction" cannot reasonably be interpreted to require that all disputes arising under the contract be resolved in the Netherland Antilles. In no event can it be construed to oust Florida of subject matter jurisdiction. At best, the language reflects an agreement by the parties not to contest the jurisdiction of the Netherland Antilles courts if suit is brought in that jurisdiction. Citations omitted.

Should the Court disagree with the District Court of Appeal and conclude that the language is a forum selection clause Appellee would contend that the lower court did not err in denying Appellants' Motion to Dismiss for lack of subject matter jurisdiction because parties to a contract cannot confer such jurisdic-

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tion on a court by acquiescence or consent. Florida Power and Light Co. v. The Canal Authority of the State of Florida, 423 So.2d 421 (Fla. 5th DCA 1982); Lovett v. Lovett, 93 Fla. 611, 112 So. 768 (Fla. 1927). Moreover, parties to a contract cannot agree to limit future causes of action to the courts of a specific place since such an agreement is void as an attempt to oust the jurisdiction of all other courts over subsequent disputes arising out the agreement. Zurich Insurance Company v. Allen, 436 So.2d 1094 (Fla. 3d DCA 1983). Even if an agreement to submit to the jurisdiction of a chosen forum is valid, the forum chosen by the parties must be neither remote nor alien and there can be no overreaching contravention of stated public policy. Maritime Limited Partnership v. Greenman Advertising Associates, Inc., 455 So.2d 1121 (Fla. 4th DCA 1984).

Finally, language used in a contract is the best evidence of the intention of the parties at the time they enter into the contract. Department of Motor Vehicles v. Mercedes Benz of North America, 408 So.2d 627 (Fla. 2d DCA 1981); Hirsch v. Hirsch, 309 So.2d 47 (Fla. 3d DCA 1975). The parties in the case at bar have indicated their intention that the law of the Netherlands Antilles shall apply since the clause in question unequivocally states:

> The laws of the Netherlands Antilles shall control...any dispute between the parties... who submit themselves to that jurisdiction.

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ARGUMENT

I. THE LOWER COURT DID NOT ERR IN DENYING APPELLANTS' MOTION TO DISMISS.

A. THE CONTRACTUAL PROVISION RELIED UPON BY APPELLANTS MERELY PROVIDES THAT NETHERLANDS ANTILLES LAW WILL GOVERN THE INTERPRETATION OF THE UNDERLYING AGREEMENT.

Perhaps the most succint and compelling argument which FABBRI could advance in support of his position is also the most obvious; that is, that the provision of the contract relied upon by Appellants as one which limits in personam jurisdiction to a Netherlands Antilles forum is nothing more than a provision providing that the laws of the Netherlands Antilles shall apply in case of a dispute between the parties. Indeed, the provision clearly states:

> "...the laws of the Netherlands Antilles shall control in case of any such conflict or dispute between the parties to this agreement, who submit themselves to that jurisdiction..." (Emphasis supplied).

It is axiomatic that language used in a contract is the best evidence of the intention of the parties at the time they

entered into the contract. Department of Motor Vehicles, etc. v. Mercedes Benz of North America, Inc., 408 So.2d 627 (Fla. 2d DCA 1981).

An analysis of the language contained in various "forum-selection" clauses is most appropriate.

The provision which was disputed in Maritime Limited Partnership v Greenman Advertising Associates, Inc., 455 So.2d 1121 (Fla. 4th DCA 1984) specifically provided that:

> ...[j]urisdiction for any litigation arising under this agreement shall be within the appropriate court in Broward County... 455 So.2d at 1122.

The provision relied upon by Appellants is markedly different from the provision construed in Maritime. The language used by the parties to the contract in Maritime was unequivocal; jurisdiction for any subsequent litigation shall lie within Broward County. The provision in the case at bar is equally as unequivocal:

> ...the laws of the Netherlands Antilles shall control...any...dispute between the parties... who submit themselves to that jurisdiction... (Emphasis supplied).

Although it is not clear what the parties intended by inserting the phrase "...who submit themselves to that jurisdiction," it is clear that the parties intended that the laws of the Nether-

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lands Antilles would apply no matter where a lawsuit was filed. The Appellants assertion that this clause is a valid agreement to submit all disputes to the courts of the Netherlands Antilles is untenable given the language used by the parties despite the rule announced by the Fourth District Court of Appeal in Maritime.

The contract clause interpreted by the United States Supreme Court in M/S Bremen v. Zapata Offshore Co., 407 U.S. 1 (1972) clearly stated that:

> "...any dispute arising must be treated before the London Court of Justice..."

There is simply no similarity between the language used by the parties to the contract in M/S Bremen and the language used by the parties in the case at bar.

In Department of Motor Vehicles v. Mercedes-Benz of North America, 408 So.2d 627 (Fla. 2d DCA 1981) the contract clause in question provided that:

> ...This agreement is to be governed by ... the laws of the State of New Jersey...

The Second District Court of Appeal held that when parties to a contract have indicated their intention as to the law which is to govern, it will be governed by such law in accordance with that intention. 408 So.2d at 629. See also Hirsch v. Hirsch, 309 So.2d 47 (Fla. 3d DCA 1975).

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In the case at bar, the parties' intent that the laws of the Netherlands Antilles shall apply is apparent. Appellants' interpretation of the provision as requiring the transfer of the case to the courts of the Netherlands Antilles is contrary to the express intent of the parties and is not supported by the cases in which similar contractual provisions were construed.

In Sanders v. Inversiones Varias, S.A., 449 So.2d 951 (Fla. 3d DCA 1984), the clause in question provided that:

> "...for all matters in connection with this contract, the lessee and lessor state their domiciles to be in the jurisdiciton of the judges of the Managua Department."

The Court found that the provision was nothing more than an agreement as to which law governs the interpretation of the contract. 449 So.2d at 952.

B. PARTIES TO A CONTRACT CANNOT CONFER SUBJECT MATTER JURSIDICTION ON A PARTICULAR COURT.

The lower court did not err in denying Defendants' Motion to Dismiss for lack of subject matter jurisdiction. The rule that jurisdiction of the subject matter, in the general abstract sense, cannot be conferred by the acquiescence or consent of the parties is universally recognized. Florida Power and Light Company v. The Canal Authority of the State of Florida, 423 So.2d 421 (Fla. 5th DCA 1982); Lovett v. Lovett, 93 Fla. 611,

112 So. 768 (Fla. 1927). Thus, the trial court properly denied Appellants' Motion to Dismiss for lack of subject matter jurisdiction.

C. PARTIES TO A CONTRACT CANNOT AGREE TO LIMIT FUTURE CAUSES OF ACTION TO THE COURTS OF A SPECIFIC PLACE.

Despite the confusion in the record, the lower court properly ruled that parties to a contract cannot agree to limit future causes of action to courts of a specific place. Zurich Insurance Company v. Allen, 436 So.2d 1094 (Fla. 3d DCA 1983). In Zurich, an insurance contract between Zurich Insurance Company and Allen required that any action under the contract be determined only by an Ontario, Canada court. Zurich Insurance Company filed a Motion to Dismiss Allen's Complaint on the grounds that Monroe County was improper venue even though Allen received his injuries in Monroe County. This court held that the trial court properly refused to enforce that provision of the insurance contract between Zurich and Allen which required that actions under the contract be determined only by an Ontario, Canada court. 436 So.2d at 1095. The Third District chose to continue to adhere to the rule announced in Huntley v. Alejandre, 139 So.2d 911 (Fla. 3d DCA 1962), cert. denied, 146 So.2d 750 (Fla. 1962) which states:

> "That an agreement to limit future causes of action... to the courts of a specific place is void as an attempt to oust the jurisdiction of all other courts over subsequent disputes arising out of the agreement."

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Appellee agrees that there is a conflict of authority in Florida. Appellant however urges this Court to adopt the rule enunciated in Maritime Limited Partnership v. Greenman Advertising Associates, Inc., 455 So.2d 1121 (Fla. 4th DCA 1984). The Fourth District Court of Appeal held that, under the facts of Maritime, parties to an agreement may contract and agree to submit to the jurisdiction of a chosen forum even though no cause of action exists at the time of execution of the agreement. 455 So.2d at 1122.[1] More specifically, the Court held that in personam jurisdiction conferred by consent would be proper providing that there was no overreaching, no contravention of stated public policy and that the chosen forum is neither remote nor alien. 455 So.2d at 1122.

FABBRI maintains that the better rule of law regarding in personam jurisdiction is the one relied upon by the Third District Court of Appeal in Zurich. However, assuming arguendo that this Court chooses to adopt the rule espoused by the Fourth District Court of Appeal in Maritime, FABBRI urges that this Court affirm the lower court's denial of Defendants' Motion to Dismiss because the dispute between the parties is, in essence, a local one and because removal to the Netherlands Antilles would seriously inconvenience FABBRI in prosecuting his claim.

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[1] The Fourth District reiterated that subject matter jurisdiction cannot be conferred by consent of, or acquiescence, by the parties. 455 So.2d at 1122.

In Maritime, the Fourth District Court of Appeal adopted the reasoning of the Supreme Court of the United States in M/S Bremen v. Zapata Offshore Co., 407 U.S. 1 (1972). In M/S Bremen, the Supreme Court held that a forum-selection clause is prima facie valid and should be enforced by federal district courts sitting in admiralty provided that:

1. The forum was not chosen because of the overwhelming bargaining power on the part of one party which would constitute overreaching at the other's expense. 407 U.S. at 13.

2. Enforcement of the provision would not contravene a strong public policy enunciated by statute or judicial fiat, either in the forum where the suit would be brought, or the forum from which the suit has been excluded. 407 U.S. at 15.

3. The purpose was not to transfer an essentially local dispute to a remote and alien forum in order to seriously inconvenience one or both of the parties. 407 U.S. at 16.

In the case at bar, the individuals involved, FABBRI and MANRIQUE, are in Dade County and the real property owned by ARGOVILLE is located in Dade County. The option agreement was executed in Dade County. The majority of banks which made loans to ARGOVILLE, the proceeds of which FABBRI is entitled to under the terms of the agreement, are located in Dade County. Finally, both ARGOVILLE and CONTINENTALES are authorized and doing business in Florida and each corporation has a designated resident agent who accepted service of process in the case at bar.

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To allow Appellants to transfer a local dispute to the remote forum of the Netherlands Antilles on the basis of that provision of the agreement which merely provides that the laws of the Netherlands Antilles should apply or that if suit is filed in the Netherlands Antilles said jurisdiction would not be contested would result in purposeful and serious inconvenience to FABBRI which was not contemplated by the parties at the time they executed the agreement.

Moreover, the public policy of ensuring that local disputes be resolved locally would be frustrated if Appellants are allowed to proceed in the Netherlands Antilles.

FABBRI urges this Court to take judicial notice of the proliferation of Panamanian and Netherlands Antilles corporations which own real property in the State of Florida. To permit the use of forum selection clauses that confer sole jurisdiction to resolve disputes on a court outside the boundaries of the State of Florida would effectively remove a substantial portion of the real property located in this state from the control of the Florida courts.

In summary, even if this Court chooses to recede from the rule of law announced in Zurich, i.e., that an agreement to limit future causes of action to the courts of a specific place is void, FABBRI urges that this Court affirm the lower court's denial of the Motion to Dismiss because the contract clause in question is nothing more than an agreement that the laws of the Netherlands Antilles will apply in subsequent litigation.

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CONCLUSION

This Court should affirm the decision of the District Court of Appeal and the lower court's denial of Appellants' Motion to Dismiss because the contract clause in question is nothing more than an agreement that the laws of the Netherlands Antilles shall apply in interpreting the underlying agreement. Alternatively, the denial of the Motion to Dismiss should be affirmed even if this Court construes the provision in question as one where the parties have agreed to submit to the jurisdiction of the Netherlands Antilles because such a provision is void as an attempt to oust jurisdiction of all other courts.

Finally, the lower court's denial of the Motion to Dismiss should be affirmed even if this Court chooses to adopt the rule espoused in Maritime and to construe the provision to mean that the parties have agreed to submit to the personal jurisdiction of the courts of the Netherlands Antilles since the dispute between the parties is a local one which should not be litigated in the remote forum of the Netherlands Antilles. Moreover, each of the individual parties is in Dade County; the agreement was executed in Dade County; the corporate defendants do business in Dade County; the corporate defendants have registered agents in Dade County who accepted service of process in the instant action; and the real property owned by ARGOVILLE is located in Dade County.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Appellee' Answer Brief has been served by mail this 7th day of April, 1986 to: LEWIS M. KANNER, ESQ., Trenam, Simmons, Kemker, Scharf, Barkin, Frye & O'Neill, P.A., 1000 DuPont Building, 169 East Flagler Street, Miami, Florida 33131.

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