IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

PRECISION WEATHER SOLUTIONS, INC., *Plaintiff,* v. FARMERS EDGE INC. AND FARMERS EDGE (US) INC., *Defendants.*	Civil Action No. 1:21-cv-00821-LO-IDD Hon. Liam O'Grady

ORDER

This matter comes before the Court on the Plaintiff's Motion to Reconsider the Court's previous order to dismiss the complaint. Dkt. 22. The Plaintiff has asked the Court to amend its previous order in accordance with Federal Rule of Civil Procedure 59(e). *Id.* The matter has been fully briefed by the Parties and is now ripe for consideration.

Background

The Plaintiff, Precision Weather Solutions ("PWS"), is a Canadian company with its principal place of business in Canada. Dkt. 16 at 1. The Defendant, Farmer's Edge ("FE"), is a Canadian company with its principal place of business in Canada. *Id.* The Defendant, Farmer's Edge (US), is a wholly owned subsidiary of FE organized under the laws of Minnesota and with an office in Iowa. *Id.* The two companies entered into a confidentiality agreement (the "Agreement") that contained a mandatory and exclusive forum-selection clause. Dkt. 7-4 at 3. After multiple disputes, the companies commenced with litigation in Manitoba, Canada. *See* Dkt.

7-16. While that litigation was ongoing, PWS filed a parallel lawsuit before this Court. *See* Dkt. 1. This Court subsequently dismissed the civil action under Federal Rule of Civil Procedure 12(b)(3). Dkt. 18. PWS has now motioned for the Court to reconsider the decision to dismiss the complaint. Dkt. 22. Upon consideration of the Plaintiff's motion, the Court will clarify that it was incorrect to dismiss the motion according to Federal Rule of Civil Procedure 12(b)(3). However, it is still appropriate to dismiss the complaint under the common-law doctrine of *forum non conveniens*.

Legal Standard

Federal Rule of Civil Procedure 59(e) allows a Court to amend a previous judgment when (1) there is an intervening change in controlling law; (2) there is new evidence in the case; or (3) there is a clear error of law or manifest injustice. *Robinson v. Wix Filtration Corp. L.L.C.*, 599 F.3d 403, 407 (4th Cir. 2010) (citations omitted). A motion under Rule 59(e) cannot be used as opportunity for a party to relitigate or reargue issues already presented to the Court. *In re Cable & Wireless, PLC*, 332 F. Supp. 2d 896, 899 (E.D. Va. 2004).

Discussion

The Plaintiff argues that there has been a clear error of law that resulted in manifest injustice based on several grounds: (1) that the complaint should not have been dismissed under 12(b)(3); (2) the court did not analyze venue under 28 U.S.C. §1391; (3) the Court improperly relied on case law and (4) the Court did not consider if there was fraud. Dkt. 20 at 5.

1. The forum-selection clause is applicable

The Plaintiff argues that it was incorrect for the Court to rely on the forum selection clause, because the clause was "limited in its plain terms to the Agreement, itself." Dkt. 20 at 4. The Plaintiff goes on to argue that "It is indisputable that PWS did not allege a breach of the Confidentiality Agreement." *Id.* However, this assertion is disputed by the Plaintiff's own amended complaint. The amended complaint alleges that "PWS entered into a series of agreements with FE, including a Confidentiality Agreement... These Agreements extend to and encompass the PWS Services..." Dkt. 16 at 10. The complaint goes on to say that the agreements between the parties prohibit the use of "PWS' Trade Secrets, confidential information and proprietary information, and intellectual property to create weather and weather-related products." *Id.* It is counterintuitive that PWS would define trade secrets within their complaint based on the terms of the Agreement, and then argue that the same complaint is beyond the scope of the Agreement. The complaint asserts a misappropriation of trade secrets, and these same trade secrets are *only* detailed within the complaint in reference to the terms of the Agreement. Additionally, the allegations within the complaint all arise out of and are related to the contractual agreement between FE and PWS and are therefore within the scope of the forum-selection clause's language. The Court finds that the claims in the Plaintiff's amended complaint fall within the scope of the Agreement.[1] *See Marine Chance Shipping v. Sebastian*, 143 F.3d 216, 222 (5th Cir. 1998) (The 5th Circuit held "we must look to the language of the parties' contracts to determine which causes of action are governed by the forum selection clauses.");

[1] The forum-selection clause in the Confidentiality Agreement reads "This Agreement shall be governed by the laws in force in the Province of Manitoba and the parties submit to the exclusive jurisdiction of the Courts of Manitoba." Dkt. 7-4 at 3.

Jeffers Handbell Supply, Inc. v. Schulmerich Bells, LLC, 2017 U.S. Dist. LEXIS 132084 at *29-30 (D.S.C. August 18, 2017).

The Plaintiff has also argued that the Court erred in relying on *Coastal Mechanics Co. v. Def. Acquisition Program Admin.*, 79 F. Supp. 3d 606 (E.D. Va. 2015). The Plaintiff believes that *Coastal Mechanics* is not applicable to the present matter because in the *Coastal Mechanics* case the district court analyzed venue under 28 U.S.C. §1391(f). *See Id.* at 610 (§1391(f) was appropriate to analyze venue because the defendant was a foreign state). In *Coastal Mechanics* the district court also analyzed the forum-selection clause between the parties. *Id.* at 611 ("However, it appears that the Fourth Circuit applies federal law to determine whether the clause is mandatory.") (*ref. Eisaman v. Cinema Grill Sys.*, 87 F. Supp. 2d 446, 449 (4th Cir. 1999)); *see also Ross v. King's Creek Plantation, LLC*, 2015 U.S. Dist. LEXIS 196082 at (E.D. Va. December 8, 2015) (The district court held that a forum-selection clause's clear and specific language put exclusive jurisdiction in the circuit court of York County, Virginia). In its previous order, the Court held that the forum-selection clause in the present case is like the forum-selection clause in *Coast Mechsanics* based on the plain language of the clause. Dkt. 18 at 5. The Court's previous order held that the language of the Agreement between PWS and FE clearly demonstrated that the clause was mandatory and exclusive. *Id.*

The Plaintiff relies on two cases to argue that the Agreement's forum-selection clause does not control venue in the present case. The Plaintiff cites to the case of *Dome Technology, LLC v. Golden Sands Gen. Contractors, Inc.* to argue that the Agreement does contain language such as "all disputes arising in connection with the agreement," and therefore the forum-selection clause is not enforceable. 257 F. Supp. 3d 735, 744 (W.D. Va. 2017) (internal quotations omitted). In *Dome Technology*, the district court found that the disputed forum selection clause

did not confer "exclusive jurisdiction" to the court but instead only conferred "exclusive legal jurisdiction." *Id.* at 743. The district court went on to find that a pre-existing arbitration clause could be enforced because it was reconciled with the separate forum-selection clause. *Id.* The clause in that case is distinct from the forum-selection clause in the Agreement because the Agreement's clause does confer "exclusive jurisdiction" and does not need to be reconciled with an arbitration agreement. The Plaintiff also cites to *UBS Financial Services v. Carilion Clinic* to argue that an agreement must contain language that "all proceedings arising out of the [sic] Agreement or any transactions contemplated hereby" to be "all inclusive." *See* Dkt. 20 at 3; citing 706 F.3d 319, 329 (4th Cir. 2013) (The Fourth Circuit ruled that an arbitration clause in FINRA was not waived by a forum-selection clause in a contract between the parties). Like *Dome Technology*, *Carilion Clinic* is not applicable to the present case because the Court is not deciding if the forum-selection clause is enforceable in light of conflicting language within a separate arbitration agreement.

The Plaintiff has not relied on any relevant legal authority[2] that demonstrates the Agreement's forum-selection clause is not mandatory, exclusive, or applicable to the amended complaint.[3] The Court finds that there was no error in relying on *Coastal Mechanics* to evaluate the validity of the forum-selection clause.

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[2] In its reply, the Plaintiff argues that *N.C. Contracting Inc. v. Munlake Contractors Inc.* holds that a district court must decide if a forum-selection clause encompasses the claims in the complaint, however that district court clearly holds that related non-contractual claims can fall within a forum selection clause. 2012 U.S. Dist. LEXIS 153483 at *19-20 (The district court held that "These lien claims involve the same operative facts as the parallel claim for breach of the subcontract, resolution of these claims relates to interpretation of the subcontract, and these claims stem from plaintiff's contractual relationship with defendant Munlake.")

[3] The Plaintiff cites to a 9th Circuit decision to argue that "the scope of the clause does **not** cover the tort claims asserted in the complaint." Dkt. 20 at 3 (emphasis in original). However, the entire quotation from that case is "Applying federal law to the forum-

2. *Forum non conveniens* and the motion to dismiss

The Plaintiff argues that the Court erred in granting the Defendant's motion to dismiss under Federal Rule of Civil Procedure 12(b)(3). Dkt. 20 at 4. It is correct that the Supreme Court has held: "Although, a forum-selection clause does not render venue in a court 'wrong' or 'improper' within the meaning of §1406(a) or Rule 12(b)(3), the clause may be enforced through a motion to transfer under §1404(a)." *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49, 59 (2013). However, the Supreme Court goes on to direct that "the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens*." *Id.* at 60.[4] The common law doctrine of *forum non conveniens* allows a district court to dismiss an action when an alternative forum exists, is available and is more convenient for the parties. *BAE Sys. Tech. Sol. & Servs. v. Republic of Korea's Def. Acquisition Program Admin.*, 884 F.3d 463, 470-471 (4th Cir. 2018) (citing *Sinochem Int'l Co. v. Malaysia Int'l Shipping Co.*, 549 U.S. 422, 430 (2007)). The Fourth Circuit has held that when a mandatory forum-selection clause exists, the plaintiff will bear the burden of showing that the clause should not be enforced. *Id.* at 471. The Plaintiffs have not plead any facts that show it meets this burden.

A dismissal of the current action would also be proper under a traditional analysis of *forum non conveniens*. *See Dunn v. Sacoolas*, 2021 U.S. Dist. LEXIS 214762 at *7 (E.D. Va.

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selection clause involved in the present case, we turn to Manetti-Farrow's contention that the scope of the clause does not cover the tort claims asserted in the complaint." *Manetti-Farrow Inc. v. Gucci America Inc.*, 858 F.2d 509, 513 (9th Cir. 1988). The actual holding of the 9th circuit was that forum-selection clauses can be applied to tort and contract laws, and that the forum-selection clause will apply when the resolution of the tort case revolves around the interpretation of the contract. *Id.* at 514.

[4] The Court also held that Section 1404(a) is the means to dismiss a case where a forum selection clause points to another federal district. *Atl. Marine Constr.*, 571 U.S. at 59.

February 16, 2021) (A district court should determine if a foreign forum would be available and adequate, then must determine if that forum is more convenient based on public and private factors) (citing *DiFederico v. Marriott Int'l, Inc.*, 714 F.3d 796, 800 (4th Cir. 2013)). In the current case, there is no question that the Canadian forum is available and adequate because the Parties have already begun proceedings in that forum. As discussed in the Court's previous order, the fact that specific remedies the Plaintiff seeks are not available in the foreign forum does not indicate the forum is inadequate. Dkt. 18 at 4 (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 258 (1981) (The Supreme Court held dismissal was appropriate based on *forum non conveniens* when an adequate forum was available to the plaintiffs in Scotland, even if the plaintiffs could not pursue a theory of strict liability in that forum)); *see also Fidelity Bank PLC v. N. Fox Shipping N.V.*, 242 Fed. App'x 84, 90 (4th Cir. 2007).

The "ultimate inquiry" into public and private interest factors that determines *forum non conveniens* is the decision of where trial "will best serve the convenience of the parties and the ends of justice." *DiFederico*, 714 F.3d at 804 (citations omitted). The parties in the current case are two Canadian companies, and the subsidiary of a Canadian company. It is clearly more convenient for the case to be litigated in Canada. It would also be inconvenient for the parties to litigate this dispute in a duplicative proceeding concerning the same factual questions. In addition, the Court recognizes that Canada has a "local interest in having localized controversies decided at home." *Piper Aircraft*, 454 U.S. at 260 (citations omitted).

It is clear the doctrine of *forum non conveniens* applies to the current case based on the forum selection clause in the Agreement. *Forum non conveniens* would also apply to the current case based on the availability and adequacy of the Canadian forum, as well as the public and private interests in having this dispute decided in Canada. The Court also recognizes it retains the

inherent power to dismiss a case under the *forum non conveniens* doctrine *sua sponte*. *Ross*, 2015 U.S. Dist. LEXIS 196082 at *8 (citing *United States v. Moussaoui*, 483 F.3d 220, 236 (4th Cir. 2007)). For the sake of clarity, the Court amends its previous order to hold that the dismissal of the current action is based upon the doctrine of *forum non conveniens*.

3. Venue analysis is unnecessary

The Plaintiff has argued that it was manifest error for the Court to not analyze venue under 28 U.S.C. §1391. Dkt. 20 at 4. This statement is untrue because it is unnecessary for the Court to decide underlying jurisdictional issues before the dismissal of a case under the doctrine of *forum non conveniens*. *Sinochem Int'l*, 594 U.S. at 429 (The Supreme Court held that "Satisfied that *forum non conveniens* may justify dismissal of an action though jurisdictional issues remain unresolved, we reverse the Third Circuit's judgment.") The Plaintiff has asserted that it has established venue under 28 U.S.C. §1391(b)(3). Dkt. 15 at 4. This portion of the general venue statute states civil actions may be brought in a federal judicial district where, "if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action." 28 U.S.C. §1391(b)(3). The Plaintiff has vaguely alleged that the Defendants have conducted business in, and directed sales to the Eastern District of Virginia, giving the Court personal jurisdiction over the Defendants. Dkt. 16 at 2. Assuming, *arguendo*, that the Plaintiff has sufficiently plead facts establishing jurisdiction and venue, it would still be proper to dismiss the action under the doctrine of *forum non conveniens*. *Sinochem Int'l*, 594 U.S. at 435 (The Supreme Court held the "judicial economy is disserved" by parallel litigation in

Pennsylvania and China, discovery regarding personal jurisdiction would unnecessarily burden the defendants (appellants) with expense and delay").

4. There is no claim of fraud regarding the forum-selection clause

The Plaintiff has also argued that the Court erred by not analyzing the forum-selection clause for fraud. Dkt. 20 at 5. To show that a forum-selection clause should not be enforced, a plaintiff must show that there was fraudulent inducement to the forum-selection clause itself and not to the overall circumstances of the contract. *Ross*, 2015 U.S. Dist. LEXIS 196082 at *13-14 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519, n.14 (1974)). A party that only shows the contract itself was induced by fraud--and not the forum selection clause--has failed to meet the burden to demonstrate the forum-selection clause should not be enforced. *Kentwool Co. v. NetSuite, Inc.*, 2014 U.S. Dist. LEXIS 197531 at *9 (D.S.C. December 1, 2014) (citing *Atl. Marine Constr. Co.*, 517 U.S. at 62) ("the plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted")). In addition, any claim of fraud must be plead with particularity under Federal Rule of Procedure 9(b). The Plaintiff has plead no facts showing fraud regarding the forum-selection clause, let alone any particular facts that demonstrate the circumstances around a purported fraud to the contract. The Plaintiff has not made a single argument why the Court should consider fraud as to the forum-selection clause in any of its supporting briefings. Therefore, the Court finds there was no error in foregoing an analysis of fraud in the previous order.

Conclusion

The Court modifies its previous order to make clear the doctrine of *forum non conveniens* applies to the instant case. Finding that it would remain proper and appropriate to dismiss this civil action, there is no clear error resulting in manifest injustice that would indicate the Court should grant a motion under Federal Rule of Civil Procedure 59. The Motion to Reconsider is hereby **DENIED**. This case is **DISMISSED WITH PREJUDICE**.

It is **SO ORDERED.**

January 12, 2022
Alexandria, Virginia

Liam O'Grady
United States District Judge