No Waiver of Forum Selection Clause Despite Filing Declaratory Judgment Action in Non-Selected Forum

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Addressing waiver of a contractual forum selection clause, the US Court of Appeals for the Fifth Circuit affirmed a lower court's enforcement of the clause and subsequent dismissal of a trade secrets case, finding that the filing of a declaratory judgment action in a non-selected forum did not waive the party's right to enforce the forum-selection clause. *Wellogix, Inc. v. SAP America, Inc. et al.*, Case No. 15-20184 (5th Cir., May 12, 2016) (*per curium*) (non-precedential).

Wellogix and SAP entered into a license agreement to integrate the two companies' purchase-to-pay software functionalities for the oil and gas industry. The agreement governed the confidentiality of Wellogix's trade secrets and included a forum selection clause, which specified Germany as "[t]he place of jurisdiction for all disputes arising between the parties out of or in connection with [the agreement]."

According to Wellogix, shortly after entering into the agreement, SAP misappropriated Wellogix's confidential technology and used it to perform work under agreements with SAP's other business partners and customers. Wellogix consequently filed a trade secrets theft claim against SAP in Texas state court, which was removed to the US District Court for the Southern District of Texas. The district court dismissed Wellogix's trade secret claims for *forum non conveniens*, holding that the forum selection clause of the license agreement was mandatory and enforceable, and all of Wellogix's claims against SAP were properly decided in Germany.

Several years later, SAP filed a complaint for declaratory relief against Wellogix in the same district, seeking a declaration of non-infringement and invalidity of five of Wellogix's patents. Wellogix responded with counterclaims for patent infringement and, again, trade secrets theft. SAP moved for summary judgment to dismiss Wellogix's trade secrets claims based on the forum selection clause. The Southern District of Texas again enforced the clause and granted dismissal for *forum non conveniens*.

Unsatisfied with this ruling, Wellogix filed a post-judgment motion arguing, for the first time, that diversity jurisdiction did not exist. The district court concluded that Wellogix had litigated "without breathing any jurisdictional doubts" and thus it retained supplemental jurisdiction to affirm the dismissal. Wellogix appealed to the Fifth Circuit, arguing that the district court lacked supplemental jurisdiction and, alternatively, that SAP waived its right under the forum selection clause by filing the

declaratory relief action.

The Fifth Circuit found neither of Wellogix's arguments persuasive. First, a federal court may dismiss a case for *forum non conveniens*without having to resolve any threshold jurisdictional issues where a foreign tribunal is "plainly the more suitable arbiter of the merits of the case." The district court thus did not abuse its discretion by enforcing the forum selection clause. Second, under both federal and Texas state law, SAP's declaratory relief action did not waive the clause either intentionally or by litigating contrary to the clause to prejudice Wellogix. SAP had consistently asserted and successfully enforced the clause in prior litigation with Wellogix. Further, while a party may waive its rights if it substantially invokes the judicial process in aspersion of a forum selection clause, causing detriment or prejudice to the other party, such facts were not before the Fifth Circuit. Indeed, SAP's declaratory relief action was necessitated by Wellogix's threat of infringement litigation in the Southern District of Texas. Moreover, Wellogix did not provide argument that any of SAP's subjective or objective conduct satisfied the waiver standard, and neither did it allege any prejudice.

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