



ENTERED

TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
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The following constitutes the order of the Court.

Signed June 2, 2004.

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
VECTRIX BUSINESS SOLUTIONS,	§	CASE NO. 01-35656-SAF-11
INC., et al.,	§	(Jointly Administered)
DEBTORS.	§	
<hr/>		
J. JAMES JENKINS, TRUSTEE FOR	§	
THE VECTRIX BUSINESS SOLUTIONS	§	
LIQUIDATING TRUST,	§	
PLAINTIFF,	§	
	§	
VS.	§	ADVERSARY NO. 03-3843
	§	
FANDANGO, INC.,	§	
DEFENDANT.	§	

MEMORANDUM OPINION AND ORDER

Fandango, Inc., the defendant, has filed a motion for a summary judgment dismissing the complaint filed by J. James Jenkins, the trustee for the Vectrix Business Solutions Liquidating Trust. Jenkins has filed a response opposing the motion. Fandango filed a reply to Jenkins' response. The court conducted a hearing on the motion on March 30, 2004.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and other matters presented to the court show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Washington v. Armstrong World Indus., Inc., 839 F.2d 1121, 1122 (5th Cir. 1988). On a summary judgment motion, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Anderson, 477 U.S. at 255. A factual dispute bars summary judgment only when the disputed fact is determinative under governing law. Id. at 250.

The movant bears the initial burden of articulating the basis for its motion and identifying evidence which shows that there is no genuine issue of material fact. Celotex, 477 U.S. at 322. The respondent may not rest on the mere allegations or denials in its pleadings but must set forth specific facts showing that there is a genuine issue for trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986).

In this adversary proceeding, Jenkins seeks to recover \$247,769.53 allegedly owed for services provided by Vectrix Business Solutions, Inc., to Fandango under a consulting

agreement, less a credit of \$46,663.60. Jenkins also seeks to collect Texas sales taxes of \$63,740.43. Jenkins alleges claims for turnover, suit on account, breach of contract, collection of sales taxes and attorney's fees. Jenkins filed his complaint on October 23, 2003.

On October 12, 2000, Vectrix and Fandango entered the consulting agreement. The agreement provides: "Governing Law: This Agreement shall be governed by, and construed in accordance with, the laws of the State of New York, without regard to choice of law rules." ¶ 27. The agreement also provides: "LIMITATION OF LIABILITY: NO ACTION UNDER THIS AGREEMENT MAY BE BROUGHT BY EITHER PARTY AGAINST THE OTHER PARTY MORE THAN ONE (1) YEAR AFTER THE OTHER PARTY'S REASONABLE KNOWLEDGE OF SUCH CAUSE OF ACTION." ¶15.

On July 9, 2001, Vectrix filed its petition for relief under Chapter 11 of the Bankruptcy Code. By order entered January 4, 2002, Vectrix confirmed a plan of reorganization. The plan created the Vectrix Business Solutions Liquidating Trust. On January 15, 2002, Jenkins became the trustee.

Jenkins' attorney wrote to Fandango, by letter dated January 25, 2002, requesting payment of \$247,769.53. Jenkins obtained a document titled "Detail Historical Aged Trial Balance," dated July 22, 2002, showing amounts due by Fandango. Jenkins' attorney wrote another letter to Fandango, dated August 7, 2002,

raising the sales tax issue. By letter dated August 9, 2002, Jenkins' attorney demanded payment of the sales tax. By letter dated November 14, 2002, Jenkins' attorney sought payment from Fandango of both the amount due for services rendered and the sales taxes.

Fandango contends that, on this record, Jenkins failed to commence his law suit within one year of Jenkins' reasonable knowledge of his cause of action. Jenkins knew of the account balance by January 25, 2002, and the sales taxes by August 9, 2002. Jenkins filed the complaint on October 23, 2003. As a result, Fandango contends that the suit is barred by the contractual limitations period. Fandango further contends that Vectrix waived any statutory limitations period by agreeing to the contract, and would be estopped from contending otherwise. Fandango asserts that this waiver and estoppel is binding on Jenkins. Fandango further contends that, as a result, Jenkins is not entitled to a turnover of funds nor to attorney's fees.

New York law allows parties to contract for a one-year limitations period. Kassner & Co. v. City of New York, 389 N.E.2d 99, 103 (N.Y. 1979). There is no genuine issue of material fact that if New York law applies, the complaint is not timely. The court must determine whether the New York choice of law provision in the agreement is binding.

Texas law recognizes the parties' autonomy to select the law

to be applied to their contract. Exxon Corp. v. Burglin, 4 F.3d 1294, 1298 (5th Cir. 1993). A Texas court would honor the contractual choice of law provision unless (i) the chosen state has no substantial relationship to the parties to the transaction and there is no other reasonable basis for the parties' choice or (ii) the law of the chosen state violates a fundamental policy of the State of Texas. DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677-78 (Tex. 1990).

Texas law provides a four-year statute of limitations for contract actions. Tex. Civ. Prac. & Rem Code § 16.004(a)(3). Texas law further provides that parties may contractually limit the time within which parties may bring an action under an agreement to two years. Tex. Civ. Prac. & Rem. Code § 16.070. That constitutes a legislated public policy. The determination by the Legislature of the time to access a state's courts for the resolution of a contract dispute is a fundamental public policy. DeSantis, 793 S.W.2d at 680 (fundamental nature of the policy at stake, not outcome of litigation, governs analysis). New York law permitting an agreed one-year limitation violates the Texas policy establishing a minimum of two years. Consequently, honoring the contractual choice of law provision would violate a fundamental public policy of the State of Texas.

With regard to whether the parties to the transaction had a substantial relationship with New York, Fandango is a Delaware

corporation, with its principal place of business in Santa Monica, California. According to Eden Warner, Fandango's current chief financial officer, Fandango had been formed in 1999 by two New York venture capital firms. Fandango had business operations in New York through officers associated with the venture capital firms. Fandango moved its headquarters to Santa Monica in the summer of 2000 but continued to do business in New York until March 2001, including accounting and treasury functions.

Vectrix had originally been a Nevada corporation, but re-incorporated in Delaware. Vectrix had its principal place of business in Dallas, Texas. Bruce Orr, the former Vectrix president, submitted an affidavit in which he avers that he negotiated the contract with Fandango on behalf of Vectrix. He negotiated by telephone from Dallas. He never went to New York or California to negotiate the contract. He signed the contract in Dallas.

According to Orr, Fandango employees would come to Texas to perform duties under the contract, but Vectrix employees never went to New York to work under the contract. Warner averred that Vectrix employees would go to California to work under the contract. Vectrix would deliver web-based services for Fandango to sell movie tickets for theaters around the country, including in New York and California. Orr avers Vectrix used a Minnesota company to perform a portion of its work.

Vectrix developed proposals for and with Fandango in the spring of 2000. Vectrix generated the proposals from Dallas.

Under the contract, notices for Vectrix were provided to its Dallas office. Notices for Fandango were provided to its Santa Monica office, with copies to its New York lawyers.

On this summary judgment record, there is a genuine issue of material fact whether the parties had a substantial relationship with New York to support the parties' contractual choice of law.

With regard to whether the parties to the transaction had another reasonable basis to choose New York law, Fandango argues that the parties intended a strict limitations period for contractual disputes to be taken to court. Because New York allows for a contractual one-year period, Fandango argues that the implementation of the parties' intent provides a reasonable basis for the selection of New York law. The summary judgment record does not lead only to a finding of intent to expeditiously compel litigation by selecting New York law. Indeed, Fandango argues that California law would recognize the one-year limitation as well. On this summary judgment record, there is a genuine issue of material fact of whether the parties had a reasonable basis to choose New York law.

Whether or not the parties had a substantial relationship to New York or another reasonable basis to choose New York law, the choice of law provision, because of the limitations, violates a

fundamental policy of Texas and would not be honored.

If the contractual choice of law is not binding, this summary judgment record further demonstrates that there is a genuine issue of material fact concerning the law to apply. Jenkins contends that if the contractual choice of law provision is not binding, then Texas law must be applied. Fandango responds that the court must then determine whether New York, Texas or California law applies, based on the state with the most significant relationship to the transaction. In re Consol. Capital Equities Corp., 143 B.R. 80, 85 (Bankr. N. D. Tex. 1992); See also In re Prof'l Investors Ins. Group, Inc., 232 B.R. 870, 884 (Bankr. N.D. Tex. 1999)(court examines equities and contacts of the transaction and the parties).

Because of this genuine issue of material fact concerning the determination of the choice of law, consideration of waiver and estoppel is premature. Unless the action is barred by the contractual limitations, the court cannot conclude that a turnover judgment or attorney's fees would be precluded.

Jenkins moves to strike summary judgment evidence submitted with Fandango's reply. Jenkins requests monetary sanctions as well. Fandango opposes the motion to strike and, in turn, requests sanctions as well. Jenkins contends that Fandango's summary judgment evidence contains inadmissible hearsay without a proof of the business records exception. Fandango responds that

it only offers the evidence to demonstrate New York contacts, and not for the truth of the matter contained in the exhibits. Jenkins also contends that the documents had not been timely produced. Fandango responds that it did not search for the documents until it learned that Jenkins contested the contractual choice of law provision in the underlying agreement. Jenkins argues that Fandango did not disclose the names of witnesses, but Fandango responds that it only identified those individuals as a result of the New York contacts issue raised in Jenkins' summary judgment response. Jenkins objects to the summary judgment affidavit of Fandango's current chief financial officer, Eden Warner. Fandango replies that Warner may submit an affidavit based on his current position with Fandango. Both sides request sanctions.

The motion to strike will be denied. The competing motions for sanctions will be denied. The parties have demonstrated a genuine issue of material fact regarding the choice of law question presented in this litigation. Once Jenkins demonstrated that the application of the parties' choice of law contractual provision would conflict with a fundamental Texas public policy, a new material issue became ripe for consideration, and related discovery. The court considers the summary judgment evidence to demonstrate a factual dispute for resolution at trial.

Based on the foregoing,

IT IS ORDERED that the motion for summary judgment is **DENIED**.

IT IS FURTHER ORDERED that the motion to strike and the motions for sanctions are **DENIED**.

###END OF ORDER###