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

Richmond Division

OMNI PRODUCTS INTERNATIONAL, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 92-396
	)	
GATTO MACHINERY DEVELOPMENT CORP. d/b/a CONAIR GATTO,	)	
	)	
	)	
Defendant.	)	

ORDER

This matter is before the Court on Defendant Gatto Machinery d/b/a Conair Gatto's Motion to Dismiss, pursuant to 28 U.S.C. § 1406, or Transfer, pursuant to 28 U.S.C. § 1404(a). For the reasons set forth in the accompanying Memorandum Opinion, the Court DENIES the motion to dismiss, but GRANTS the motion to transfer. The Clerk is hereby directed to TRANSFER the case to the Hauppauge Division of the Eastern District of New York.

It is so ORDERED.

Let the Clerk send a copy of this Order and the accompanying Memorandum Opinion to all counsel of record.

DATE

SENIOR UNITED STATES DISTRICT JUDGE

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

Richmond Division

OMNI PRODUCTS INTERNATIONAL, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 92-396
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GATTO MACHINERY DEVELOPMENT CORP. d/b/a CONAIR GATTO,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter is before the Court on Defendant Gatto Machinery d/b/a Conair Gatto's ("Conair's") Motion to Dismiss, pursuant to 28 U.S.C. § 1406, or Transfer, pursuant to 28 U.S.C. § 1404(a). For the reasons set forth below, the Court denies the motion to dismiss, but grants the motion to transfer to the Hauppauge Division of the Eastern District of New York. The Court further denies the plaintiff's request to obtain discovery concerning the formation of the contract at issue in this case prior to the Court ruling in favor of the defendant on this motion. The Court already has before it a sworn affidavit from the defendant's President which fully supports the Motion to Transfer and the plaintiff has set forth no articulable basis, nor is any apparent to the Court, for its belief that further discovery will shed any further light on this motion.

I. Essence of the Claim

This is an action for breach of contract. Plaintiff Omni

Products International ("Omni"), a maker of outdoor furniture, entered into a sales contract (the "Contract") with Conair for equipment which Omni needed to open a new manufacturing facility in Richmond. Specifically, the Contract obligated Conair to furnish and install for Omni three extruders, along with accompanying accessories and support equipment, which would allow Omni to produce extruded polyvinyl chloride ("PVC"), out of which its furniture is built. Omni alleges, inter alia, that Conair failed to adhere to the delivery schedule set forth in the Contract and that such failure constituted a material breach of the agreement because of the seasonal nature of the outdoor furniture business which necessitates adherence to a rigid production schedule. Omni also asserts a breach of warranty claim, alleging that the extruders and accompanying dies eventually provided by Conair were only capable of producing serviceable extruded PVC parts at a significantly slower rate than initially represented. Omni also claims that cooling, sizing and sawing equipment provided by Conair was insufficient to complete the manufacturing process contemplated by both parties when they entered the Contract.

II. Contract Negotiations

The Motion to Dismiss or Transfer is muddled by a host of factual disputes over what took place during the contract negotiation process and at what point the Contract actually was formed. Conair contends that the Contract contained Conair's "Standard Terms and Conditions" ("Terms and Conditions") which, among several other provisions, includes a forum selection clause

which provides:

> CONFLICT OF LAWS: This sale is being entered into within the State of New York and it is agreed that any action or proceeding brought to enforce the terms of this sale shall be brought in a court of competent jurisdiction within the County of Suffolk, State of New York and shall be governed by the laws of the State of New York.

Omni contends instead that the Terms and Conditions were not part of either the offer or acceptance that constituted the Contract, but that they were affixed, if at all, only to a preliminary price proposal and confirmatory documents sent to Omni following formation of the Contract.

Conair contends that its Price Quotation, dated October 2, 1989 (the "Quotation"), represents the offer that was accepted by Omni and which formed the basis of the Contract. Conair claims that the Terms and Conditions were affixed to this Quotation, and supports this contention with the sworn affidavit of its President, Ernest Preiato ("Preiato") (See Preiato Aff. at paras. 5-6). Omni states that it has no record of the Quotation in its files even though it concedes that this document was the starting point for all ensuing negotiations.[1] Therefore Omni does not, and cannot, deny that the Terms and Conditions were attached to the Quotation. The Terms and Conditions are listed on a one-page form document which, Preiato states, Conair sends to all parties with whom it is involved in contract negotiations. (Preiato Aff. at para. 6). Thus, the record as it stands, reflects the fact that the Terms and

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[1] Omni was represented in those discussions by David Bain, a consultant affiliated with Morris Anderson & Associates, Ltd. Mr. Bain is now deceased.

Conditions were part of the Quotation.

Omni, however, disputes the materiality of the Quotation. It contends that the Quotation was not an "offer" at all, but merely a proposal or invitation to bargain, and therefore was never effectively made part of the Contract. Omni contends that a last-minute exchange of telefaxes between Omni and Conair on December 21, 1989 constituted the Contract[2], and that because the Terms and Conditions were not attached to these transmissions that they fall out of the agreement altogether.[3] The Court disagrees with this characterization of the Contract's formation; its reasons are set forth in detail at Section III(A) below.

III. Analysis

A. The "Standard Terms and Conditions" Containing the Forum Selection Clause Are Part of the Contract as a Matter of Law

Omni's representatives have never denied receiving the Terms and Conditions along with the Quotation. It is almost implausible

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[2] It appears from the record that at approximately 2:17 p.m. on that date, Conair sent to Omni by telecopier an equipment summary with individual pricing information. At approximately 4:00 p.m., Conair sent to Omni by telecopier documents described as "the equipment pricing analysis reflecting the net amount," which set forth an alternative pricing scheme. Neither of these transmissions contained the Terms and Conditions.

Later on in the afternoon of December 21, 1989, in response to the documentation provided by Conair, Omni sent to Conair a Purchase Order authorized by Bain and Barker and signed on Omni's behalf by its Chief Financial Officer.

[3] Conair also contends that its Terms and Conditions were sent to Omni along with its "Order Acknowledgement" and all invoices for goods provided for under the Contract. Since the Court holds that the forum selection clause was made part of the Contract by virtue of its inclusion in Conair's offer, the presence of the Terms and Conditions in confirmatory documents is of no moment.

that Conair, an experienced merchant, would not include these provisions in their offer. In fact, Preiato states in his affidavit that such was, in fact, the case. There obviously is great incentive for merchants like Conair, who conduct business throughout the country, to protect themselves against the potentially exorbitant expense of being sued in every remote corner of the United States. Furthermore, the Terms and Conditions contain other very important provisions, most notably those relating to warranties, that Conair would want to ensure are part of every contract into which they enter. The Terms and Conditions are certainly not set forth in big, bold print, but experienced merchants do not deal in a vacuum when they enter into agreements of this type. Unfortunately for Omni, it simply appears that their representatives neglected to read the Terms and Conditions that were included in the Quotation.

The question remains, then, whether the Quotation constituted the Contract's offer. The Court holds that it did. Despite Omni's attempt to muddle the issue by directing the Court's attention to a few telefaxes exchanged one afternoon to nail down the details of the agreement, the Court holds that the Quotation constituted the offer, and the Purchase Order the acceptance, plain and simple.

The detailed nature of the Quotation belies an attempt to characterize it as a mere proposal to bargain. While it is true that the Quotation appeared to contemplate some further negotiations and that the equipment and pricing terms eventually agreed upon in the Purchase Order differ in some respects from

those set forth in Conair's Quotation, that does not negate the Quotation's status as an offer. The Purchase Order is, in fact, far more similar to the Quotation than dissimilar. The project contemplated certainly is the same. Most of the parts eventually ordered appear to be the same. The Purchase Order merely appears to reflect some minor changes in equipment ordered and different pricing terms. The Quotation is too thorough and precise, and similar to the Purchase Order, to be portrayed as a mere invitation to bargain.

The fax transmissions exchanged on December 21, 1989 simply represent the parties' efforts to finalize pricing information with respect to equipment that was to be included in the Contract. It is not tenable for Omni to argue that just because Conair didn't throw in its Terms and Conditions with the very last telefax sent to Omni prior to the signing of the Purchase Order, that it loses all of the important protections contained therein. Omni clearly was on notice that any agreement between it and Conair was to be "subject to the Terms and Conditions set forth on the front and back of [the Quotation]." This is not a "battle of the forms" case where one party accepted or confirmed a Contract offer by unilaterally adding different terms that materially altered the Contract. Here, Conair placed its forum selection clause "on the table" by including it in its offer, which Omni had over two-and-a-half months to review before entering into the Contract. The parties did, in fact, negotiate certain terms during that time period, but Omni, for whatever reason, chose not to take issue with

the forum selection clause. When the Contract was accepted via the December 21, 1989 Purchase Order, Omni had, in the Court's opinion, legally accepted the terms set forth by Conair in its Quotation. One of these terms dictated that any litigation arising out of the Contract be conducted in a court of competent jurisdiction in Suffolk County, New York.

B. General Enforceability of Forum Selection Clauses

When a forum selection clause like the one at issue here is effectively incorporated into a Contract, the Court is compelled to accord it substantial weight in deciding whether to transfer the case. It is fairly clear, however, that such a clause does not constitute proper grounds for dismissing the lawsuit, nor is it entirely dispositive of the venue issue.

This Court could follow either of two lines of Supreme Court precedent in this area, but would still arrive at the same result: the forum selection clause tips the scales in favor of transferring the case. Conair urges the Court to follow The Bremen v. Zapata Offshore Co., 407 U.S. 1 (1972). This case held that, unless major inconvenience would result from litigating in the chosen venue or the party seeking enforcement of a forum selection clause committed certain indiscretions, the clause should be respected. The Bremen Court held that the party resisting application of a selection clause must demonstrate either that litigation in the agreed forum would be "unreasonable and unjust, or that the clause [is] invalid for fraud or overreaching." Bremen, 407 U.S. at 15. Although this opinion was handed down in an admiralty case which, as the Supreme

Court itself has recognized, is of limited application in diversity cases, the Fourth Circuit has followed Bremen in the diversity context. See Mercury Coal & Coke, Inc. v. Mannesmann Pipe and Steel Corp., 696 F.2d 315, 317 (4th Cir. 1982). Thus, there certainly is authority to support Conair's reliance upon this case. Under the test articulated in Bremen, the Court appears to be left with no choice but to transfer the case. Litigation in New York does not appear "unreasonable and unjust" and Omni has not made any allegations of fraud or overreaching by Omni.

Omni urges the Court to apply Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988) instead of Bremen. The Stewart Court specifically declined to use principles set forth in the admiralty context to evaluate the import of a forum selection clause at issue in the diversity case it was deciding. 487 U.S. at 28-30. In Stewart, as in the instant case, the forum selection clause at issue specified litigation in a certain state, but allowed litigation in either state or federal court. See 487 U.S. at 24. Also in that case, like the one before the Court, the party attempting to enforce the forum selection clause moved to dismiss the case under 28 U.S.C. § 1406 or, in the alternative, transfer it pursuant to 28 U.S.C. § 1404(a). Id.

As an initial matter, Stewart indicates that a forum selection clause provides no basis for dismissal where venue is otherwise properly laid under 28 U.S.C. § 1391. Id. at 29 n.8. See also Crescent Int'l, Inc. v. Avatar Communities, Inc., 857 F.2d 943, 944 n.1 (3d Cir. 1988) ("§ 1406 does not apply when, as here, venue is

proper under 28 U.S.C. § 1391.") In this case, venue in the Eastern District of Virginia is appropriate under 28 U.S.C. § 1391(a)(2) because a substantial part of the events at issue occurred, and the machines at issue are located, in this district. It would be especially inappropriate to dismiss a claim such as this when there clearly existed a legitimate and good faith dispute over the validity of the forum selection clause at issue. Thus, in the Court's opinion, Conair's Motion to Dismiss, pursuant to 28 U.S.C. § 1406, is without merit.

Stewart dictates that a forum selection clause is not dispositive in the 1404(a) transfer analysis, but that it is to be considered among many case-specific factors which the district court should balance in making a venue determination. 487 U.S. at 29. Such a clause, however, is to be accorded greater weight than the other factors in the venue equation: "[T]he presence of a forum-selection clause such as the parties entered into in this case will be a significant factor that figures centrally in the district court's calculus." Id. Stewart does, however, specifically require consideration of "factors other than those that bear solely on the parties' private ordering of their affairs," Id. at 30, in deciding whether to transfer the case. Using this multi-factored approach and considering the factors traditionally reviewed in the venue inquiry, factoring in the heavily weighted forum selection clause, the Court is led to the same result as it reaches under Bremen -- the case should be transferred.

Let the Clerk send a copy of this Memorandum Opinion and the accompanying Order to all counsel of record.

DATE

SENIOR UNITED STATES DISTRICT JUDGE