

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

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CLARK'S TIRE AND AUTOMOTIVE	:	FEBRUARY TERM, 2008
SERVICE CENTER, INC. and	:	
ALFA AUTO WORLD, INC., individually	:	No. 3341
and on behalf of all others similarly situated	:	
	:	(Commerce Program)
Plaintiffs,	:	
v.	:	Superior Court Docket
	:	No. 202 EDA 2009
AAA MID-ATLANTIC, INC.	:	
Defendant	:	

OPINION

Albert W. Sheppard, Jr., J. April 7, 2009

This Opinion is submitted relative to the appeal of defendant, AAA Mid-Atlantic, Inc. of this court's Order dated December 29, 2008, overruling Preliminary Objections to plaintiffs' Second Amended Complaint. Those Objections had sought dismissal of the action, or in the alternative, a holding stating that venue was in Delaware and that the parties are subject to mandatory arbitration.

For the reasons discussed, this court respectfully submits that its decision should be affirmed.

BACKGROUND

Plaintiffs, Clark's Tire and Automotive Service Center, Inc. and Alfa Auto World, Inc. ("Clark's"), individually and on behalf of all others similarly situated, bring this Class Action against AAA Mid-Atlantic, Inc. ("AAA") and allege as follows. From January 1, 1990 through September 30, 2005, Clark's and AAA entered into standard emergency roadside assistance provider agreements whereby AAA would act as a hub for AAA customers in need of roadside assistance, and farm these jobs out to Class members in pre-designated geographic territories.¹ In reliance upon these agreements, Clark's equipped itself with drivers, vehicles and technicians adequate to meet its commitment to provide service to AAA members twenty-four hours a day, seven days a week.² Clark's further alleges that sometime in the late 1990's, in direct contravention of the standard agreements to distribute work to Class members, AAA began competing with Clark's by developing and utilizing its own fleet of roadside providers to meet the needs of AAA members.³ This competition increased exponentially in 2002, Clark's claims, when AAA acquired a number of heavy duty service vehicles and tow trucks capable of providing the same full range of roadside services offered by Class members.⁴

On August 28, 2008, Clark's sued AAA's alleging breach of contract, seeking compensatory damages and costs. In response, AAA filed Preliminary Objections seeking dismissal of Clark's action based upon three Amendments agreed upon by the

¹ Second Amended Complaint ¶¶ 14-15.

² *Id.* at ¶ 20.

³ *Id.* at ¶ 22-23.

⁴ *Id.* at ¶ 23.

parties dated March 2007, November 2007 and June 2008.⁵ Specifically, AAA argues that these Amendments provide that any controversy or dispute arising out of a contract between Clark's and AAA must be submitted to binding arbitration, and in the event that a dispute falls outside of the scope of arbitration, Delaware state and federal courts shall have exclusive jurisdiction.⁶

On December 29, 2008, this court overruled AAA's Preliminary Objections and upon request from AAA's counsel for interlocutory appeal, issued a supplemental order on January 5, 2009 stating that a substantial issue of venue or jurisdiction exists in this matter. The instant appeal followed.

DISCUSSION

The issue on appeal is whether the court erred in ruling that the present dispute is **not** subject to mandatory arbitration under the auspices of Delaware state and federal courts as referenced in the three amended contracts between Clark's and AAA.

As a threshold matter, neither party challenges the validity of the original contractual arrangement between Clark's and AAA providing for emergency roadside service by Clark for AAA customers. Rather, the current matter depends on the enforceability of the March 2007, November 2007 and June 2008 contract Amendments and whether they are controlling with respect to venue and jurisdiction. Pennsylvania law makes clear that a "contract is formed when the parties to it 1) reach a mutual understanding, 2) exchange consideration, and 3) delineate the terms of their bargain with

⁵ Defendants Preliminary Objections to plaintiffs' Second Amended Complaint ¶¶ 48, 54, 61.

⁶ *Id.* at ¶ 62.

sufficient clarity.”⁷ Further, it is “well settled that a written agreement may be modified by a subsequent (written or) oral agreement and that this modification may be shown by writings or by words or by conduct or by all three.”⁸ However, where a subsequent agreement is said to vary the terms of a prior contract, it must be founded upon consideration.⁹ Consideration “must actually be bargained for as the exchange for the promise.”¹⁰

It is not enough, however, that the promisee has suffered a legal detriment at the request of the promisor. The detriment incurred must be the ‘quid pro quo’, or the ‘price’ of the promise, and the inducement for which it was made.¹¹

In addition, “[t]he burden of proving modification of a contract is carried by the party asserting the modification.”¹²

Here, AAA insists that the three Amendments are valid under contract law, and in particular, the Amendments meet the consideration requirement.¹³ Therefore, AAA contends that if this matter is to proceed, it must be directed to arbitration subject to the state and federal laws of Delaware. In supporting this claim, AAA relies on Wilson of Wallingford, Inc. v. The Reliable Data Systems, Inc., in which plaintiff argued that a

⁷ Weaverton Transport Leasing, Inc. v. Moran, 834 A.2d 1169, 1172 (Pa. Super. 2003).

⁸ Bonczek v. Pascoe Equipment Co., 450 A.2d 75, 77 (Pa. Super. 1982).

⁹ Trombetta v. Raymond James Financial Services, Inc., 907 A.2d 550, 558 (Pa. Super. 2006); Nicolella v. Palmer, 248 A.2d 20, 23 (Pa. Super. 1968).

¹⁰ Stelmack v. Glen Alden Coal Co., 14 A.2d 127, 129 (Pa. 1940).

¹¹ Weaverton, 834 A.2d at 1172.

¹² Trombetta, 907 A.2d at 558.

¹³ Reply Memorandum of Law in Support of Defendant’s Preliminary Objections to plaintiffs’ Second Amended Complaint 3-4.

forum selection clause was invalid for lack of consideration.¹⁴ The court found plaintiff's assertion that it received no consideration unconvincing because "a party is presumed to have received appropriate consideration, in the form of a lower price, for a forum selection clause. This presumption applies even where the party did not specifically negotiate that particular term."¹⁵

Here, unlike Wilson of Wallingford, Clark's does not dispute the validity of the original contract with AAA upon which ample consideration was exchanged. Rather, Clark's contends that the consideration requirement was not met in the formulation of the contract Amendments. The facts pled in this case are similar to those of Nicolella v. Palmer,¹⁶ and Wilcox v. Regester.¹⁷ In Nicolella, the court held a contract modification was invalid because it lacked new consideration.¹⁸ Specifically, the court explained that "[t]he only possible consideration [in the modification] would be appellant's agreement to proceed with the work. Yet appellant was already obligated to do so."¹⁹ Similarly, in Wilcox, the court would not allow a party to be burdened with new complications and restrictions if they had not "received added compensation or other valid consideration for the additional commitments and burdens."²⁰

¹⁴ 1995 U.S. Dist. LEXIS 18191 (E.D. Pa. 1995).

¹⁵ *Id.* at 6.

¹⁶ 248 A.2d 20 (Pa. 1968).

¹⁷ 207 A.2d 817 (Pa. 1965).

¹⁸ Nicolella, 248 A.2d at 23.

¹⁹ *Id.*

²⁰ Wilcox, 207 A.2d at 821.

In this case, AAA has not met its burden of proving the validity of the three contract Amendments. The facts do not indicate that Clark's has received any additional benefit as a result of signing the three Amendments. Effectively, Clark's has taken on the burden of both jurisdiction and venue clauses, and in return, AAA has agreed to do no more than that which it was already obliged to. As such, AAA has garnered the benefit of the Amendments by imposing venue and jurisdiction clauses that it alone is comfortable with. But, it has not sustained any detriment upon which to balance its contention that adequate consideration exists. Thus, this case is controlled by Nicolella and Wilcox, and calls for a finding that the three Amendments do not meet the consideration requirement. Hence, the Amendments are invalid along with the venue and jurisdiction clauses contained within.²¹

CONCLUSION

For these reasons, this court respectfully submits that the Order entered December 29, 2008 overruling the Preliminary Objections should be affirmed.

BY THE COURT:



ALBERT W. SHEPPARD, JR.,

²¹ This court also notes that even if it were determined that consideration did exist in the amended contracts, the validity of the Amendments would remain questionable due to "modification" and "termination" clauses contained within standard contracts between Clark's and AAA. Specifically, these provisions allow contract modifications in conjunction with a thirty (30) day review period, and contract termination coupled with ten (10) days notice. Instantly, AAA inappropriately attempted to bypass the thirty (30) day review period for modification, and instead tried to force modifications upon Clark's within a ten (10) day notice period. See AAA Mid-Atlantic, Inc. Emergency Road Service Contract: Contract Number 4257, §XIV(dated 4/1/99), Contract Number 4243, § XIV (dated 5/29/02), Contract Number 4243, §XIV (dated 10/16/05); See also Notice of Proposed Amendment to Roadside Assistance Service Provider Agreement, dated November 5, 2007.