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UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

CHINA NORTH INDUSTRIES TIANJIN
CORP.,

No. 04-56323

Petitioner - Appellee,

D.C. No. CV-04-00387-VAP

v.

MEMORANDUM*

US 591

4B 2007

GRAND FIELD CO., INC.,

Respondent - Appellant.

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, District Judge, Presiding

Argued and Submitted July 25, 2006
Pasadena, California

Before: FERNANDEZ, RYMER, and CLIFTON, Circuit Judges.

Grand Field Co., Inc. appeals the district court's order remanding China North Industries Tianjin Corp.'s suit to enforce a foreign arbitration award to the San Bernardino County Superior Court. We have jurisdiction despite 28 U.S.C. § 1447(d) because the district court's order was based on its interpretation of a

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

“forum selection clause.” See *Pelleport Investors, Inc. v. Budco Quality Theaters, Inc.*, 741 F.2d 273, 276-77 (9th Cir. 1984).

There is no question that Grand Field had the right to remove this action at any time before trial under the New York Convention.¹ 9 U.S.C. § 205. We disagree that the parties’ stipulation is a “forum selection clause” in the sense of selecting a state, rather than a federal, forum. It does select a specific forum – the China International Economic and Trade Arbitration Commission (CIETAC) – for arbitration of the parties’ underlying dispute about whether Grand Field owed China North money. However, the stipulation does not say that the San Bernardino County Superior Court is the only forum where disputes about an award, if any, will be resolved. That the San Bernardino County Superior Court may have jurisdiction over the proceeding and that an award may be enforced “by” it, does not mean that no other court has jurisdiction or that the award may not also be enforced by some other court; if the parties had intended to make that court the exclusive court with jurisdiction to hear an action to confirm the award, they could easily have said so, but did not. Thus, the stipulation is not a “forum selection clause” that clearly and unequivocally waives Grand Field’s right of removal.² See

¹ 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). 9 U.S.C. §§ 201-08.

² The district court’s order turns entirely on the effect of Grand Field’s stipulation; it did not rule on any ground of waiver unrelated to the stipulation, nor

Resolution Trust Corp. v. Bayside Developers, 43 F.3d 1230, 1240 (9th Cir. 1994) (adopting “clear and unequivocal” standard for waiver); *Ferrari, Alvarez, Olsen & Ottoboni v. Home Ins. Co.*, 940 F.2d 550, 554 (9th Cir. 1991) (noting that burden of proof is on the party asserting waiver).

REVERSED.

do we.

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DEPUTY UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(b)(2)

CHINA NORTH INDUSTRIES
TIANJIN, CORP ,

Case No EDCV 04-387-
VAP(SGLx)

Plaintiff

ORDER GRANTING PLAINTIFF'S
MOTION TO REMAND

v

GRAND FIELD CO., INC ,
Defendant.

[Motion filed on April 30,
2004.]

The Court has received and considered all papers
filed in support of the Motion for Remand. The Motion is
appropriate for resolution without oral argument. See
Fed R Civ P 78, Local Rule 7-15. For the reasons set
forth below, the Motion is GRANTED.

I. FACTUAL AND PROCEDURAL HISTORY

On June 28, 1999, China North Industries Tianjin
Corp ("Plaintiff") filed a Complaint against Grand Field
Co , Inc. ("Defendant") in the Superior Court of the

DOCKETED ON 07/02/2004

United States
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17

1 State of California, County of San Bernardino seeking
2 payment of debt for the purchase of merchandise. On
3 February 15, 2000, the Superior Court approved a
4 stipulation of the parties to enter into binding
5 arbitration before the China International Economic and
6 Trade Arbitration Commission ("CIETAC") in accordance
7 with CIETAC's Arbitration Rules. The stipulation
8 provides "that the arbitral award is final and binding on
9 both parties and shall be treated with full force and
10 effect within the United States and by this Court."
11

12 Pursuant to that stipulation, the state court action
13 was dismissed without prejudice and the parties submitted
14 the matter to CIETAC. On February 15, 2001, CIETAC
15 awarded Plaintiff \$1,081,295.14 a principal sum of
16 \$677,510.43, interest at a rate of 7% per annum from
17 April 6, 1996, and an arbitration fee of 218,985 RMB
18 (equivalent to approximately \$26,457.81 United States
19 dollars). Plaintiff alleges that Defendant has not paid
20 this debt.

21
22 On March 22, 2004, Plaintiff filed a Complaint in the
23 Superior Court of the State of California, County of San
24 Bernardino seeking the confirmation of the arbitration
25 award. On April 2, 2004, Defendant timely removed the
26 action to this Court based upon federal question
27 jurisdiction. On April 30, 2004, Plaintiff filed a
28

1 Motion to Remand ("Mot "). The parties timely filed an
2 Opposition ("Opp'n") and Reply ("Reply").

3
4 **II. LEGAL STANDARD**

5 Removal jurisdiction is governed by statute. See 28
6 U S C. § 1441, et seq The Ninth Circuit applies a
7 strong presumption against removal jurisdiction, ensuring
8 "the defendant always has the burden of establishing that
9 removal is proper " Gaus v Miles, Inc., 980 F 2d 564,
10 566 (9th Cir 1992) (citing Nishimoto v Federman-
11 Bachrach & Assocs., 903 F.2d 709, 712 n 3 (9th Cir.
12 1990)). See also In re Ford Motor Co./Citibank (South
13 Dakota), N A., 264 F 3d 952, 957 (9th Cir. 2001) ("The
14 party asserting federal jurisdiction bears the burden of
15 proving the case is properly in federal court."), McNutt
16 v General Motors Acceptance Corp., 298 U.S. 178, 189
17 (1936) Removal is inappropriate when the district court
18 would not have original jurisdiction over the case. See
19 28 U S C. § 1441(a). A case shall be remanded when the
20 court lacks subject matter jurisdiction. See 28 U S C §
21 1447(c)

22
23 **III. DISCUSSION**

24 Plaintiff argues that removal was improper in this
25 case because (1) the Court lacks subject matter
26 jurisdiction over this action based upon 9 U S C § 205,
27 and (2) even if the Court has jurisdiction, Defendant

28

1 waived its right to removal in the February 15, 2000
2 Stipulation.

3
4 **A. SUBJECT MATTER JURISDICTION**

5 Plaintiff asserts that the February 15, 2000
6 Stipulation does not fall under the 1958 Convention on
7 the Recognition and Enforcement of Foreign Arbitral
8 Awards (the "New York Convention") because the
9 stipulation, itself, did not arise out of a commercial
10 legal relationship [Mot at 7-11.] Plaintiff's
11 argument is without merit

12
13 The Federal Arbitration Act confers original
14 jurisdiction on the district courts of the United States
15 over "an action or proceeding falling under the [New
16 York] Convention". 9 U.S.C. § 203 "An arbitration
17 agreement or arbitral award arising out of a legal
18 relationship, whether contractual or not, which is
19 considered as commercial, . . . falls under the [New
20 York] Convention " Id. § 202 (emphasis added)

21
22 Plaintiff concedes that this action seeks
23 confirmation of an arbitral award that arises out of a
24 commercial legal relationship. [Mot at 8] Thus, it is
25 of no consequence whether the February 15, 2000
26 Stipulation arises out of a commercial relationship,

27
28

1 this Court has original jurisdiction to confirm the
2 arbitral award nevertheless See 9 U S C §§ 202, 205

3
4 The Court has jurisdiction over this matter pursuant
5 to 9 U.S.C §§ 202, 205 Thus, Defendant had the right
6 to remove this action based upon federal question
7 jurisdiction The question, then, is whether Defendant
8 waived this right by entering into a forum selection
9 clause, as Plaintiff contends.

10

11 **B. WAIVER**

12 Plaintiff asks this Court to enforce a "forum
13 selection clause" and remand this action to the San
14 Bernardino County Superior Court [Mot at 5-7] That
15 clause, approved by the Superior Court on February 15,
16 2000, states, in its entirety, that "[t]he parties
17 further stipulate that the arbitral award is final and
18 binding on both parties and shall be treated with full
19 force and effect within the United States and by this
20 Court " [Id. Ex B.]

21

22 "A party's waiver of its right to remove generally
23 depends on its intent to do so " Foley v. Allied
24 Interstate, Inc., 312 F. Supp. 2d 1279, 1284 (C.D Cal
25 2004) (quoting Chicago Title & Trust Co v. Whitney
26 Stores, Inc., 583 F Supp 575, 577 (N.D. Ill. 1984),
27 citing Resolution Trust Corp v. Bayside Developers, 43

28

1 F 3d 1230, 1240 (9th Cir. 1994)). See also Pelleport
2 Investors, Inc. v Budco Quality Theatres, Inc, 741 F.2d
3 273, 279-80 (9th Cir. 1984) (affirming district court's
4 decision remanding case to state court given defendant's
5 waiver of its right to removal in a forum selection
6 clause); Hamakua Sugar Co v Fiji Sugar Corp., 778 F.
7 Supp. 503, 504 (D Haw. 1991) (remanding case to state
8 court based upon forum selection clause). "Furthermore,
9 because access to a federal forum is a significant right,
10 'a waiver of the right of removal must be clear and
11 unequivocal.'" Id (quoting Bayside Developers, 43 F 3d
12 at 1240).¹

13
14 The parties in this case bargained that litigation
15 arising from the arbitral award would be resolved in one
16 jurisdiction. The stipulation specifies which court will
17 be the forum for litigating disputes. It does not say
18 any court, nor any court in California. It states that
19 the arbitral award "shall be treated with full force and
20 effect by this Court." [Id. Ex. B (emphasis

21
22
23 ¹ "However, a defendant may not experiment in state
24 court and then seek to remove upon receipt of an adverse
25 ruling." Foley, 312 F Supp 2d at 1284 (citing Moore v
26 Permanente Med Group, Inc, 981 F 2d 443, 447 (9th Cir.
27 1992), Acosta v. Direct Merch Bank, 207 F. Supp 2d
28 1129, 1131 (S.D Cal. 2002)) As a result, a party may
inadvertently "waive the right to remove to federal court
where, after it is apparent that the case is removable,
the defendant takes actions in state court that manifest
[its] intent to have the matter adjudicated there, and to
abandon [its] right to a federal forum." Bayside
Developers, 43 F 3d at 1240.

1 added)] The parties' use of "this Court" is
2 unambiguous; it indicates their intention that the action
3 would not be moved or transferred, but would remain in
4 the San Bernardino County Superior Court, the Court to
5 which the parties had submitted.

6
7 Defendant affirmatively, by its own voluntary act,
8 submitted to the jurisdiction of San Bernardino County
9 Superior Court, thereby waiving its right of removal ²

10
11 IV. CONCLUSION

12 For the aforementioned reasons, Plaintiff's Motion to
13 Remand is granted.

14
15
16 IT IS SO ORDERED.

17
18 Dated July 2, 2004

Virginia A. Phillips

VIRGINIA A. PHILLIPS
United States District Judge

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26
27 ² Defendant asserts that any ambiguity in the
28 Stipulation's language must be resolved against waiver
[Opp'n at 8-9] As the Stipulation is unambiguous,
however, the Court need not reach this issue.