CARLTON FIELDS

“This Is Florida’s Problem. Not Texas’s.” Fifth Circuit’s Decision on Personal Jurisdiction Includes Two Cautionary Reminders

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On October 2, 2020, the U.S. Court of Appeals for the Fifth Circuit confronted the question whether a federal district court in Texas had jurisdiction to vacate an arbitration award in Florida. The district court answered that question in the negative and the Fifth Circuit agreed with that decision. *See Sayers Constr., LLC v. Timberline Constr., Inc.*, 2020 WL 5848636 (5th Cir. Oct. 2, 2020). The story starts when Florida Power & Light Company hired Sayers Construction LLC to perform work in Florida. In turn, Sayers hired subcontractors, Timberline Construction Inc., a South Dakota corporation, and High Voltage Inc., a Utah corporation. The subcontractors received their work orders in Florida and they performed their work in Florida. The subcontractors submitted their invoices to Sayers in Texas. When Sayers stopped paying those invoices, the subcontractors demanded arbitration. The arbitration took place in Florida and the arbitrator awarded damages and fees to the subcontractors. Sayers then filed this lawsuit to vacate the arbitration award in federal court in Texas. The subcontractors moved to dismiss and the district court dismissed the lawsuit without prejudice for lack of personal jurisdiction. The Fifth Circuit affirmed, concluding that the subcontractors did not have “minimum contacts” in Texas to justify the exercise of personal jurisdiction. The panel quickly dispatched the arguments that “(1) Timberline solicited a business relationship with Sayers in Texas; (2) Timberline and High Voltage contracted with Sayers, which has an office in Texas; [and] (3) Timberline and High Voltage mailed invoices to Sayers's office in Texas.” The panel then turned to the arguments that the agreement contains a Texas choice-of-law provision and that the parties’ course of dealings favors a determination that personal jurisdiction exists. The panel rejected those arguments, as well, as follows:

> While such [choice-of-law] clauses can be probative of purposeful availment, they're never dispositive. But the choice-of-law clause in the Master Services Agreement does not suggest the parties expected to resolve their disputes in Texas. That's because the

> same Agreement also required that arbitration take place in accordance with the AAA's venue-selection rules—i.e., as close as possible to the project in Florida. So to the extent the Agreement is probative of the parties' expectations regarding venue, it cuts against finding personal jurisdiction in Texas. The parties' course of dealing cuts the same way. After Sayers allegedly failed to pay its subcontractors' invoices, the parties met in Florida to discuss the dispute. Then they arbitrated the dispute in Florida. And Florida's courts have determined that Florida is a proper venue for Timberline and High Voltage to seek enforcement of the arbitration awards. *See Sayers Constr., L.L.C. v. Timberline Constr., Inc.*, No. 3D19-2373, ––– So. 3d ––––, 2020 WL 3443268 (Fla. Dist. Ct. App. June 24, 2020).

In sum, the panel concluded that "this is Florida's problem. Not Texas's." Although the panel's decision on personal jurisdiction is timely and interesting in its own right, perhaps the published opinion is more notable for two cautionary notes to practitioners. In particular, the panel explained that, "[a]s an LLC invoking federal diversity jurisdiction, Sayers bore responsibility for alleging the citizenship of each of its members to establish complete diversity." It observed that "[o]ur review of the record indicates that Sayers failed to meet that obligation." And "[o]rdinarily that would require us to dismiss the action." But the panel determined that it would affirm the dismissal on personal jurisdiction grounds instead, citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999), for the proposition that "there is no unyielding jurisdictional hierarchy. ... [T]here are circumstances in which a district court appropriately accords priority to a personal jurisdiction inquiry." The panel also underscored the need for a cross-appeal if an appellee seeks a modification of the judgment on appeal: "Because the subcontractors did not cross-appeal the district court's without-prejudice dismissal, we cannot consider whether the case should be dismissed with prejudice for Sayers's violation of the FAA's service-of-process rules." Quoting Wright's Federal Practice and Procedure, the panel noted that, "[a]s shown by common examples an appellee cannot, without cross-appeal, seek . . . to convert a dismissal without prejudice into a dismissal with prejudice." Both of these points are important reminders for practitioners in the federal courts.

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