UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:17-cv-04360-RGK-E	Date	November 15, 2017
Title	***FINSA PORTAFOLIOS, S.A. de C.V. et al. v. OPENGATE CAPITAL, LLC et al.***		

Present: The Honorable	R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE	
Sharon L. Williams	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
Not Present	Not Present	

Proceedings: **(IN CHAMBERS) Order Re: Plaintiffs' Motion for Reconsideration (DE 41); Plaintiffs' Motion for Leave to Amend (DE 43)**

I. INTRODUCTION

Plaintiffs Finsa Portafolios, S.A. de C.V. and FINSA CKD M Fideicomiso CIB/2017 (collectively, "FINSA" or "Plaintiffs") brought several fraud and breach of contract claims against OpenGate Capital, LLC and six of its subsidiaries in connection with the sale of a manufacturing facility in Mexico. On August 7, 2017, Defendants OpenGate Capital, LLC and OpenGate Publishing, LLC (collectively, "the OpenGate entities" or "Defendants") filed a Motion to Dismiss under Federal Rule of Civil Procedure ("Rule") 12(b)(6), or in the alternative, a Motion to Dismiss on forum non conveniens grounds and to compel arbitration. On October 9, 2017, the Court granted Defendants' Motion to Dismiss on forum non conveniens grounds and compelled arbitration.

Presently before the Court are Plaintiffs' Motions for Reconsideration and for Leave to File a First Amended Complaint ("FAC"). For the following reasons, the Court **DENIES** Plaintiffs' Motions.

II. FACTUAL BACKGROUND

The complex facts of this case have been laid out extensively in the Court's previous Order. (Order Re: Defs.' Mot. to Dismiss, ECF No. 40.) The following is a summary of Plaintiffs' allegations relevant to the instant Motion:

Finsa Portafolios, S.A. de C.V. is a Mexican corporation with its principal place of business in Mexico. FINSA CKD M Fideicomiso CIB/2017 is a Mexican trust with its principal place of residence in Mexico.

Defendant OpenGate Capital, LLC ("OpenGate") is a private equity firm incorporated in California and with its principal place of business located in Los Angeles, California. Six OpenGate subsidiaries are named as co-Defendants in this action.

In October 2012, the OpenGate entities and three of their subsidiaries purchased a laboratory furniture manufacturing business, including a facility in Reynosa, Mexico ("the Reynosa Facility"). After completing the purchase, OpenGate discovered that the Reynosa Facility was overrun by a drug cartel, whose activity severely diminished the Reynosa Facility's value.

In December 2014, the OpenGate entities and three of their subsidiaries negotiated a sale-leaseback agreement for the Reynosa Facility. As alleged, FINSA agreed to purchase the Reynosa Facility from OpenGate, via its subsidiary Fisher Hamilton, for $15 million and the promise to lease back the Reynosa Facility to OpenGate, via Fisher Hamilton.[1]

The final contract involved three agreements: the Purchase Agreement, the Lease Agreement, and the Guaranty Agreement (collectively, "the Agreements"). The official parties to the Purchase and Lease Agreements were OpenGate's Mexican subsidiary Fisher Hamilton and FINSA. The official parties to the Guaranty Agreement were OpenGate's subsidiary Hamilton Scientific and FINSA.

The Purchase and Lease Agreements contain a forum selection clause designating Reynosa, Mexico as the chosen forum for subsequent litigation. The Guaranty Agreement contains an arbitration clause designating arbitration in Mexico as the chosen method of dispute resolution.[2]

During negotiations, OpenGate fraudulently concealed and misrepresented information about the Reynosa Facility's value and its subsidiaries' ability to make lease payments. Fisher Hamilton never made a single rent payment, and OpenGate closed the guarantor Hamilton Scientific in March 2015. In response, Plaintiffs brought several fraud and breach of contract claims against Defendants.

Defendants later filed a Motion to Dismiss and Compel Arbitration. This Court granted the Motion on forum non conveniens grounds based on the forum selection and arbitration clauses in the Agreements. Plaintiffs then brought the present Motions for Reconsideration and for Leave to File a FAC.

III. JUDICIAL STANDARD

A court has discretion to reconsider a judgment or order pursuant to Rule 59(e) or 60(b). *Sch. Dist. No. 1J Multnomah Cty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993). Absent unusual circumstances, reconsideration is only appropriate where the court is presented with newly discovered evidence, the court committed clear error or the decision was manifestly unjust, or there has been an intervening change in controlling law. *Id.* at 1263.

Local Rule 7-18 supplements the Federal Rules and states:

[1] FINSA did not join Fisher Hamilton as a Defendant in this suit.
[2] The precise language and scope of the forum selection and arbitration clauses are discussed in detail in this Court's prior order. (Order Re: Defs.' Mot. to Dismiss, ECF No. 40.)

> A Motion for Reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the moving party for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts present to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

C.D. Cal. L.R. 7-18.

IV. DISCUSSION

A. Local Rule Challenges

Defendants argue both Motions violate the Court's meet and confer requirements under Local Rule 7-3 and the notice requirements under Local Rule 6-1.

Plaintiffs filed their Motion less than seven days after they met and conferred with Defendants, in violation of Local Rule 7-3. The Court has discretion to refuse to consider Plaintiffs' Motion on this ground alone. *Jauregui v. Nationstar Mortg. LLC*, No. EDCV 15-00382-VAP (KKx), 2015 WL 215414, at *2 (C.D. Cal. May 7, 2015). Despite Plaintiffs' failure to comply with the rule, the Court will consider the Motion on the merits, as there is little or no prejudice to Defendants. *See id.*

Defendants also challenge Plaintiffs' Motion under Local Rule 6-1, which states that a notice of motion shall be filed with the clerk at least twenty-eight days before the date of the hearing. Here, Plaintiffs properly noticed the motion on October 9, 2017, twenty-eight days before the hearing date on November 6, 2017.

B. Grounds for Reconsideration

Plaintiffs argue reconsideration is warranted because the Court committed clear error in its forum non conveniens analysis and because newly discovered evidence shows that Mexico is an inadequate forum. The Court addresses each argument below.

1. Clear Error

Plaintiffs argue that the Court committed clear error by: (1) erroneously assigning the burden to Plaintiffs to show there was an adequate alternative forum; (2) failing to require OpenGate to submit to jurisdiction in Mexico before dismissing the case; (3) dismissing the case, because a Mexican judge or arbitrator cannot assert jurisdiction over the OpenGate entities; and (4) not allowing Plaintiffs to amend their complaint before dismissing the case. The Court will address each argument in turn.

a. Burden

The Court previously dismissed the action for forum non conveniens after finding Mexico to be an adequate alternative forum. The Court stated that an adequate alternative forum does not exist if Defendants are not amenable to service of process, *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1143 (9th Cir. 2001), but found that Plaintiffs provided no facts or law to show this was the case. Plaintiffs allege this erroneously placed the burden on them to establish an adequate alternative forum.

Generally, the party moving to dismiss based on forum non conveniens bears the burden of showing there is an adequate alternative forum. *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1118 (9th Cir. 2002). Where the parties' contract contains a valid forum selection clause, however, "the plaintiff must bear the burden of showing why the court should not transfer the case to the forum to which the parties agreed." *Atl. Marine Const. Co., v. U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568, 582 (2013). Here, as the party defying a valid forum selection clause, Plaintiffs had the burden to show why Mexico was not an adequate alternative forum.[3]

Plaintiffs' failure to cite supporting facts or law "improperly shift[ed] to the Court the burden of researching the applicable law . . . ." *Hana Fin., Inc. v. Hana Bank*, No. CV 07-1534 PA (JWJx), 2011 WL 13187366, at *2 (C.D. Cal. Sept. 19, 2011); *United States v. Aguilar*, 782 F.3d 1101, 1108 (9th Cir. 2015) (refusing to manufacture arguments for a party who cited no authority in support of its position). Moreover, it precludes reconsideration on this ground.

b. Submission to the Jurisdiction

Next, Plaintiffs argue that the Court erred in failing to require the OpenGate entities to submit to jurisdiction in Mexico before dismissing the case. At a minimum, Plaintiffs argue that the Court was required to stay the case and condition dismissal on Mexico's acceptance of jurisdiction. The Court, however, is not required to impose a condition on dismissal unless there is "a justifiable reason to doubt that a party will cooperate with the foreign forum." *Leetsch v. Freedman*, 260 F.3d 1100, 1104 (9th Cir. 2001). In their previous Opposition, Plaintiffs offered no facts or law to support their contention that Defendants would not be subject to service of process in Mexico. Nor did Defendants indicate to the Court that they would not cooperate. The Court did not commit clear error in declining to impose conditions on its dismissal.

c. Mexican Jurisdiction

Plaintiffs also assert that the Court erred in dismissing the case because a Mexican judge or arbitrator cannot assert jurisdiction over the OpenGate entities. In support, Plaintiffs rely and cite to the

[3] The Court did err in reasoning in part that Mexico was an adequate alternative forum because Plaintiffs could file suit against Fisher Hamilton and Hamilton Scientific. All Defendants must be subject to service of process for a forum to be adequate. *Gutierrez v. Advanced Medical Optics, Inc.* 640 F.3d 1025, 1029 (9th Cir. 2011). But this does not change the fact that Plaintiffs failed to show why Defendants would not be subject to service of process in Mexico.

Mexican Civil Code. A motion for reconsideration, however, is not a tool to "raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). This Mexico law could have been known to FINSA at the time it filed its Opposition; yet, as stated previously, Plaintiffs offered no facts or law to support their argument in their previous motion. Accordingly, reconsideration on this ground is unwarranted. *See* L.R. 7-18.

d. Leave to Amend

Lastly, Plaintiffs argue that the Court erred in denying a chance to amend their complaint. A court may dismiss a complaint with prejudice if amendment would be futile. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). Here, Plaintiffs filed several fraud and breach of contract claims against Defendants, all of which were subject to either the forum selection or arbitration clause in the parties' agreements. The Court reviewed Plaintiffs' Complaint extensively in its previous order and did not find facts to suggest the clauses were procured by fraud or otherwise unenforceable, nor were there facts to suggest that Mexico would be an inadequate and unavailable forum. Based on the facts presented, the Court concluded that amendment would be futile.

FINSA's proposed amendment only affirms the Court's decision. Plaintiffs allege its newly discovered facts "change the landscape of [the] case . . . into a pure fraud case" preceding the contract. But the proposed FAC makes no saving transformation. Instead, it merely drops all but the fraudulent representation and concealment claims against the OpenGate entities. The Court already determined that FINSA's fraud claims fell within the scope of the forum selection and arbitration clauses. Accordingly, the Court did not err in denying leave to amend.

2. *Newly Discovered Evidence*

Plaintiffs argue that the Court should grant the Motion for Reconsideration because of newly discovered evidence, namely that: (1) Defendants engaged in a similar fraudulent scheme on at least three other occasions; and (2) Defendants recently stipulated that it will not submit to jurisdiction before a Mexican arbitrator. The Court will address each argument in turn.

Plaintiffs argue that is has recently discovered new information in relation to Defendants' fraud scheme. To support their argument, Plaintiffs cite numerous exhibits, all of which were attached to their initial Opposition to Defendants' Motion to Dismiss. These materials were thus previously available to Plaintiffs, and Plaintiffs made no use of the exhibits in its Opposition. The Court will not reconsider the Motion on this ground. *See Sch. Dist.*, 5 F.3d at 1263 (refusing to consider materials previously available to the parties on a motion for reconsideration).

As to Plaintiffs' second argument, Defendants' recent refusal to stipulate to jurisdiction before an arbitrator in Mexico does not warrant reconsideration. At this time, Defendants have not refused to submit to service of process. Plaintiffs have not even filed suit or commenced arbitration in Mexico. As

such, Mexico has not yet declined jurisdiction and reconsideration is not yet warranted. *See Gutierrez v. Advanced Medical Optics, Inc.* 640 F.3d 1025, 1031 (9th Cir. 2011) (noting that after a foreign country explicitly declines to accept jurisdiction, the plaintiff does not have an available forum and reconsideration of the former dismissal is appropriate). Nor does Defendants' refusal to stipulate create enough doubt that they will cooperate with the foreign forum to persuade the Court to amend its Order to impose a conditional dismissal. *Cf. Leetsch*, 260 F.3d at 1104. If and when Plaintiffs can present the Court with facts illustrating that Defendants are not subject to jurisdiction in Mexico, Plaintiffs may again seek to bring their action before this Court. *See, e.g.*, *Gutierrez*, 640 F.3d at 1027 (considering an appeal of a district court's dismissal on forum non conveniens grounds); *Id.* at 1031 (remanding the case for reconsideration after the Mexican court dismissed the case for lack of jurisdiction).

For the foregoing reasons, the Court **DENIES** Plaintiffs' Motion for Reconsideration.

A. Leave to Amend

For the reasons set forth above, the Court's prior Order regarding Defendants' Motion to Dismiss still stands. The Court thus **DENIES** Plaintiffs' Motion for Leave to File a FAC.

V. CONCLUSION

For the foregoing reasons, the Court **DENIES** Plaintiffs' Motion for Reconsideration and for Leave to File a FAC.

IT IS SO ORDERED

_____ : _____

Initials of Preparer _____