

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Michelin North America, Inc., and	)	
Michelin Retread Technologies, Inc.,	)	
	)	C.A. No. 6:13-1067-HMH
Plaintiffs/Counterclaim Defendants,	)	
	)	
vs.	)	
	)	
Inter City Tire and Auto Center, Inc., and	)	
Inter City Retread, Inc.,	)	
	)	
Defendants/Counterclaim Plaintiffs,	)	
	)	
vs.	)	
	)	
Service Tire Truck Centers, Inc.,	)	
Tire Centers, LLC, James Cavanaugh,	)	
William McCabe, William Schafer,	)	
Andrew Meurer, and Marc Pasquet,	)	
	)	
Counterclaim Defendants.	)	

	)	
Inter City Tire and Auto Center, Inc. and.	)	
Inter City Retread, Inc.,	)	C.A. No. 6:13-2752-HMH
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
Michelin North America, Inc., Michelin	)	
Retread Technologies, Inc., Service Tire	)	
Truck Center, Inc., James Cavanaugh	)	OPINION & ORDER
William McCabe and Oscar Simoes,	)	
	)	
Defendants.	)	

Inter City Retread, Inc.,	)	
	)	C.A. No. 6:14-1254-HMH
Plaintiff,	)	
	)	
vs.	)	
	)	
Michelin Retread Technologies, Inc.,	)	
	)	
Defendant.	)	

This matter is before the court on a motion by Michelin North America, Inc. (“MNA”) for partial summary judgment on the issue of whether Inter City Tire and Auto Center, Inc. (“ICT”) may seek damages arising solely from the termination of certain contracts between the parties. After a thorough review of the facts and pertinent law, MNA’s motion for partial summary judgment is granted.

I. FACTUAL AND PROCEDURAL BACKGROUND

The instant litigation arises in part out of a series of a three different agreements between MNA and ICT: (1) the 2009 MNA Authorized Commercial Customer Agreement (“2009 CCA”); (2) the 2010 MNA Authorized Commercial Customer Agreement (“2010 CCA”); and (3) the 2013 MAST Retail Agreement (“2013 MAST Agreement”) (collectively referred to as the “Dealer Agreements”). On April 19, 2013, MNA terminated via written notice the 2009 CCA. (MNA Mot. Partial Summ. J. Ex. 4 (2009 CCA Term. Letter), ECF No. 370-5.)¹ On April 22, 2013, MNA terminated via separate written notices the 2010 CCA and the 2013 MAST Agreement. (Id. Ex. 5 (2010 CCA Term. Letter), ECF No. 370-6.); (Id. Ex. 6 (2013 MAST Agreement Term. Letter), ECF No. 370-7.) In ICT and Inter City Retread, Inc.’s Third

¹All citations in ECF refer to C.A. No. 13-1067.

Amended Answer and Counterclaim, ICT alleges two distinct causes of action for damages resulting from MNA's breach of the Dealer Agreements. Count IV of the Third Amended Counterclaim alleges that MNA violated the South Carolina Unfair Trade Practices Act, in part, by "[a]rbitrarily and maliciously terminating the Commercial Customer and Passenger Tire Agreements without good cause, in bad faith, and without any reasonable business justification, in retaliation for blowing the whistle on Michelin's corrupt sales practices." (Third Amended Countercl. ¶ 200(h), ECF No. 222.) Count IV also alleges that "Inter City is entitled to treble damages and attorneys' fees." (*Id.* ¶ 208, ECF No. 222.) Count XVII of the Third Amended Counterclaim alleges that MNA wrongfully terminated the Dealer Agreements in violation of the common law of South Carolina. (*Id.* ¶¶ 284-289, ECF No. 222.)

Under the heading "CONSEQUENCES UPON TERMINATION," the 2009 CCA contains the following provision:

A. Upon termination of this Agreement (however arising, including non-renewal under Section 27):

...

5. Neither party shall be liable to the other for any damages or losses resulting solely from termination of this Agreement. In no event shall either party be liable for any punitive, consequential or incidental damages arising from enforcement or termination of this Agreement.

(MNA Mot. Partial Summ. J. Ex. 1 (2009 CCA ¶ 29(A)(5)), ECF No. 370-2.) Under the heading "CONSEQUENCES UPON TERMINATION," the 2010 CCA contains the following provision:

A. Upon termination of this Agreement (however arising, including non-renewal under Section 27):

...

5. Neither party shall be liable to the other for any damages or losses resulting solely from termination of this Agreement. In no event shall either

party be liable for any punitive, consequential or incidental damages arising from enforcement or termination of this Agreement.

(MNA Mot. Partial Summ. J. Ex. 2 (2010 CCA ¶ 29(A)(5)), ECF No. 370-3.) Under the heading “CONSEQUENCES UPON TERMINATION,” the 2013 MAST Agreement contains the following provision:

A. Upon termination of these MAST Terms (however arising):

...
v. Neither party shall be liable to the other for any damages or losses resulting solely from termination of these MAST Terms. In no event shall either party be liable for any punitive, consequential or incidental damages arising from enforcement or termination of these MAST Terms.

(MNA Mot. Partial Summ. J. Ex. 3 (2013 MAST Agreement ¶ 27(A)(v)), ECF No. 370-4.)

On November 25, 2014, MNA moved for partial summary judgment, arguing that the limitation of damages clauses preclude ICT from obtaining damages resulting solely from the termination of the Dealer Agreements. (MNA Mot. Partial Summ. J., ECF No. 370.) ICT submitted its response on December 15, 2014. (ICT Mem. Opp’n Mot. Partial Summ. J, ECF No. 404.) The court heard oral argument on December 18, 2014. This matter is now ripe for review.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate only “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In deciding whether a genuine issue of material fact exists, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in his favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). However, “[o]nly disputes over

facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” Id. at 248.

A litigant “cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another.” Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985). “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate.” Monahan v. County of Chesterfield, 95 F.3d 1263, 1265 (4th Cir. 1996). “[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” Ballenger v. N.C. Agric. Extension Serv., 815 F.2d 1001, 1005 (4th Cir. 1987).

B. Limitation of Damages Clauses

MNA argues that it is entitled to summary judgment on the issue of termination damages because the Dealer Agreements contain limitation of damages clauses that preclude ICT from seeking damages resulting from termination of the Dealer Agreements. (MNA Mem. Supp. Mot. Partial Summ. J., generally, 370-1.)

South Carolina courts have recognized that “[l]imitation of liability and exculpation clauses are routinely entered into.” Gladden v. Boykin, 739 S.E.2d 882, 884 (S.C. 2013). In the context of services, the South Carolina Supreme Court has stated that limitation of liability and exculpation clauses “are commercially reasonable in at least some cases, since they permit the provider to offer the service at a lower price, in turn making the service available to people who would otherwise be unable to afford it.” Id. Courts will not enforce a limitation of liability

clause where the clause is found unconscionable or to violate public policy. Id. at 883-84. In South Carolina, “unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” Id. at 884 (quoting Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663, 668 (S.C. 2007)). Both circumstances must be met in order for a contractual provision to be found unconscionable. See id. South Carolina courts “must determine public policy by reference to legislative enactments wherever possible.” Gladden v. Boykin, 739 S.E.2d 882, 883 (S.C. 2013).

MNA argues that there is no evidence that the limitation of damages clauses are unconscionable. (MNA Mem. Supp. Mot. Partial Summ. J. 7-11, ECF No. 370-2.) ICT makes no argument that the clauses contained in the Dealer Agreements are unconscionable. (ICT Mem. Opp’n Mot. Partial Summ. J., generally, ECF No. 404.)² Rather, ICT argues that South Carolina law allowing for wrongful termination claims prevents enforcement of the limitation of damages clause. (Id. at 18-22, ECF No. 404.)

South Carolina allows for recovery of damages for wrongful termination of a contract where the contract contains a provision that allows the parties to terminate a contract at will. Courts applying South Carolina law have found that “a dealer terminated in accordance with the terms of the contract has . . . a cause of action for wrongful termination only when the supplier acted arbitrarily or in bad faith.” Glaesner v. Beck/Arnley Corp., 790 F.2d 384, 388 (4th Cir. 1986); see also Richland Wholesale Liquors v. Glenmore Distilleries Co., 818 F.2d 312, 315

²By failing to address MNA’s unconscionability argument, ICT has effectively conceded the argument. See Kettle v. Leonard, No. 7:11-CV-189-BR, 2012 WL 4086595, at *5 (E.D.N.C. Sept. 17, 2012) (unpublished) (citing cases).

(4th Cir. 1987) (noting that wrongful termination exists only in extraordinary circumstances); Bostick Oil Co. v. Michelin Tire Corp., 702 F.2d 1207, 1215-16 (4th Cir. 1983) (jury question whether party was terminated because of its role as a competitor to Michelin); de Treville v. Outboard Marine Corp., 439 F.2d 1099, 1100 (4th Cir. 1971) (reversing grant of summary judgment where dealer was terminated after nine-year relationship even though contract contained a termination provision); Gaines W. Harrison & Sons, Inc. v. J.I. Case Co., Inc., 180 F. Supp. 243, 253 (E.D.S.C. 1960) (upholding jury verdict for \$5,000 for wrongful termination of contract with at-will termination provision where dealer's agreement would not be renewed without a large investment of money and agreement not to sell competitive products); Carolina Cable Network v. Alert Cable TV, Inc., 447 S.E.2d 199, 202 (S.C. 1994) (noting that "[t]he extraordinary circumstances which must be demonstrated are those which support a finding that the termination was done arbitrarily, maliciously or in bad faith"). According to ICT, these cases demonstrate that a limitation of damages provision would not be enforceable where the provision limits damages resulting from termination of a contract. (Dec. 18, 2014 Hr'g Tr. 7, ECF No. 428.) However, the cases cited by ICT stand only for the proposition that an at-will termination clause will not prevent a wrongful termination claim where the termination was alleged to be done arbitrarily, maliciously, or in bad faith. None of the cases hold that a limitation of damages clause would be unenforceable when a party alleges wrongful termination of a contract. Rather, South Carolina law is clear that a limitation of damages clause is enforceable unless the clause is found to be unconscionable or to violate public policy. See Gladden, 739 S.E.2d at 883-84.

In the present case, the court finds that the limitation of damages clauses found in the contracts are not unconscionable. All of ICT's evidence implicates whether MNA terminated the Dealer Agreements arbitrarily, maliciously, or in bad faith.³ See (ICT Mem. Opp'n MNA Mot. Partial Summ. J. 4-18, ECF No. 404.) There is no evidence that ICT lacked meaningful choice when it entered into the Dealer Agreements. Moreover, the term is not so oppressive that no reasonable person would enter into the contract. The limitation of damages provisions benefitted MNA and ICT because the terms applied equally to both parties to the contracts.

ICT argues that the South Carolina Supreme Court's recent decision in Partain v. Upstate Automotive Group, 689 S.E.2d 602 (S.C. 2010), is analogous to the instant case and counsels against enforcing the limitation of damages clause. (ICT Mem. Opp'n MNA Mot. Partial Summ. J. 22-23, ECF No. 404.) In Partain, the South Carolina Supreme Court refused to enforce an arbitration clause where one party's conduct was so "outrageous" that it was not within the parties' contemplation when they agreed to the arbitration provision. Id. at 605. According to ICT, because MNA's conduct here was illegal, outrageous, and unanticipated, South Carolina law would not enforce the limitation of damages clause. (ICT Mem. Opp'n MNA Mot. Partial Summ. J. 22-23, ECF No. 404.) ICT submits that arbitration clauses are liberally construed, but limitation of damages clauses are narrowly construed. See S.C. Elec. & Gas Co. v. Combustion Eng'g, Inc., 322 S.E.2d 453, 458 (S.C. Ct. App. 1984). Therefore, ICT views Partain as analogous to the instant case, arguing that the limitation of damages clauses' narrow construction means that MNA's conduct was not within the contemplation of the parties

³MNA and Michelin Retread Technologies, Inc. have pending a motion for summary judgment on the issue of whether MNA wrongfully terminated ICT. The court expresses no opinion on the merits of whether MNA wrongfully terminated ICT.

at the time of entry into the contract. However, the language of the limitation of damages clauses at issue specify that the clause would be effective “upon termination . . . (however arising).” (MNA Mot. Partial Summ. J. Ex. 1 (2009 CCA), ECF No. 370-2.); (Id. Ex. 2 (2010 CCA), ECF No. 370-3.); (Id. Ex. 3 (2013 MAST Agreement), ECF No. 370-4.) Accordingly, the court finds the limitation of damages clauses enforceable.

ICT also argues that South Carolina’s exception to the employment-at-will doctrine provides the public policy basis for an exception to enforcement of a contractual limitation of damages clause. (ICT Mem. Opp’n MNA Mot. Partial Summ. J. 24-26, ECF No. 404.) Although South Carolina is an employment at-will state, “an at-will employee has a cause of action in tort for wrongful termination where there is a retaliatory termination of the at-will employee in violation of a clear mandate of public policy.” Barron v. Labor Finders of S.C., 713 S.E.2d 634, 637 (S.C. 2011). The public policy exception applies where: “(1) the employer requires the employee to violate the law, or (2) the reason for the employee’s termination itself is a violation of criminal law.” Id. (citations omitted). However, “the public policy exception is not limited to these situations.” Id. ICT argues that its relationship with MNA is analogous to an at-will employee’s relationship with an employer. (ICT Mem. Opp’n MNA Mot. Partial Summ. J. 25, ECF No. 404.) Because MNA’s conduct undermines the public policies espoused in the Robinson-Patman Act and SCUTPA, Inter City argues that enforcement of the limitation of damages provision would undermine those policies as well.

The instant case is distinguishable from the traditional employment-at-will context. Employment-at-will arises “absent the creation of a specific contract of employment.” Barron, 713 S.E.2d at 637. MNA and ICT entered into a series of contracts, and those contracts

specifically provide for a limitation of damages in the event either party terminates the contracts. Moreover, the court has previously found that both MNA and ICT are “sophisticated business entit[ies].” (Aug. 20, 2013 Order 13, ECF No. 75.) Unlike an at-will employee who may have no viable alternative option to an employer, ICT has alternative sources of revenue. See (MNA Mot. Partial Summ. J. Ex. 8 (Neil Erbesh Aff. ¶ 11), ECF No. 370-9) (noting that sales of Michelin products make up more than 24 percent of ICT’s revenue).

Furthermore, enforcement of the limitation of damages provision would not undermine the Robinson-Patman Act or SCUTPA. Although the limitation of damages provisions prevent ICT from seeking damages resulting from termination of the Dealer Agreements, the provisions do not prevent ICT from pursuing damages for MNA’s other alleged violations of the Robinson-Patman Act or SCUTPA.⁴ Accordingly, the court finds that the limitation of damages clauses contained in the Dealer Agreements do not violate public policy, and MNA’s motion for partial summary judgment on the issue of termination damages is granted.

Finally, the parties dispute whether ICT’s termination damages are valued at \$68,000,000 or \$27,000,000. ICT has submitted a declaration from its proposed damages expert, Samuel Rosenfarb, stating that he has valued ICT’s termination damages at \$27,000,000.⁵ (ICT Mem. Opp’n MNA Mot. Partial Summ. J. Ex 22 (Rosenfarb Decl.), ECF

⁴The court expresses no opinion on the merits of whether MNA violated the Robinson-Patman Act or SCUTPA.

⁵MNA, Michelin Retread Technologies, Inc., and Service Tire Truck Center, Inc. have pending motions in limine to exclude the testimony of Mr. Rosenfarb. The court expresses no opinion on the merits of these motions at this time.

No. 404-22.) The court declines to address the specific amount of termination damages at this time.

It is therefore

ORDERED that MNA's motion for partial summary judgment, docket number 370, is granted.

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.
Senior United States District Judge

Greenville, South Carolina
December 22, 2014