IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FIRE PROTECTION SERVICE, INC., Plaintiff,	§	
v.	§	CIVIL ACTION NO. 4:19-2162
SURVITEC SURVIVAL PRODUCTS, INC., Defendant.	§	

MEMORANDUM AND ORDER

After Plaintiff Fire Protection Service, Inc. ("FPS") presented its evidence during the non-jury trial of this dispute, Defendant Survitec Survival Products, Inc. ("Survitec") made an oral Motion for Judgment on Partial Findings ("Motion") pursuant to Rule 52(c) of the Federal Rules of Civil Procedure, and filed a written Trial Brief [Doc. # 62] in support of the Motion. FPS filed a written Response [Doc. # 63], and the Court heard oral argument on the Motion. Having carefully reviewed the full record and applicable legal authorities, the Court **grants** the Motion.

I. FINDINGS OF FACT AND RELEVANT STATUTORY PROVISIONS

The Court makes the following findings of fact. Survitec is in the business of manufacturing marine safety and survival equipment, including life rafts. Beginning in the late 1990s, FPS was an authorized dealer and servicer of Survitec's life rafts pursuant to an oral agreement. Although both parties recognized the benefit of trying

to reach an amicable resolution of any disputes, either party could decide if it wanted to "walk away." The Court finds that FPS and Survitec each could terminate the agreement without cause. In August 2017, Survitec sent a letter to each of the three FPS service locations terminating the relationship between Survitec and FPS effective December 27, 2017.

After Survitec terminated the dealer agreement, FPS demanded that Survitec repurchase its unsold inventory in FPS's possession. FPS claimed Survitec was required to repurchase the unsold inventory under the Texas Fair Practices of Equipment Manufacturers, Distributors, Wholesalers, and Dealers Act, TEX. BUS. & COMM. CODE § 57.001 *et seq*. (the "Act"), which became effective September 1, 2011. The Act governs the relationship between suppliers and dealers of certain "equipment" as defined by the Act at § 57.002. Suppliers are those "engaged in the business of the manufacture, assembly, or wholesale distribution of equipment or repair parts." *Id.*, § 57.002(20). Dealers are those "primarily engaged in the business of selling or leasing equipment or repair parts for equipment to end users of the equipment; and repairing or servicing equipment." *Id.*, § 57.002(3). A "dealer agreement" is defined in the Act as "an oral or written agreement or arrangement, of definite or indefinite duration, between a dealer and a supplier that provides for the rights and obligations of the parties with respect to the purchase or sale of equipment or repair parts." *Id.*,

§ 57.002(4). The Act defines "equipment" to include machinery, equipment, or implements "used for, or in connection with . . . industrial, construction, maintenance, mining or utility activities or applications." *Id.*, § 57.002(7)(A)(iv). The Act provides specifically that "equipment" does not mean "off-highway vehicles." *Id.*, § 57.002(7)(B)(ii).

The Act provides that a "supplier may not terminate a dealer agreement without good cause." *Id.*, § 57.153. Under the Act, "good cause" is limited to those events identified in § 57.154.[1] The Act further requires that "a supplier must provide a dealer written notice of termination of a dealer agreement at least 180 days before the effective date of termination. The notice must state all reasons constituting good cause for the termination and that the dealer has 60 days in which to cure any claimed deficiency." *Id.*, § 57.155(a). If a supplier fails to comply with any of the requirements of the Act, the dealer may sue the supplier "for damages sustained by the dealer as a consequence of the supplier's violation, including damages for lost profits,

---

[1] Some of the "good cause" events listed in § 57.154 involve actions related to the dealer's financial condition, such as bankruptcy, actions for dissolution or liquidation of the business, and abandoning the business operation. *See* Act, § 57.154. Other events identified in the Act as constituting "good cause" involve serious misconduct by the dealer, such as being convicted of a felony affecting the dealer/supplier relationship and engaging in conduct that is injurious or detrimental to customers, the public welfare, or the reputation of the supplier's product. *See id.*

together with the actual costs of the action, including the dealer's attorney's fees and paralegal fees . . .." *Id.*, § 57.401(a).

As mentioned above, the Act requires the supplier, upon termination of a dealer agreement, to repurchase unsold inventory. *See id.* § 57.353. The supplier is not required to repurchase from the dealer certain items, such as repair parts that cannot be resold as a new part without repackaging or reconditioning, and inventory in the dealer's possession more than 36-months prior to notice of termination. *See id.*, § 57.358. "All payments or allowances of credit due to a dealer shall be paid or credited within 90 days after receipt by the supplier of property required to be repurchased under this subchapter." *Id.*, § 57.354(a). "A supplier who refuses to repurchase any inventory covered under [the Act] after termination or discontinuation of the dealer agreement is liable to the dealer for" 110% of the repurchase price of the unsold inventory, any freight charges paid by the dealer, interest, and the dealer's attorney's fees and costs. *See id.* § 57.355(a).

On May 17, 2019, FPS filed this lawsuit against Survitec in Texas state court. Following removal, FPS filed a First Amended Complaint [Doc. # 16], asserting a

claim that Survitec violated the Act by terminating the dealer agreement without good cause and without adequate notice, and by failing to repurchase the unsold inventory.[2]

The case was tried to the Court, with FPS presenting its evidence on February 3, 2021. At the close of FPS's evidence, Survitec presented its Rule 52(c) Motion for Judgment on Partial Findings. The Motion has been briefed and argued to the Court. It is now ripe for decision.

II. APPLICABLE LEGAL STANDARD

In a bench trial, a judgment entered after the plaintiff's case in chief is decided under Federal Rule of Civil Procedure 52(c), which provides for a judgment on partial findings. *Fairchild v. All Am. Check Cashing, Inc.*, 815 F.3d 959, 963-64 (5th Cir. 2016). A judgment on partial findings is appropriate when a claim or defense of the

---

[2] In connection with a dealer's right to sue for damages under § 57.401(a), FPS has presented evidence that it suffered damages "as a consequence of" Survitec's termination of their agreement without cause. FPS has failed to present evidence, however, that it suffered any damages "as a consequence of" Survitec's giving less than 180 days notice of termination and failing to include in the termination notice an explanation of the reason for termination.

In connection with the 90-day period for payment under § 57.354(a) of the Act, it is uncontested, and the Court finds, that Survitec has not yet received the unsold inventory that FPS claims Survitec must repurchase. As a result, the 90-day period has not yet begun.

With reference to seller's liability under § 57.355(a), discussions between the parties regarding Survitec's repurchase obligation have not resulted in an agreement regarding what inventory, if any, Survitec must repurchase under the Act, but FPS has not presented evidence that Survitec *refused* to repurchase the unsold inventory.

nonmoving party "can be maintained or defeated only with a favorable finding on that issue." *See* FED. R. CIV. P. 52(c). Rule 52(c) "does not require the district court to draw any inferences in favor of the non-moving party and permits the court to make a determination in accordance with its own view of the evidence." *Fairchild*, 815 F.3d at 964 n.1.

"A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a)." FED. R. CIV. P. 52(c). When a district court enters a Rule 52(c) judgment, the factual findings are reviewed for clear error and the legal conclusions are reviewed *de novo*. *Fairchild*, 815 F.3d at 964.

III. ANALYSIS

Survitec argues that the application of the Act to its dealer agreement with FPS would be a retroactive application in violation of the Texas Constitution.[3] The relevant Texas constitutional provision states: "No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made." TEX. CONST. art. I, § 16; *Associated Mach. Tool Techs. v. Doosan Infracore Am., Inc.*, 745

[3] Survitec argues also that the Act does not apply because the life rafts are not "equipment" as defined in the Act at § 57.002(7). As explained hereafter, the Court grants Survitec's Rule 52(c) Motion based on the argument that the retroactive application of the Act in this case violates the Texas Constitution. Therefore, the Court need not address definitively the difficult question whether the life rafts are "equipment" under the Act.

F. App'x 535, 537 (5th Cir. 2018).[4] In its Rule 52(c) Motion, Survitec bases its constitutional argument exclusively on the "retroactive law" provision in article I, § 16.

A. Retroactive Application

A statute is retroactive if it applies "in scope or effect to matters which have occurred in the past." *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 138 (Tex. 2010). In *Robinson*, the Texas Legislature enacted a law limiting successor liability for certain corporations facing asbestos claims. *See id.* at 130. The new statute applied to actions "pending on [the] effective date and in which the trial, or any new trial or retrial following motion, appeal or otherwise, begins on or after that effective date." *Id*. at 131. It was clear, and the Texas Supreme Court in *Robinson* recognized, that the new statute applied retroactively to the plaintiff's asbestos claim, a clam the plaintiff had a vested right to assert. *See id*. at 148.

---

[4] In *Doosan*, the Fifth Circuit certified to the Texas Supreme Court the question "[w]hether the termination for good cause provision of the Texas Dealers Act violates Article I, Section 16 of the Texas Constitution as applied to a contract terminable at will that was executed pre-enactment but terminated post-enactment." *Doosan*, 745 F. App'x at 539. On August 24, 2018, the Texas Supreme Court accepted the certified question, but the case settled prior to a decision by the Texas Court. *See Associated Mach. Tool Techs. v. Doosan Infracore Am., Inc.*, No. 18-0763 (Tex. Nov. 20, 2018). Therefore, the Fifth Circuit granted the parties' joint stipulation to withdraw the certified question. *See Associated Mach. Tool Techs. v. Doosan Infracore Am., Inc.*, No. 17-20527 (5th Cir. Dec. 10, 2018).

Here, it is uncontested that FPS and Survitec entered into their oral agreement in the late 1990s, well before the effective date of the Act in 2011. The Act states that it applies to "(1) a dealer agreement entered into or renewed on or after the effective date of this Act; and (2) a dealer agreement that was entered into before the effective date of this Act, has no expiration date, and is a continuing contract." *Doosan*, 745 F. App'x at 537 (quoting Act of June 17, 2011, ch. 1039, 2011 Tex. Sess. Law Serv. § 4(a)). Continuing contracts "which contemplate continuing performance (or successive performances) and which are indefinite in duration can be terminated at the will of either party." *Clear Lake City Water Auth. v. Clear Lake Utilities Co.*, 549 S.W.2d 385, 390 (Tex. 1977); *City of Corpus Christi v. Taylor*, 126 S.W.3d 712, 722 (Tex. App. – Corpus Christi-Edinburg 2004, pet. withdrawn).

FPS argues that the continuing contract with Survitec was actually a series of shorter contracts, citing *Northshore Cycles, Inc. v. Yamaha Motor Corp.*, 919 F.2d 1041 (5th Cir. 1990). In *Northshore*, a case involving Louisiana law rather than Texas law, the Fifth Circuit stated in *dicta* that a dealer agreement "which empowers either party to terminate without cause merely by furnishing, say, thirty (30) days' notice to the other party, might be construed as a month-to-month agreement . . .." *Northshore*, 919 F.2d at 1043. The Fifth Circuit's decision in *Northshore* is inapplicable, both legally and factually. There is no evidence in this case that the oral agreement

between FPS and Survitec contained a specific notice of termination provision, or any notice provision at all. There is also no evidence that the parties modified their oral agreement after it was entered into in the late 1990s. Although both parties had the right to terminate the contract prior to the effective date of the Act, there is no evidence that the parties agreed to incorporate the requirements of the Act into their existing contract and, thereby, to enter into a new contract to which the Act would apply only prospectively. There is no evidence that the parties intended their oral agreement to be a series of short-term contracts, rather than the long-term agreement that remained in existence until terminated, with or without cause, by either party.

The Court finds that the parties' oral agreement was entered into before the effective date of the Act, had no expiration date, and was a single continuing contract terminable at will. As a result, the Court concludes that the Act applied retroactively to the parties' oral agreement.

B. Constitutionality

"The Texas Supreme Court has held that 'the constitutional prohibition against retroactive laws does not insulate every vested right from impairment, nor does it give way to every reasonable exercise of the Legislature's police power; it protects settled expectations . . . and prevents the abuses of legislative power.'" *Doosan*, 745 F. App's at 538 (quoting *Robinson*, 335 S.W.3d at 145). There are "three factors to consider

when deciding if a retroactive statute is constitutional: (1) 'the nature of the prior right impaired by the statute'; (2) 'the extent of the impairment'; and (3) 'the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings.'" *Id*. (quoting *Robinson*, 335 S.W.3d at 145). "There must be a compelling public interest to overcome the heavy presumption against retroactive laws." *Robinson*, 335 S.W.3d at 146.

FPS argues that *Robinson* does not apply to a contract-clause challenge. *See* Response, pp. 12-13. FPS argues also that Survitec has failed to establish a violation of the contracts clause in either the United States Constitution or the Texas Constitution. Survitec is not, however, asserting a violation of the United States Constitution. Survitec's Rule 52(c) Motion is based on the "retroactive law" provision of the *Texas* Constitution, a provision to which *Robinson* clearly applies. *See Doosan*, 745 F. App'x at 538 (applying *Robinson*).

1. Nature of the Prior Right

In this case, the nature of the prior right impaired by the Act is Survitec's right to have its dealer agreement with FPS enforced according to the terms agreed upon by the parties. Prior to the effective date of the Act, Survitec could terminate the oral agreement with FPS, or decide to "walk away," without showing "good cause." There is no evidence that the parties to the oral agreement understood that Survitec was

required to provide FPS with 180 days notice prior to termination, or would be required to repurchase from FPS any unsold inventory. These settled expectations regarding the terms of the parties' agreement were altered by the Act. The Act at § 57.153 precludes Survitec from terminating its dealer agreement with FPS absent good cause, and § 57.155 of the Act requires Survitec to provide 180 days notice prior to termination. Section 57.353 of the Act imposes on Survitec an obligation to repurchase unsold inventory. The Act, applied retroactively to the parties' agreement, would impair the parties' "settled expectations" that their agreement would be enforced according to the terms to which they agreed, rather than the new terms imposed by the Act. *See Robinson*, 335 S.W.3d at 145.

FPS argues that because the parties' agreement was terminable at will, the parties could not have any expectations. *See* Response, p. 11. It was the very ability to terminate the agreement at will, however, that was a significant component of the parties' "settled expectations" in the agreement.

The Court finds that the parties had settled expectations that their agreement would be enforced according to the terms to which they agreed, including the term allowing either party to terminate the agreement without cause. The Court finds further that the retroactive application of the Act, particularly § 57.153 precluding a

supplier from terminating a dealer agreement without good cause, impaired those settled expectations.

2. Extent of the Impairment

FPS argues that there is little, if any, impairment to the parties' agreement as a result of the Act. To the contrary, the Act's impairment of the parties' settled expectations and rights in their agreement is significant, if not total. The retroactive application of the Act completely prevents Survitec from terminating its agreement with FPS without one of the good cause bases listed in § 57.154 of the Act, which all require some action by or involving FPS that adversely impacts Survitec or FPS's customers, or reflects FPS's change of ownership or financial distress. The Act defines "terminate" broadly to include "terminate, cancel, fail to renew, or substantially change the competitive circumstances of a dealer agreement." Act, § 57.002(21). The Act also precludes the parties from agreeing to protect prior contractual rights, stating that any "attempted waiver of a provision of this chapter or of the application of this chapter is void." *See id.*, § 57.003. Therefore, under the Act, it appears impossible for Survitec to terminate the agreement based on general dissatisfaction with FPS's performance, changes in Survitec's business model, relocation to a new geographic area, or a change to a different product line. *See, e.g., Associated Mach. Tool Techs. v. Doosan Infracore Am., Inc.*, 2015 WL 13660130, *4

(S.D. Tex. Nov. 24, 2015). The Act fundamentally changed the parties' relationship, effectively binding Survitec to FPS unless and until FPS engaged in conduct identified as "good cause" in the Act.

The Act was "approved" on June 17, 2011, but did not become effective until September 1, 2011. FPS argues that, as a result of this "grace period" between enactment and effective date, the retroactive application of the Act did not impair Survitec's right to terminate the oral agreement at will because Survitec could have terminated the agreement any time between enactment and the effective date of the Act. FPS is correct that Survitec could have terminated the dealer agreement with FPS after the Act was enacted in June 2011 and before it became effective on September 1, 2011. This does not, however, prevent the Act's impairment of Survitec's settled expectation that it would be able to *choose* to terminate the agreement when it decided to do so. In FPS's scenario, Survitec would have been *forced* to terminate its dealer agreement with FPS in order to avoid the effect of the Act on the oral agreement. There was nothing Survitec could do during the period between enactment and effective date, other than terminate the agreement, to protect its interest and rights in the voluntary and inherently flexible dealer agreement it had with FPS. The Court finds that the extent of the Act's impairment of the parties' settled expectations in their pre-existing agreement was substantial, if not total.

3. Public Interest

The sponsor of the Act stated that the "purpose of this law is to protect dealers from changes imposed by a supplier if the changes are substantial and negatively impact the dealer's business." *Doosan*, 2015 WL 13660130 at *5 (citing Texas Senate Journal, 2011 Reg. Sess. No. 67). This stated purpose of the Act, to provide dealers with bargaining power and protection, clearly benefits dealers. It is unclear, and unexplained, how the Act's protection for dealers serves the broader public interest. *See, e.g., Robinson*, 335 S.W.3d at 149 (noting that the new law would benefit Texas by "reducing the liability of an employer and investor in the State," but finding that the extent of that benefit was unclear and failed to rise to the level of public interest).

In the legislative history of the Act, the Texas Legislature stated summarily and without explanation that the retail sales of equipment covered by the Act "through the use of independent dealers operating under contract with the equipment suppliers vitally affect the general economy of this state, the public interest, and the public welfare." H.B. 3079, 82nd Leg., Reg. Sess. (Tex. 2011), ch. 1039, § 1. FPS argues, based on this comment, that the Texas Legislature intended to benefit "the public interest" and that this Court must "give effect to the Legislature's intent." *See* Response, p. 17. The Texas Supreme Court in *Robinson* noted that the new, retroactively-applied law would benefit Texas's public interest by "reducing the

liability of an employer and investor in the State." *Robinson*, 335 S.W.3d at 149. *Robinson* specifically cautions, however, that the prohibition on retroactive laws exists to prevent "the abuses of legislative power that arise when individuals or groups are singled out for special reward or punishment." *Robinson*, 335 S.W.3d at 145; *see also Doosan*, 2015 WL 13660130 at *5. Although the Texas Supreme Court in *Robinson* recognized a public interest in the new statute, the Court held that the public interest was "slight" and that the new law, as applied to the plaintiff's asbestos claim, violated article I, § 16 of the Texas Constitution. *See Robinson*, 335 S.W.3d at 150.

In this case, notwithstanding the Texas Legislature's general, unsupported comment regarding public interest, the relevant subsection of the Act prohibiting a supplier from terminating a dealer agreement without good cause protects only dealers and no other members of the public. *See, e.g.*, *Doosan*, 2015 WL 13660130 at *6. Any public interest that the Legislature found was served by the Act is only slight, and fails to outweigh the impairment of Survitec's settled expectations in its oral agreement with FPS.

It is clear that the Texas Legislature viewed protecting dealers as a valid goal. "A retroactive law is not permissible merely because the end seems to justify the means. The presumption is that a retroactive law is unconstitutional without a compelling justification that does not greatly upset settled expectations." *Robinson*,

335 S.W.3d at 146-47. In this case, the Court concludes that the Act applies retroactively to the parties' dealer agreement, and that the retroactive application greatly upsets the parties' settled expectations that their oral agreement would remain terminable at will. The relatively narrow public interest on which FPS relies fails to outweigh the Act's significant disruption of the parties' settled expectations. Therefore, the retroactive application of the Act to the FPS-Survitec oral agreement violates article I, § 16 of the Texas Constitution.[5]

IV. CONCLUSION AND ORDER

The Act became effective September 1, 2011. The retroactive application of the Act to the oral agreement between Survitec and FPS – an agreement that was in effect long before the Act's effective date – violates article I, § 16 of the Texas Constitution. As a result, the Act cannot be enforced against Survitec in this case, and it is hereby

---

[5] FPS notes that the Texas Supreme Court, after "striking down several Depression-era moratory statutes" that authorized postponement of the deadline for paying debts, has "never again struck down a law as an unconstitutional impairment of contract." *See* Response, p. 12. As noted above, however, Survitec asserts only a "retroactive law" argument in support of its Rule 52(c) Motion based on a violation of the Texas Constitution. As recently as 2010, the Texas Supreme Court struck down a statute as a violation of the "retroactive law" provision of article I, § 16 of the Texas Constitution. *See Robinson*, 335 S.W.3d at 150.

ORDERED that Survitec's Motion for Judgment on Partial Findings [Doc. # 62] is **GRANTED** and judgment on FPS's claim under the Act is entered in favor of Survitec. The Court will issue a separate final judgment.

SIGNED at Houston, Texas, this 12th day of **February, 2021.**

NANCY F. ATLAS
SENIOR UNITED STATES DISTRICT JUDGE