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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

RESOLUTE TRANSPORTATION, INC., Plaintiff and Appellant, v. SHOFUR, LLC et al., Defendants and Respondents.	B272294 (Los Angeles County Super. Ct. No. BC601700)

APPEAL from an order of the Superior Court of Los Angeles County. Elizabeth Feffer, Judge. Affirmed.

Kanowsky & Associates, Carl Kanowsky and Dean Ogrin; Broedlow Lewis, Jeffrey Lewis and Kelly B. Dunagan for Plaintiff and Appellant.

Lapidus & Lapidus and Daniel Craig Lapidus for Defendants and Respondents.

Resolute Transportation, Inc. (appellant) appeals from an order dismissing its complaint against Shofur, LLC and Shofur Holdings, LLC (collectively respondents) based on a forum selection clause included in the agreement between the parties. We find no abuse of discretion, therefore we affirm the order.

FACTUAL BACKGROUND

Appellant is a business entity engaged in passenger transportation. Appellant had a longstanding business relationship with United Healthcare Workers (UHW) which it had worked hard to cultivate over the years. Appellant annually earned hundreds of thousands of dollars in revenue by providing transportation services to UHW.

Appellant contracted with UHW to provide transportation services to carry UHW members from locations around California to Sacramento, California for a rally on June 2, 2015.

Respondents are business entities with their principal places of business in Georgia. Respondents provide their customers with access to a fleet of buses, shuttles, limousines and other vehicles with their own drivers. Customers reserve the type of vehicle needed for a specific period of time and respondents coordinate to provide the vehicle and driver for the requested time period.

In May 2015, appellant contacted respondents via e-mail requesting a price quote for approximately 166 buses on June 2, 2015, departing from multiple locations and traveling to Sacramento, California. On May 21, 2015, respondents emailed a price quote and reservation agreement to appellant.

On May 26, 2015, appellant requested a reduction of the order from 166 buses to 35 buses. Later that day, appellant changed the request from 35 buses to 36 buses.

On the same day, respondents emailed appellant an updated reservation agreement for 36 buses. The total rate

under the contract was $129,088. The agreement contained limitations on respondents' liability as well as a clause stating:

> "This Agreement and related Terms of Service shall be subject to and governed by and interpreted and construed in accordance with the laws of the State of Georgia, without regard to such state's conflicts of laws principles. You hereby consent to the exclusive jurisdiction and venue of the state and federal courts located in Fulton County, Georgia, USA, in all disputes arising out of, or relating to, the use of this Agreement, Website and the Terms of Use."

Appellant paid respondents $129,088 the same day that it received the price quote and contract.

Following receipt of the payment, respondents emailed appellant to confirm receipt of the wire payment and requested that appellant return to respondents an executed copy of the agreement. Eric Abbott, president and CEO of appellant, responded "Sure bet."[1] However, appellant did not sign the contract.

Abbott provided a declaration stating that he advised respondents' agent, Tony,[2] that he did not agree to certain terms in the contract, including one that provided that respondents would not be responsible for equipment failures. Abbott stated that he expressly refused to sign the contract, and that Tony responded that respondents would not provide services without a signed written contract. Abbott states he made it clear to Tony that the only terms agreeable to appellant were the fees to be

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[1] A copy of this email exchange is in the record.

[2] Amir Tony Harris (referred to as Tony for consistency), is the owner and president of respondents, who often goes by "Tony" in communications with customers.

charged and the number of buses. Abbott claims to have had this conversation with Tony more than once.

Tony filed a responsive declaration. In it, he stated: "No one on behalf of [appellant] ever told me that [appellant] would not sign the Contract. In fact, the exact opposite is true. On May 26, 2015, in response to my email to Mr. Fitzpatrick asking for [appellant] to return the signed Contract, Mr. Fitzpatrick replied, "Sure bet."[3]

On May 27, 2015, Jason Katz, identified as the general manager in Los Angeles for appellant, emailed respondents to change the order from 35 buses to 31 buses, with the additional request that some buses comply with the Americans with Disabilities Act. Later that same day, Katz emailed again, requesting a change from 31 to 32 buses. Katz confirmed the order of 32 buses two days later.

During the evening of June 1, 2015, respondents received more calls from appellant, requesting more changes to the reservation. At approximately 1:26 a.m. on June 2, 2015, the day of the scheduled services, Katz sought to change the reservation back to 35 buses. Katz sent respondents an email stating: "We, Resolute Transportation have agreed to the 35 coaches provided in the attached document and agree to the terms sent previously. We understand there will be a refund of approximately $2,000 due to us for the difference in price." Tony declared that on the basis of this email, respondents operated with the understanding that appellant agreed to the terms of the previously sent contract.

Appellant alleges that the bus service provided by respondents was inadequate. More than 14 buses were late. Other buses had drivers back out of the job. Two buses broke down. One bus driver fell asleep at the wheel and the riders of

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[3] This evidence conflicts with the email in the record. See footnote 1.

that bus missed the rally. Toilets on two buses overflowed and the drivers refused to stop and allow passengers to use the restroom.

As a result of respondents' failure to provide adequate services, appellant alleges that it was forced to reduce its bill to UHW by $198,000. In addition, appellant lost UHW as a client.

PROCEDURAL HISTORY

On November 19, 2015, appellant filed its complaint against respondents and two individuals, all of whom were alleged to be agents of each other. The complaint alleged causes of action for breach of oral contract, fraud, negligent misrepresentation, negligence, and a common count for money had and received. In its breach of contract allegations, appellant alleged a single oral contract with respondents.

In February 2016, respondents filed a motion to dismiss the action based on the forum selection and choice of law provisions within the operative contract between the parties. Respondents argued that, based on the forum selection clause, the case should be dismissed pursuant to Code of Civil Procedure sections 410.30 and 418.10.[4] Appellant opposed the motion.

On March 18, 2016, the trial court heard and granted the motion to dismiss.

DISCUSSION

I. Applicable law and standard of review

Section 410.30 provides, in part: "When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just." (§ 410.30, subd. (a).)

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[4] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Section 418.10 permits a defendant to file a motion to stay or dismiss an action on the ground of inconvenient forum. (§ 418.10, subd. (a)(2).)

A defendant may enforce a forum selection clause by bringing a motion pursuant to sections 410.30 and 418.10. (*Cal-State Business Products & Services, Inc. v. Ricoh* (1993) 12 Cal.App.4th 1666, 1680.) Generally, California courts will "enforce forum selection clauses contained in a contract freely and voluntarily negotiated at arm's length unless enforcement would be unfair or unreasonable. [Citation.]" (*Hunt v. Superior Court* (2000) 81 Cal.App.4th 901, 908 (*Hunt*).)

An order dismissing a complaint on the ground of inconvenient forum is reviewed for abuse of discretion. (*Trident Labs, Inc. v. Merrill Lynch Commercial Finance Corp.* (2011) 200 Cal.App.4th 147, 154.) If the order was based on any challenged findings of fact pertaining to the existence of a contract or mutual assent, the standard of review is substantial evidence. (*Vita Planning & Landscape Architecture, Inc. v. HKS Architects, Inc.* (2015) 240 Cal.App.4th 763, 771-772 (*Vita Planning*).) Under this standard, "we must uphold the trial court's finding if supported by substantial evidence." (*Id.* at p. 772.) Substantial evidence is evidence that is """"reasonable in nature, credible, and of solid value . . . ."""" (*Ibid.*) "'The ultimate determination is whether a reasonable trier of fact could have found for the respondent based on the whole record. [Citation.]' [Citation.]" (*Ibid.*)

II. Substantial evidence supports the trial court's determination that appellant agreed to the forum selection clause

A threshold question is whether appellant consented to the forum selection clause contained within the written terms emailed to appellant along with the proposed price. It is

undisputed that neither party signed the written agreement. However, "when the respective parties orally agree upon all of the terms and conditions of an agreement with the mutual intention that it shall thereupon become binding," the agreement may be enforced even where there is no formal written agreement. (*Columbia Pictures Corp. v. De Toth* (1948) 87 Cal.App.2d 620, 629; *Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 358 (*Banner*).)

"Whether it was the parties' mutual intention that their oral agreement to the terms contained in a proposed written agreement should be binding immediately is to be determined from the surrounding facts and circumstances of a particular case and is a question of fact for the trial court. [Citations.]" (*Banner, supra*, 62 Cal.App.4th at p. 358.) "Evidence as to the parties' understanding and intent in taking what actions they did take is admissible to ascertain when or whether a binding agreement was ever reached. [Citations.]" (*Ibid.*)

Here, the trial court reviewed extensive evidence regarding the question of whether the parties reached an agreement to be bound by the written terms. The court had two declarations from Tony, owner and president of respondents, who directly communicated with appellant regarding the business transaction. These declarations laid out the chain of events leading up to the day that services were rendered pursuant to the contract. Tony also attached a copy of the document which laid out respondents' terms, as well as copies of the email communications between the parties.

The written agreement itself does not require signatures in order to become enforceable. On the contrary, it contains language suggesting that no signature is necessary. Specifically, it states on the first page: "When you make a reservation for transportation . . . you enter into an agreement with us." It also

states on the first page: "Please review these Service Terms fully before you agree to use the Services. By using our Services, you agree to be bound by these Service Terms."

The trial court also had before it an email from Katz, appellant's general manager from Los Angeles, expressly agreeing to "the terms sent previously."

This evidence is a sufficient basis for the trial court's determination that there was mutual consent to the terms provided in respondents' written contract. Appellant vigorously disputes that the evidence above was sufficient for the trial court to conclude that appellant agreed to the forum selection clause set forth within that written contract. However, the evidence considered by the trial court was reasonable, credible, and of solid value. A "'reasonable trier of fact could have found for the respondent based on the whole record. [Citation.]' [Citation.]" (*Vita Planning, supra*, 240 Cal.App.4th at p. 772.) Under the circumstances, we do not disturb the trial court's factual determination that the parties agreed to the forum selection clause.

III. The trial court properly dismissed the matter as to all defendants

Appellant argues that the trial court improperly dismissed the matter as to Shofur Holdings, LLC. Appellant explains that the unsigned proposal containing a Georgia forum selection clause was between Shofur, LLC and appellant. No similar contract was introduced between Shofur Holdings, LLC and appellant. In addition, respondents introduced no evidence regarding the relationship between the two entities nor why Shofur Holdings, LLC was entitled to enforce a contract to which it was not a party. Appellant argues that at a minimum, the order below should be reversed as to Shofur Holdings, LLC.

Appellant concedes that it alleged in its complaint a single contract with Shofur, LLC and Shofur Holdings, LLC. Specifically, appellant pled that, "In about May 2015, in Los Angeles County, California, [appellant] and [respondents] entered into an oral contract which provided that [appellant] would pay [respondents] to safely and timely transport member of the UHW from Southern California to the Rally in Sacramento, California." The trial court ultimately held that the single contract referenced in appellant's complaint incorporated the written terms that respondents had emailed to appellant.

Appellant makes no allegations that it entered a separate agreement with Shofur Holdings, LLC. While appellant concedes that its allegations are binding, appellant argues that there are no allegations that appellant entered an agreement with Shofur Holdings, LLC to litigate in Georgia.

The trial court found otherwise. The trial court found that the single contract at issue contained an enforceable forum selection clause. Because that single contract existed between appellant and both respondents, it follows that the forum selection clause also applies to both respondents.

Lu v. Dryclean-U.S.A. of California (1992) 11 Cal.App.4th 1490 (*Lu*), supports this outcome. In *Lu*, the plaintiffs filed a complaint for rescission of a franchise agreement and damages. The agreement contained a forum selection clause which required any disputes arising out of the agreement to be litigated in Florida. The court found that forum selection clause to be valid and issued an order granting defendants' motion to dismiss. (*Id.* at pp. 1492-1493.) On appeal, the plaintiffs argued, among other things, that the forum selection clause was not enforceable against two of the defendants, Dryclean Franchise and Dryclean U.S.A., because these two related corporate entities did not sign the agreement containing the clause. (*Id.* at pp. 1493-1494.) The

Court of Appeal disagreed, finding that the alleged conduct of the two parent entities was "closely related to the contractual relationship." (*Id.* at p. 1494.) The forum selection clause therefore applied to the related entities as well as the signatory. The appellate court reasoned that "[t]o hold otherwise would be to permit a plaintiff to sidestep a valid forum selection clause simply by naming a closely related party who did not sign the clause as a defendant." (*Ibid.*, fn. omitted.)

Appellant attempts to distinguish *Lu* because in *Lu*, there was evidence that the parent entities were involved in the transaction. Appellant argues that respondents offered no evidence below that Shofur Holdings, LLC was a close participant or had any involvement in the provision of buses to appellant. In the absence of such evidence, appellant argues, *Lu* is inapplicable.

We disagree. Appellant chose to include Shofur Holdings, LLC in the lawsuit and alleged that it contracted with appellant to provide the services under the agreement. Thus, pursuant to the complaint, Shofur Holdings, LLC's actions were identical to those of Shofur, LLC. Respondents were not required to produce additional evidence of Shofur Holdings, LLC's involvement in order to take advantage of the agreed upon forum selection clause.

IV. Corporations Code section 2203 does not require reversal

It was undisputed in the trial court that respondents conducted intrastate business in California without registering with the Secretary of State, as required. Appellant argues that Corporations Code section 2203 imposes a consequence on corporations that fail to register with the California Secretary of State. The legal consequence for respondents' failure to register,

appellant argues, is acquiescence to the jurisdiction of California courts.

Corporations Code section 2203, subdivision (a), provides:

> "Any foreign corporation which transacts intrastate business and which does not hold a valid certificate from the Secretary of State may be subject to a penalty of twenty dollars ($20) for each day that unauthorized intrastate business is transacted; and the foreign corporation, by transacting unauthorized intrastate business, shall be deemed to consent to the jurisdiction of the courts of California in any civil action arising in this state in which the corporation is named a party defendant."

Under Corporations Code section 2203, subdivision (c), a foreign corporation that transacts business in California without complying with the registration requirement is not permitted to "maintain any action or proceeding upon any intrastate business so transacted in any court of this state . . . until it has complied with the [registration requirement]."

The statute has been interpreted by the courts as follows:

> "A foreign corporation transacting intrastate business which has failed to qualify with the Secretary of State may nevertheless *defend* an action brought against it in state court. [Citations.] A foreign corporation transacting intrastate business which has failed to qualify with the Secretary of State may also *commence* an action in state court. [Citation.] A foreign corporation transacting intrastate business which has failed to qualify may not, however, *maintain* an action commenced prior to qualification, except upon the satisfaction of certain conditions. (§ 2203, subd. (c).)"

(*United Medical Management Ltd. v. Gatto* (1996) 49 Cal.App.4th 1732, 1739.)

Appellant cites no case law, and we have found none, suggesting that a forum selection clause in a contract is defeated by a corporation's failure to register with the Secretary of State. Foreign corporations are entitled to defend against actions brought against them in state court regardless of registration status. (*Mediterranean Exports, Inc. v. Superior Court of San Mateo County* (1981) 119 Cal.App.3d 605, 614 [Corporations Code section 2203 "does not include a provision that the corporation may not *defend* an action brought against it"].) In this case, respondents' defense included a motion to dismiss on the ground of forum non conveniens.

Appellant argues that under the plain language of the statute, a corporation that fails to register "shall be deemed to consent to the jurisdiction of the courts of California." (§ 2203, subd. (a).) However, the statute appears to refer to personal jurisdiction, not subject matter jurisdiction. Personal jurisdiction may be established through "activities conducted or effects generated within the state's boundaries sufficient to establish a 'presence' in the state so that exercising jurisdiction is consistent with '"traditional notions of fair play and substantial justice."' [Citations.]" (*Global Packaging, Inc. v. Superior Court* (2011) 196 Cal.App.4th 1623, 1629 (*Global Packaging*).) Personal jurisdiction is determined by "the legal existence of the party and either its presence in the state or other conduct permitting the court to exercise jurisdiction over the party." (*Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal.4th 1028, 1034-1035 (*Greener*).) Thus, it logically follows that a corporation engaging in business in California without registering shall be deemed to have consented to personal jurisdiction in this state. Respondents have not objected to personal jurisdiction in this matter.

Subject matter jurisdiction is different. "Subject matter jurisdiction . . . is the power of the court over a cause of action or

to act in a particular way. [Citations.]" (*Greener, supra*, 6 Cal.4th at p. 1035.) The parties cannot deprive courts of a subject matter jurisdiction if they have it. However, the parties can contract to select a forum among those that do have subject matter jurisdiction. In such cases, "'courts possess discretion to *decline* to exercise jurisdiction in recognition of the parties' free and voluntary choice of a different forum. . . .' [Citation.]" (*Miller-Leigh LLC v. Henson* (2007) 152 Cal.App.4th 1143, 1149.) That is what occurred here. Appellant has failed to establish that Corporations Code section 2203 operates to defeat the trial court's power to decline to exercise jurisdiction in recognition of an enforceable forum selection clause.

"Courts will enforce forum selection clauses contained in a contract freely and voluntarily negotiated at arm's length unless enforcement would be unfair or unreasonable. [Citation.]" (*Hunt, supra*, 81 Cal.App.4th at p. 908.) Forum selection clauses are "presumed valid; the party opposing its enforcement bears the 'substantial' burden of proving why it should *not* be enforced. [Citations.]" (*Global Packaging, supra*, 196 Cal.App.4th at p. 1633.) Appellant has failed to show that Corporations Code section 2203 should defeat the forum selection clause at issue here.

DISPOSITION

The order is affirmed. Respondents are awarded their costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.*
GOODMAN

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* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.