Filed 12/20/16 Vardanyan v. Costa Rica Travel Planning CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ASTRIK VARDANYAN et al., Plaintiffs and Appellants, v. COSTA RICA TRAVEL PLANNING, INC., Defendant and Respondent.	B266292 (Los Angeles County Super. Ct. No. BC548200)

APPEAL from an order of the Superior Court of the County of Los Angeles, Gregory W. Alarcon, Judge. Affirmed.

Kabateck Brown Kellner, Brian S. Kabateck, Joshua H. Haffner, Kevin S. Conlogue, Justin F. Spearman for Plaintiffs and Appellants.

WFBM, Mary Watson Fisher, Stacy M. LaRuffa for Defendant and Respondent.

Plaintiffs and appellants Astrik Vardanyan, Erik Pogosyan, David Pogosyan, and Hiyk Pogosyan,[1] appeal from an order granting a motion to dismiss filed by respondent and defendant Costa Rica Travel Planning, Inc. (C.R. Travel). The order resulted in the dismissal of plaintiffs' lawsuit against C.R. Travel and the other defendants based on a forum selection clause contained in their contract. Plaintiffs contend the forum selection clause was unenforceable. Plaintiffs also argue the trial court erred in not granting them leave to file a declaration. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed a wrongful death lawsuit[2] against C.R. Travel and other defendants.[3] Plaintiffs alleged that at all relevant times they were California residents, and C.R. Travel was a corporation with its principal place of business in Colorado.

Plaintiffs alleged that in June 2013, Vardanyan purchased a vacation package from C.R. Travel, a travel agency. C.R. Travel sent an e-mail to Vardanyan, dated July 8, 2013,

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[1] Because Erik Pogosyan, David Pogosyan and Hiyk Pogosyan share the same surname, we refer to them by their first names.

[2] According to plaintiffs, decedent drowned while swimming in the ocean in Costa Rica. Vardanyan was decedent's wife; Erik, David, and Hiyak were decedent's minor sons.

[3] Only defendant C.R. Travel filed a respondent's brief. Plaintiffs' state they recently learned the other named defendants will not be appearing.

regarding the planned trip, stating in part, "Thanks again for choosing us to make your Costa Rica vacation arrangements. We are currently in the process of confirming your reservations.. . . [¶] Please remember . . . the recommended itinerary and quote we sent you [are] subject to availability and change. We do not know at this point if all the hotels, activities, etc. listed in your quote are available. We are working on that now. . . . [¶] When your reservations are confirmed, we will send your confirmed itinerary to you via e-mail. Our policy is to collect 50% of the total amount due upon confirmation and the remaining balance at least 45 days prior to your departure. [¶] By asking us to make reservations for you, you are agreeing to our Terms & Conditions. If you cancel your reservations with us from this point forward, we will charge your credit card a minimum $50/person non-refundable cancellation fee. This is in addition to any penalties or fees charged by any applicable entities (hotels, airlines, tour companies, etc.)"

The terms and conditions attached to the email consisted of one page and included a forum selection clause in a separate paragraph with the heading "*APPLICABLE LAW*" in italicized, capitalized print. Below that heading was the following language: "The contract will be governed by the laws of the State of Colorado and all disputes shall be brought in Weld County, Colorado."

Plaintiffs further alleged: (1) on approximately July 12, 2013, (about four days after C.R. Travel's e-mail to Vardanyan enclosing the forum selection clause) they received from C.R. Travel "a full travel itinerary for the trip to Costa Rica;" (2) on July 30, 2013, over three weeks after C.R. Travel's e-mail, they and decedent "arrived in Costa Rica to start their vacation;" on

August 4, 2013, decedent drowned in Costa Rica while swimming in the ocean; and (4) defendants were liable for decedent's death because they failed to warn decedent of dangerous ocean undercurrents. After the complaint was filed, Vardanyan was appointed guardian ad litem for Erik, David, and Hiyak.

After C.R. Travel was served with the summons and complaint, it removed the matter to federal court based on diversity of citizenship. About five months later, on plaintiffs' motion, the federal district court remanded the case to the California Superior Court.

C.R. Travel filed a motion to dismiss pursuant to Code of Civil Procedure section 410.30,[4] based on the forum selection clause. Plaintiffs opposed the motion to dismiss arguing the forum selection clause was unenforceable and unreasonable because: (1) there was lack of notice; (2) it was not conspicuous; (3) it was unconscionable; (4) its enforcement would deprive plaintiffs of their day in court; (5) it lacked mutuality; and (6) both public and private factors weighed in plaintiffs' favor.

At the hearing on the motion, the following exchange occurred: "[Plaintiffs' counsel]: Your Honor, the first thing I wanted to say is looking at the tentative [ruling I] noted that [it said] there was no evidence submitted in support of our opposition[;] I was surprised to see that . . . . [I] instructed that [our client's declaration—the Vardanyan declaration] be filed in this case . . . . When I saw the tentative, I e-mailed my office, and my associate there just e-mailed me [and said] oops. It didn't get filed. [¶] So, Your Honor, I request leave that that declaration be filed so the court could consider it. [¶] . . . [¶] [C.R. Travel's

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[4] All statutory citations are to the Code of Civil Procedure unless otherwise noted.

counsel]: Well, I would object, Your Honor. I'm sorry to have to do that, but we've had plenty of time. This case has been around the circle a bit . . . . [¶] [I]t doesn't look like an 'oops. I forgot to attach it.' There's actually no reference to anything in the opposition papers to lead you to believe that there would've been anything attached— [¶] . . . [¶] [Plaintiffs' counsel]: I just . . . want[ed] to note that we do, in fact, cite to our client's declaration on page 8 of the opposition. It's clear we made an error in not hav[ing] fil[ed] it with the court." The trial court took C.R. Travel's motion to dismiss under submission. As noted, the motion was ultimately granted and the case was dismissed.

DISCUSSION

A. Vardanyan Declaration

Citing to section 473, plaintiffs contend their requested relief to allow them to file Vardanyan's declaration was mandatory.[5] Plaintiffs' contention is comprised of one sentence and is not supported by any argument of how and why section 473 is applicable. Plaintiffs therefore have waived their claim the trial court erred in not granting them leave to file the declaration. "An appellate court 'will not develop the appellants' arguments for them . . . .' [Citation.]" (*Pfeifer v. Countrywide Home Loans, Inc.* (2012) 211 Cal.App.4th 1250, 1282, fns. omitted.)

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[5] We deny plaintiffs' request to take judicial notice of a one-page declaration of Vardanyan (without exhibits) because, without exceptional circumstances, we are not inclined to take judicial notice of material that was not presented in the trial court. (*Innovative Business Partnerships, Inc. v. Inland Counties Regional Center, Inc.* (2011) 194 Cal.App.4th 623, 627.)

Even if plaintiffs did not waive their claim, section 473 is inapplicable. Section 473, subsection (b) provides that "[W]henever an application for relief is made . . ., and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, [the trial court shall] vacate any . . . resulting . . . dismissal entered against his or her client . . . ." (See also *Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1604.) Plaintiffs' request for leave to file Vardanyan's declaration was not supported by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect. There is no exception to the requirement that the party seeking mandatory relief under section 473, subdivision (b) submit an attorney affidavit of fault. (*Las Vegas Land & Development Co., LLC v. Wilkie Way, LLC* (2013) 219 Cal.App.4th 1086, 1092-1093.)

In addition, plaintiffs incorrectly claimed at the hearing on the motion (and argue on appeal) that they cited Vardanyan's declaration on page 8 of their opposition to the motion to dismiss. Page 8 of plaintiffs' opposition cited to "Decl." The term "Decl." was defined in plaintiffs' opposition as "[C.R. Travel]'s declaration in support of Motion to Dismiss," and as the "Declaration of Stacey M. Dippong." Dippong was counsel for C.R. Travel, and her declaration was the only declaration submitted in support of the motion to dismiss. That is, the declaration to which plaintiffs cited in their opposition was not the Vardanyan declaration, as plaintiffs contend, but the declaration of C.R. Travel's counsel submitted in support of C.R. Travel's motion to dismiss. Nowhere in plaintiffs' opposition was there even a reference to Vardanyan's declaration or any

indication plaintiffs would be filing and relying on it in support of their opposition. The trial court did not err.

B. Dismissal Based on Forum Selection Clause

1. Standard of Review

The case authority is divided as to the standard of review applicable when an appellate court reviews a trial court's decision to enforce a forum selection clause. Some appellate courts have applied a substantial evidence standard of review. (See, e.g., *CQL Original Products, Inc. v. National Hockey League Players' Assn.* (1995) 39 Cal.App.4th 1347, 1354; *Cal-State Business Products & Services, Inc. v. Ricoh* (1993) 12 Cal.App.4th 1666, 1680-1681 (*Cal-State*).) The majority of courts, however, have applied the abuse of discretion standard. (See, e.g., *Verdugo v. Alliantgroup, L.P.* (2015) 237 Cal.App.4th 141, 148 (*Verdugo*); *Trident Labs, Inc. v. Merrill Lynch Commercial Finance Corp.* (2011) 200 Cal.App.4th 147, 154, fn. 3; *America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 7-9.) We apply the standard adopted by the majority and review the trial court's decision in this case for an abuse of discretion.

2. Applicable Law

A defendant may enforce a forum selection clause by bringing a motion pursuant to section 410.30. (*Cal-State*, *supra*, 12 Cal.App.4th at p. 1680.) Section 410.30, subdivision (a) provides: "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."

"California favors contractual forum selection clauses so long as they are entered into freely and voluntarily, and their enforcement would not be unreasonable. [Citation.]" (*America Online, Inc. v. Superior Court, supra,* 90 Cal.App.4th at p. 11.) Nonetheless, "California courts will refuse to defer to the selected forum if to do so would substantially diminish the rights of California residents in a way that violates our state's public policy." (*Id.* at p. p. 12; see *Intershop Communications AG v. Superior Court* (2002) 104 Cal.App.4th 191, 200 (*Intershop*) ["a forum selection clause will not be enforced if to do so would bring about a result contrary to the public policy of this state"].)

A distinction has been drawn between permissive and mandatory forum selection clauses for the purpose of analyzing whether the clause should be enforced. A forum selection clause is permissive if it merely requires the parties to submit to jurisdiction in the chosen forum; the clause is mandatory if it requires the parties to litigate disputes exclusively in the chosen forum. (*Verdugo*, *supra*, 237 Cal.App.4th at p. 147, fn. 2.) When the clause is merely permissive "the traditional forum non conveniens analysis applies." (*Intershop, supra,* 104 Cal.App.4th at p. 196.) When a mandatory forum selection clause exists, courts do not consider the traditional forum non conveniens factors; the only question is whether enforcement of the clause would be unreasonable. (*Verdugo*, *supra*, 237 Cal.App.4th at p. 147, fn. 2; *Animal Film, LLC v. D.E.J. Productions, Inc.* (2011)

193 Cal.App.4th 466, 471; *Intershop, supra,* 104 Cal.App.4th at p. 196.)[6]

"A forum selection clause . . . is presumed valid; the party opposing its enforcement bears the 'substantial' burden of proving why it should *not* be enforced" (i.e., that the clause is unreasonable). (*Global Packaging, Inc. v. Superior Court* (2011) 196 Cal.App.4th 1623, 1633; *Schlessinger v. Holland America* (2004) 120 Cal.App.4th 552, 558-559 (*Schlessinger*.) A forum selection clause is unreasonable if the forum selected would be "unavailable or unable to accomplish substantial justice." (*Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, 494; see also *Cal-State*, *supra*, 12 Cal.App.4th at p. 1679.) "'Mere inconvenience or additional expense is not the test of [the] unreasonableness . . .'" of a mandatory forum selection clause. (*Smith, Valentino & Smith, Inc. v. Superior Court*, *supra*, 17 Cal.3d at p. 496.)

3. Analysis

a. Dismissal of Action and Agreement by Minor Plaintiffs

There are two arguments plaintiffs make for the first time on appeal: (1) their status as California residents required the trial court to stay the action rather than dismiss it; and (2) the forum selection clause was unenforceable because the three minor plaintiffs never agreed to the clause. Because plaintiffs

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[6] The forum selection clause here is mandatory because it requires the parties to litigate their disputes in a chosen forum, Weld County, Colorado.

did not raise these issues in the trial court, we do not reach them on appeal. (See *Johnson v. Greenelsh* (2009) 47 Cal.4th 598, 603 ["issues not raised in the trial court cannot be raised for the first time on appeal"]); *In re Aaron B.* (1996) 46 Cal.App.4th 843, 846 ["'[A] party is precluded from urging on appeal any point not raised in the trial court.'"].)

b. Notice

Plaintiffs cite the July 8, 2013, e-mail Vardanyan received after requesting C.R. Travel make travel reservations, and argue it did not provide adequate notice of the forum selection clause. They point out the forum selection clause was included in an attachment of terms and conditions to the e-mail, and that the e-mail automatically bound her to it despite the fact that "she had never seen" those terms and conditions.[7] We hold the notice given was lawful.

It is true that a party is required to provide adequate notice of a forum selection clause in a standardized contract in order for it to be enforceable. (*Intershop Communications*, *supra*, 104 Cal.App.4th at pp. 201-202.) However, plaintiffs had notice of the forum selection clause before C.R. Travel confirmed the reservations for their trip to Costa Rica. Plaintiffs could have, but did not, cancel the trip in order to avoid having to litigate any trip-related lawsuit in Colorado.

Plaintiffs rely on *Carnival Cruise Lines, Inc. v. Superior Court* (1991) 234 Cal.App.3d 1019, at page 1027 (*Carnival*), for the proposition that "absent notice of the forum selection clause,

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[7] Related to this argument is defendant's claim that the forum selection clause was not conspicuously set forth in the e-mail attachment. We address that issue separately.

'the requisite mutual consent to that contractual term is lacking and no valid contract with respect to such clause thus exists.'" That case is distinguishable.

Carnival concerned a lawsuit filed by vacationers who sued a cruise line, in California, for negligence. The superior court denied a defense motion to dismiss or stay the action based on a forum-selection clause on the tickets which provided that all disputes would be litigated in Florida. (*Carnival*, *supra*, 234 Cal.App.3d at pp. 1022, 1025.)

The issue concerning plaintiffs' awareness of the forum-selection clause was raised in a declaration of an attorney for one of the plaintiffs. That attorney stated: "At least 44 of the plaintiffs received their tickets upon actual embarking of the vessel on January 17, 1988. At least five plaintiffs received boarding passes only, no ticket at all. At least six plaintiffs received their tickets on the day of departure, four of whom received them two hours before embarkation, and at least four plaintiffs received the tickets the day before the cruise." (*Carnival*, *supra*, 234 Cal.App.3d at p. 1023.)

The superior court in that case did not address whether notice of the forum selection was adequate but it ruled plaintiffs' motion to dismiss or stay the proceeding should be denied based, in large part, on the relative convenience of the parties. (*Carnival*, *supra*, 234 Cal.App.3d at p. 1025.) The Court of Appeal reversed the decision based on case authority that was subsequently overruled by the United States Supreme Court. *Carnival* was remanded to the Court of Appeal for reconsideration in light of the new Supreme Court authority. (*Id*. at p. 1026.) Upon remand, *Carnival* concluded its original decision was, in light of the new Supreme Court authority,

incorrect. (*Ibid*.) Yet, it noted the Supreme Court specifically left the issue of notice open when it decided the superseding case. (*Ibid*.) Thus, because the superior court had not addressed the adequacy of notice, the Court of Appeal remanded its case back to the superior court for that issue to be resolved. (*Id*. at pp. 1026-1027.) In so doing, *Carnival* held, "the forum-selection clause is unenforceable as to any particular plaintiff if the [superior] court determines that such plaintiff did not have sufficient notice of the forum-selection clause prior to entering into the contract for passage." (*Ibid*.)

Here, plaintiffs did not receive notice of the forum-selection clause on the day of their departure, or just hours before it. The terms and conditions of the contract, including the forum-selection clause, were made known to plaintiffs well in advance of their trip. We see nothing in the record to demonstrate that a binding contract was initially entered into by the parties and thereafter, without the consent or assent of plaintiffs, a forum-selection clause was added to its terms. Indeed, all indications were that plaintiffs traveled to Costa Rica with the knowledge of the forum-selection clause as it was disclosed to them over three weeks prior to their trip.[8]

While it may have cost plaintiffs $250 to cancel the reservation ($50 per person), the cancellation fee did not, as a matter of law, render the forum selection clause unenforceable. (See *Schlessinger, supra,* 120 Cal.App.4th at pp. 556, 558-561

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[8] We express no opinion regarding the enforceability of the cancellation penalty against a traveler who, after receiving notice of a forum-selection clause in the same manner as plaintiffs, contacted the travel agency to object to the clause or opt out of the contract.

[cancellation fee of 100 percent of price paid if cancellation was within 23 days of departure did not render the forum selection clause unenforceable]; *Cross v. Kloster Cruise Lines, Ltd.* (D. Or. 1995) 897 F.Supp. 1304, 1308-1309 [upholding the enforcement of the forum selection clause despite a $400 forfeiture fee]; and *Miller v. Regency Maritime Corp.* (N.D. Fla. 1992) 824 F.Supp. 200, 203 [40 percent forfeiture fee did not render the clause unenforceable].)

In sum, the trial court did not abuse its discretion in resolving the issue of notice against plaintiffs as plaintiffs did not satisfy their substantial burden of showing notice of the forum selection clause was inadequate.

c. Unconscionable

Plaintiffs contend the forum selection clause was unconscionable because it was presented on a take it or leave it basis (i.e., a contract of adhesion), it was one-sided, and they would have been subject to a fee if they cancelled their reservation. As the trial court found, the clause was not unconscionable.

"'[U]nconscionability has both a "procedural" and a "substantive" element,' the former focusing on "'oppression"' or "'surprise"' due to unequal bargaining power, the latter on "'overly harsh"' or "'one-sided"' results. [Citation.] 'The prevailing view is that [procedural and substantive unconscionability] must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.' [Citation.] But they need not be present in the same degree. . . . [T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is

required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114.)

A forum selection clause that is presented as a "'take it or leave it'" proposition, and not subject to negotiation, does not make the clause unenforceable. (*Schlessinger*, *supra*, 120 Cal.App.4th at p. 559.) "A forum selection clause within an adhesion contract[9] will be enforced "as long as the clause provided adequate notice to the [party] that he was agreeing to the jurisdiction cited in the contract." (*Intershop, supra,* 104 Cal.App.4th at pp. 201-202; *Hunt v. Superior Court* (2000) 81 Cal.App.4th 901, 908; *Carnival Cruise Lines v. Superior Court* (1991) 234 Cal.App.3d 1019, 1026-1027.) As we have explained, plaintiffs were provided with adequate notice of the forum selection clause.

In analyzing substantive unconscionability, "[s]ome courts have imposed a higher standard [than merely one-sided or overly harsh]: the terms must be "'so one-sided as to *shock the conscience*." [Citation.]' [Citation.] Where a party with superior bargaining power has imposed contractual terms on another, courts must carefully assess claims that one or more of these provisions are one-sided and unreasonable." (*Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 88.) Plaintiffs have not shown that the forum selection clause was so one sided as to "shock the conscience," or that it was, in any respect, harsh or oppressive.

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9 An adhesion contract is "a standardized contract, imposed upon the subscribing party without an opportunity to negotiate the terms." (*Intershop*, *supra*, 104 Cal.App.4th at p. 201.)

In addition, we are not persuaded by plaintiffs' contention the forum selection clause was unconscionable because they would have been subject to a fee if they cancelled the trip. As noted above, courts have upheld forum selection clauses with significantly higher penalties upon cancellation. (*Schlessinger*, *supra*, 120 Cal.App.4th at pp. 556, 558-561; *Cross v. Kloster Cruise Lines, Ltd.*, *supra*, 897 F.Supp. at pp. 1308-1309; *Miller v. Regency Maritime Corp.*, *supra*, 824 F.Supp. at p. 203.) In addition, we see nothing in the record to indicate the cancellation fee caused plaintiffs to carry on with their trip despite their opposition to the forum selection clause. The clause was not unconscionable.

d. Conspicuous

Plaintiffs contend the forum selection clause was invalid because it was not "reasonably communicated to [Vardanyan] and was not conspicuous." They rely on *Broberg v. The Guardian Life Ins. Co. of America* (2009) 171 Cal.App.4th 912 (*Broberg*), at pages 922 through 923, which in turn relied on California Uniform Commercial Code section 1201, subdivision (b)(10), for the proposition that, "Conspicuous . . . means so written, displayed or presented that a reasonable person against whom it is to operate ought to have noticed it . . . [and] include[s] . . . a heading in capitals . . . larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size or set off from the surrounding text of the same size by symbols or other marks that call attention to the language." (Emphasis omitted.) In other words, the term conspicuous "includes," but is not limited to, matters with pronounced

headings or text. We have no qualms with the language used by *Broberg*.

Here, the document that contains the forum selection clause (the e-mail attachment of terms and conditions) consists of only one page, and the forum selection clause is set forth in one separated, short paragraph. That paragraph has the heading "*APPLICABLE LAW*" in italicized, capitalized print. Therefore, although the text of the clause was set forth in the same sized font as that of other sections, it was not "buried in a sea" of same-sized print. (*Broberg v. The Guardian Life Ins. Co. of America, supra,* 171 Cal. App. 4th at p. 922.)

In addition, the font of the text was not too small. Indeed, because the document was e-mailed to Vardanyan, the font could have been made larger after opening it on a computer.

The trial court did not abuse its discretion in finding the forum selection clause was sufficiently conspicuous.

DISPOSITION

The order is affirmed. C.R. Travel is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KUMAR, J.*

We concur:

TURNER, P.J.

BAKER, J.

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