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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

IMMOBILIARIA BUENAVENTURAS, S.A. de C.V., Plaintiff and Appellant, v. KOR HOTEL GROUP et al., Defendants and Respondents.	B239883 (Los Angeles County Super. Ct. No. BC465591)

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

The Berglund Group and Keith W. Berglund for Plaintiff and Appellant.

Iaffaldano Shaw & Young LLP and James K. Kawahito for Defendants and Respondents.

I. INTRODUCTION

This appeal is from an order staying an action arising from a purchase agreement for a beach lot in Cancun, Mexico. The purchase agreement was between two Mexican corporations, plaintiff, Immobiliaria Buena-Venturas, S.A. De C.V. and defendant, K.R. Playa III, S.DeR.L.De C.V. The purchase agreement contained a forum selection clause

waiving the right to any jurisdiction except Mexican courts. We affirm the order staying this action on forum non conveniens grounds because the trial court did not abuse its discretion in enforcing the forum selection clause.

II. BACKGROUND

The complaint, which was filed on July 21, 2011, alleges plaintiff conducts significant business in Los Angeles County. Plaintiff is a Mexican corporation. The Cancun property was owned by K.R. Playa III, S.DeR.L.De C.V. which is a subsidiary of co-defendant, Kor Hotel Group, LLC, a California corporation. Co-defendant, Jeffrey Lynn Smith, is president of acquisitions with Kor Hotel Group in Los Angeles, California. Mr. Smith worked in conjunction with several individuals and entities including Kor Hotel Group and KR Playa III De R.L. De C.V. The complaint collectively refers to KR Playa III, S.DeR.L.De C.V., Mr. Smith and the Kor Hotel Group as the Kor Group.

The complaint further alleges the "Kor Group" induced plaintiff to deposit $2 million with the co-defendant, Chicago Title Insurance, in escrow in Los Angeles. The total purchase price was $20 million for the Mexican property. The "Kor Group" insisted that Chicago Title Company act as both escrow agent and title insurer. Chicago Title Company is not licensed to provide the type of title insurance required under Mexican law. The "Kor Group" represented to plaintiff that certain documentation would be provided including title insurance within a specified time. Because no title insurance was provided, plaintiff was prevented from closing escrow despite having secured a funding commitment. The "Kor Group" instructed Chicago Title Company to transfer the $2 million escrow deposit into a bank account. The account, according to the complaint, was controlled by the "Kor Group" in Los Angeles. The "Kor Group" subsequently sold the property to a third party for $17 million. Plaintiff sued on various theories of fraud, contract and fiduciary duty breach, common counts and for other equitable forms of relief.

Attached to the complaint as exhibit C is the purchase agreement. The purchase agreement was executed on behalf of plaintiff, K.R. Playa III, S.DeR.L.DeC.V. and Chicago Title Company. The Fourteenth Clause of the purchase agreement contains the following forum selection clause: "Competent Courts and Jurisdiction [¶] The Parties submit, expressly and irrevocably, to the jurisdiction and competency of the Courts of the City of Cancun and/or Playa del Carmen, Quintana Roo, Mexico, and hereby they expressly and irrevocably waive any other forum, court or jurisdiction they could be entitled to by virtue of their present of future domiciles, the location of their assets, or by any other cause."

On October 19, 2011, the Kor Hotel Group, KR Playa III, S.De.R.L.De C.V. and Mr. Smith moved to dismiss or alternatively to stay the action on forum non conveniens grounds. (Code Civ. Proc §§ 410.30, 418.10, subd. (a).) The moving defendants argued: the lawsuit should be heard in a Mexican court based on the forum selection clause; Chicago Title Company was subject to the forum selection clause because it was a signatory to the purchase agreement; the forum selection clause is mandatory; and the trial court's inquiry was limited as to whether it was unreasonable to enforce the forum selection clause. Defendant asserted it was reasonable to enforce the clause because: the selected forum was available to plaintiff; both parties to the purchase agreement are sophisticated Mexican corporations; and plaintiff is not registered to conduct business in the State of California. In addition, in December 2009, plaintiff filed an action in the civil courts of Cancun, Mexico based on similar claims of contract breach and fraud. And, the parties had been litigating the Mexican action for almost two years when plaintiff filed the current lawsuit.

Plaintiff opposed the motion arguing: defendants failed to meet their burden of showing that all defendants were amenable to service and jurisdiction only in California; Chicago Title Company was not amenable to service in Mexico and had answered the Los Angeles Superior Court complaint; the escrow agreement did not contain a forum selection clause; and the forum selection clause was permissive rather than mandatory. Plaintiff relied on the declaration of Sofia Adelia Velazquez Gutierrez, an attorney

licensed to practice in Mexico. According to Ms. Gutierrez, the forum selection clause is "a common standard domestic jurisdiction clause" for Mexican legal documents. The clause confirms that jurisdiction is proper in Mexico but does not exclude other forums. Plaintiff asserted: it might be deprived of a proper judicial relief; there was a third party litigation concerning the property in a different case, *California NRUS Properties, LLC v. Kor Hotel Group, LLC*, (Super. Ct. L.A. County No. BC435005); KR Playa III, S.De.R.L.De C.V. is insolvent in Mexico because, upon receipt of sale from a third party, proceeds were conveyed to a different entity; and discovery and financial institutional record rules were different in Mexico.

The trial court ruled: the forum selection clause was mandatory; Chicago Title Company was subject to the clause because it executed the purchase agreement; the only inquiry was whether it was unreasonable to enforce the clause; and plaintiff failed to establish it was unreasonable or unfair to enforce the clause. The trial court then stayed the present action pending resolution of the Mexican case. Plaintiff filed a timely notice of appeal.

III. DISCUSSION

Defendants requested the trial court to dismiss or stay the action on the ground of forum non conveniens. (§§ 410.30, 418.10.) 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." Plaintiff asserts the trial court's ruling was incorrect because: the language in the forum selection clause was permissive rather than mandatory; Chicago Title Company was not a party to the purchase agreement and waived the right to the Mexican forum by answering the complaint; it is unreasonable to enforce the forum selection clause when all defendants are not subject to Mexican jurisdiction; and defendants failed to produce any credible evidence that dismissal on the ground of forum non conveniens was appropriate.

In *Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 751 (*Stangvik, supra*,) our Supreme Court described the traditional forum non conveniens as follows: "Forum non conveniens is an equitable doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere. [Citations]." (See *Investors Equity Life Holding Co. v. Schmidt* (2011) 195 Cal.App.4th 1519, 1528.) An exercise of that discretion requires a determination that the alternate forum is a suitable place for trial. (*Stangvik, supra*, 54 Cal.3d at pp. 751-752; *Investors Equity Life Holding Co. v. Schmidt, supra,* 195 Cal.App.4th at p. 1528.) If it is, then the trial court considers the private interests of the litigants and the public's concerns in retaining California jurisdiction. (*Stangvik, supra*, 54 Cal.3d at p. 751; *Investors Equity Life Holding Co. v. Schmidt, supra,* 195 Cal.App.4th at p. 1528.) Our Supreme Court explained the private and public interests factors as follows: "The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation. [Citations.]" (*Stangvik, supra*, 54 Cal.3d at pp. 751-752.) The moving party on a dismissal or stay motion on forum non conveniens grounds has the burden of proof. (*Stangvik, supra*, 54 Cal.3d at p. 751; *Morris v. AGFA Corp*. (2006) 144 Cal.App.4th 1452, 1463.) The trial court's ruling on the motion is discretionary and entitled to substantial deference on review. (*Stangvik, supra*, 54 Cal.3d at p. 754; *Guimei v. General Electric Co*. (2009) 172 Cal.App.4th 689, 696.)

But, the analysis for a forum non conveniens motion differs when there is a forum selection clause. In such cases, there is a threshold issue of whether the clause is permissive or mandatory, which is decided de novo on appeal. (*Animal Film, LLC v.*

D.E.J. Productions, Inc. (2011) 193 Cal.App.4th 466, 471; *Intershop Communications AG v. Superior Court* (2002) 104 Cal.App.4th 191, 196.) If the clause is permissive, the general forum non conveniens analysis applies. (*Ibid*; *Berg v. MTC Electronic Technologies Co.* (1998) 61 Cal.App.4th 349, 358-359.)

However, when the foreign selection clause is mandatory, the traditional forum non conveniens analysis does not apply. (*Intershop Communications AG v. Superior Court, supra*, 104 Cal.App.4th at p. 196; *Berg v. MTC Electronic Technologies Co., supra*, 61 Cal.App.4th at pp. 358-359.) Rather, the only inquiry is whether enforcement of the clause would be unreasonable. (*Lee v. Southern California University for Professional Studies* (2007) 148 Cal.App.4th 782, 787-788; *Cal-State Business Products & Services, Inc. v. Ricoh* (1993) 12 Cal.App.4th 1666, 1680.) A mandatory forum selection clause is presumed to be valid and is enforced unless to do so would be unreasonable under the circumstances. (*Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, 495-496; *Berg v. MTC Electronic Technologies Co., supra*, 61 Cal.App.4th at pp. 358-360.) When there is a mandatory clause, the plaintiff bears the burden of showing that enforcement would be unreasonable. (*Smith, Valentino & Smith, Inc. v. Superior Court, supra*, 17 Cal.3d at p. 496; *Lee v. Southern California University for Professional Studies, supra*, 148 Cal.App.4th at p. 788.) Our Supreme Court has explained a plaintiff opposing enforcement of a forum selection clause must establish that the selected forum is "unavailable or unable to accomplish" substantial justice. (*Smith, Valentino & Smith, Inc. v. Superior Court, supra*, 17 Cal.3d at p. 494; accord *Intershop Communications AG v. Superior Court, supra*, 104 Cal.App.4th at p. 196.)

As noted, the forum selection clause provides: "Competent Courts and Jurisdiction [¶] The Parties submit, expressly and irrevocably, to the jurisdiction and competency of the Courts of the City of Cancun and/or Playa del Carmen, Quintana Roo, Mexico, and hereby they expressly and irrevocably waive any other forum, court or jurisdiction they could be entitled to by virtue of their present of future domiciles, the location of their assets, or by any other cause." This language expressly reflects an agreement that Mexico was the selected forum to the exclusion of other places. The forum selection

clause was mandatory. (See *Animal Film, LLC v. D.E.J. Productions, Inc.*, *supra*, 193 Cal.App.4th at p. 472; *Intershop Communications AG v. Superior Court*, *supra*, 104 Cal.App.4th at p. 196 [clause stating "'*To the extent permitted by the applicable laws the parties elect Hamburg to be the place of jurisdiction*'" was mandatory].)

Because the clause is mandatory, the pertinent inquiry then is whether the trial court abused its discretion in determining it would not be unreasonable to enforce the clause. Unreasonableness may be established by showing: the other jurisdiction's court is unavailable; the absence of a rational basis for the selected forum; and enforcement is contrary to California public policy. (*Guimei v. General Electric Co.*, *supra*, 172 Cal.App.4th at p. 696; *Intershop Communications AG v. Superior Court*, *supra*, 104 Cal.App.4th at p. 199.) Plaintiff did not produce any evidence of these factors. First, there was no evidence that the Mexican court was not available. Rather, the evidence showed the contrary. By the time this action was filed in July 2011, the parties had been litigating the issues arising out of the purchase agreement in a Mexican court since December 2009. Second, there is a rational basis for selecting Mexico as the forum. The purchase agreement was between two Mexican corporations for real property located in that nation. Furthermore, the parties, including plaintiff, selected Mexico as the forum to the exclusion of other forums and laws. Third, there is no evidence that any California public policies are at stake. And, there is no evidence that substantial justice could not be achieved in a Mexican court. Thus, plaintiff failed to establish it was unreasonable to enforce the forum selection clause in Mexico in the trial court.

On appeal, plaintiff insists that enforcement is unreasonable because: defendants engaged in fraudulent conduct; it is "seriously inconvenient" given that plaintiff sued parties, who are not signatories to the purchase agreement; and there was no showing all parties are amenable to Mexican jurisdiction. But, the mere inconvenience of suing in Mexico is insufficient to meet plaintiff's burden of showing unreasonableness. (*Smith, Valentino & Smith, Inc. v. Superior Court*, *supra*, 17 Cal.3d at p. 494; *Berg v. MTC Electronic Technologies, Co.*, *supra*, 61 Cal.App.4th at pp. 358-359.) Furthermore, it is of no consequence that there are nonparties to the purchase agreement named in

California action. California law allows for a nonparty to rely on the forum selection clause if the litigant is closely related to the contractual relationship. (*Bugna v. Fike* (2000) 80 Cal.App.4th 229, 233; *Lu v. Dryclean-U.S.A. of California, Inc.* (1992) 11 Cal.App.4th 1490, 1494.)

In sum, the forum selection clause was mandatory. And, plaintiff failed to establish enforcement was unreasonable. Accordingly, the trial court did not abuse its discretion in staying the California litigation pending completion of the existing Mexican lawsuit.

IV. DISPOSITION

The order granting the motion to stay the action pending completion of the action in Mexico is affirmed. Defendants, Kor Hotel Group, K.R. Playa III, S.DeR.L.De C.V., and Jeffrey Lynn Smith are awarded their costs on appeal from plaintiff, Immobiliaria Bueneventuras, S.A. de C.V.

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TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.